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## Bargaining About Future Jeopardy

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# Bargaining About Future Jeopardy

Daniel C. Richman

49 Vand. L. Rev. 1181 (1996)

*The debate about how much protection criminal defendants should have against successive prosecutions has generally been conducted in the context of how to interpret the Double Jeopardy Clause. The doctrinal focus of this debate ignores the fact that for the huge majority of defendants—those who plead guilty instead of standing trial—the Double Jeopardy Clause simply sets a default rule, establishing a minimum level of protection when defendants choose not to bargain about the possibility of future charges. In this Article, Professor Richman examines the world that exists in the shadow of minimalist double jeopardy doctrine, exploring the dynamics of such bargaining and the rules that govern it.*

*Professor Richman begins by showing why, for most defendants, the limited scope of fifth amendment protection against successive prosecution makes little difference. If a guilty plea does not give jeopardy protection against all charges that could possibly be brought, such protection will be afforded by a standard agreement covering the "scope of the indictment." And prosecutors' institutional constraints will generally offer assurances far beyond those terms. For those defendants not satisfied with these protections, however, minimalist double jeopardy doctrine presents a dilemma, since a plea agreement that explicitly protects against unbrought charges can be negotiated only at the risk of exposing crimes or culpability of which the government was not aware. Drawing on recent contract literature, Professor Richman shows how this strategic obstacle will frequently lead to the creation of "gaps" in the protection offered by specially negotiated plea agreements.*

*The Article then turns to the rules devised by courts to fill these contractual gaps, rules generally based on due process analyses of defendants' expectations or prosecutors' "good faith" obligations. After critiquing these rules, Professor Richman inquires into the extent of the government's obligations when it contracts with defendants and proposes a set of default rules that better reflect the realities of the bargaining process.*

# Bargaining About Future Jeopardy

Daniel C. Richman\*

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## I. INTRODUCTION

Last term, the Supreme Court once again dared to navigate the complexities of its double jeopardy case law,<sup>1</sup> and held that, because civil forfeitures are not "punishment" for purposes of the Double Jeopardy Clause, the government may prosecute a defendant for a criminal offense and forfeit his property for the same offense in a separate legal proceeding.<sup>2</sup> But how much of an impact do such doctrinal decisions make in our criminal justice system?

Consider the plight of a savings and loan executive who finds herself facing a federal indictment in one district, charging her with several offenses relating to a fraudulent loan scheme. She would like to dispose of the pending charges but worries that whatever sentencing concessions she gains in exchange for her guilty plea would be effectively nullified if she were prosecuted for the other loan scams she engineered, some of which involved real estate in other federal districts. The pending indictment—and her limited knowledge of the investigation—give her no reason to think that the government knows of these other crimes. Yet she cannot be sure of what the future will hold.<sup>3</sup> Should she bring the uncharged crimes to the government's attention and seek to reach a global settlement, or should she discount the value of the sentencing concessions offered on the pending indictment? If she fails to volunteer this information, to what extent would a plea agreement reached with respect to the charged counts bar the government from prosecuting on the uncharged counts?

This dilemma is not confined to the white-collar context. Consider the drug defendant charged with a single count of narcotics distribution who, upon arrest, confesses to having sold cocaine on thirty other occasions at the same street corner.

In neither case will the Double Jeopardy Clause, as currently interpreted, be of much help. But for most criminal defendants—that is, those contemplating guilty pleas instead of trials<sup>4</sup>—fifth

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1. In *Albernaz v. United States*, 450 U.S. 333, 343 (1981), then-Justice Rehnquist conceded that "the decisional law" in the double jeopardy area "is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."

2. *United States v. Ursery*, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996).

3. These facts are loosely based on *United States v. Cruce*, 21 F.3d 70 (5th Cir. 1994).

4. During the year ending June 30, 1992, of the 50,260 defendants convicted and sentenced in the United States district courts, 44,154 (88%) had entered pleas of guilty and 476

Amendment doctrine simply sets a default rule,<sup>5</sup> establishing a minimum<sup>6</sup> level of protection where the parties choose not to bargain about the possibility of future charges.<sup>7</sup> The questions this Article explores are: (1) What are the reasons why such bargaining might take place? (2) What are the obstacles? (3) What legal rules should govern this process?

Asking these questions temporarily puts aside the doctrinal debate over how the Double Jeopardy Clause should be applied to successive prosecutions—a debate that has focused on the plight of a defendant reprosecuted after a trial<sup>8</sup>—and looks instead at the sys-

(1%), of nolo contendere. Kathleen Maguire and Ann L. Pastore, eds., *Sourcebook of Criminal Justice Statistics—1993* at 522-23 table 5.44 (U.S. Dept. of Justice, 1994). The proportion of guilty pleas in state cases may be even greater. In 300 representative counties, 91% of the felony convictions in 1990 were based on guilty pleas. *Id.* at 536 table 5.57.

5. Ayres and Gertner explain:

The legal rules of contracts and corporations can be divided into two distinct classes. The larger class consists of “default” rules that parties can contract around by prior agreement, while the smaller, but important, class consists of “immutable” rules that parties cannot change by contractual agreement. Default rules fill the gaps in incomplete contracts; they govern unless the parties contract around them.

Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale L. J.* 87, 87 (1989). See Douglas G. Baird, Robert H. Gertner, and Randal C. Pickner, *Game Theory and the Law* 147 (Harvard U., 1994) (“[D]efault rules . . . come into play only if the contract is silent with respect to the relevant contingency.”) (emphasis omitted).

6. I say “minimum” here because defendants will rarely go below the constitutional floor outside the context of cooperation agreements, which raise issues quite different from the exculpatory plea agreements discussed here. See Daniel C. Richman, *Cooperating Clients*, 56 *Ohio St. L. J.* 69, 91-111 (1995); *Ricketts v. Adamson*, 483 U.S. 1, 9-10 (1987) (finding waiver in cooperation agreement). But see *Montoya v. New Mexico*, 55 F.3d 1496, 1498-99 (10th Cir. 1995) (finding that defendant waived right to assert double jeopardy regarding future habitual offender proceedings where the terms of the plea agreement were violated).

7. The statistics reported above at note 4 as to number of guilty pleas do not reveal whether the plea resulted from actual negotiations between the prosecution and defense counsel. A defendant may plead guilty without any agreement simply out of contrition, or, to be more realistic, on the reasonable expectation that his sentence will be discounted accordingly. Nonetheless, the defendant willing to plead guilty is, at least theoretically, in a position to bargain with the prosecutor about charges not included in the indictment.

8. See, for example, Akhil Reed Amar and Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 *Colum. L. Rev.* 1 (1995); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 *U. Pa. L. Rev.* 101, 106-26 (1995) (suggesting that eighth amendment proportionality analysis can supplement the Supreme Court’s restrictive reading of the Double Jeopardy Clause in the successive prosecution context); George C. Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Game Offense Problem*, 83 *Cal. L. Rev.* 1027 (1995) (suggesting that a focus on blameworthiness can give content to the inquiry into legislative intent required by the Court’s double jeopardy doctrine); George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 *Iowa L. Rev.* 323 (1986) (discussing the proper definition of the “same offense” in the context of successive prosecutions); Peter Westen and Richard Druhel, *Toward a General Theory of Double Jeopardy*, 1978 *S. Ct. Rev.* 81 (examining the confusion caused by the Court’s double jeopardy analysis of successive prosecutions).

temic consequences of the Supreme Court's restrictive reading of that provision. Such an approach not only sheds new light on the doctrinal debate, but also reminds us that constitutional doctrine may not be the chief determinant of a defendant's rights and expectations. Although bargaining will occur in the shadow of doctrine, institutional constraints and strategic considerations may play an equal or greater part in shaping negotiated results.

Part I examines how protection against successive prosecution is actually provided to defendants who plead guilty. Off-the-rack formal guarantees,<sup>9</sup> provided by the Double Jeopardy Clause and standardized plea agreements and supplemented by institutional pressures on prosecutors, can give many defendants confidence that the concessions<sup>10</sup> bought by their guilty plea will not be nullified by another prosecution. A significant class of defendants,<sup>11</sup> however, may not be sufficiently assured by these formal and informal guarantees and will consider contracting for explicit protection against charges that have not yet been brought.

Part II shows that, for this class, minimalist double jeopardy doctrine potentially has an "information forcing" effect, demanding that a defendant with uncharged culpability identify himself as one deserving of a higher sentence than the government might otherwise have thought. Recent applications of economic and game theory to the contracting process have highlighted, however, how strategic obstacles to bargaining can lead to contractual gaps, even where the

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9. See Charles J. Goetz and Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 Cal. L. Rev. 261, 266 (1985) ("[T]he law supplies standardized and widely suitable risk allocations which enable parties to take an implied formulation 'off the rack,' thus eliminating certain types of costs and errors arising from individualized specification of terms.").

10. The sentencing concessions offered by prosecutors generally consist of promises to recommend reduced sentences or sentencing ranges and/or to make, or not to oppose, particular factual representations at sentencing. Because sentencing judges are not bound by these promises, they remain free to dash the expectations of one or both parties. However, they generally do not. See Richman, 56 Ohio St. L. J. at 91-92 (cited in note 6) (noting the increase in certainty a defendant with a plea agreement has even though the judge is not bound).

11. Although it is impossible to calculate how many defendants have concerns about reprosecution that they fear are not addressed by double jeopardy doctrine or informal protections, the number must be considerable. It is hard to imagine that the successive prosecution claims regularly litigated in every jurisdiction arise out of new charges that defendants failed to consider when they were first prosecuted. And the class goes beyond these defendants because double jeopardy claims will probably not even be raised when a defendant is reprosecuted for conduct that, though it could have been a part of a global plea agreement in the first case, is completely different from the conduct charged in that case. Neither are double jeopardy claims likely to be raised in the dual sovereignty context, where reprosecution might have been prevented through negotiation. The class also includes defendants whose fears of future prosecution prove groundless, as well as defendants who did endeavor to negotiate agreements giving formal protection beyond the double jeopardy default.

default rule penalizes a party for withholding information.<sup>12</sup> Part II draws on this work to help explain why even the defendant who—aware of his own criminal conduct—fears future charges may forego the negotiation of a global settlement.

Parts I and II are thus chiefly positivist in exploring the effects of minimalist double jeopardy doctrine on the plea bargaining process. They have a normative component as well, however. The claim is not that the information-forcing effects of minimalist doctrine necessarily justify the limitation of jeopardy protection as a constitutional matter. Rather, it is that such effects (though limited by strategic impediments) are socially beneficial, promoting the separation of more culpable defendants from less culpable, or at least leaving at risk those who have strategically withheld information.

Parts I and II provide the backdrop against which to consider the expansive default rules that many courts have created to give additional formal protection to defendants who plead guilty. Part III looks at these rules, which many courts believe to be a matter of due process, and asks precisely what about the bargaining process justifies the mitigation of the harsh double jeopardy regime for pleading defendants. By inquiring into the appropriate extent of the government's obligation to bargain in good faith and critiquing the existing hodgepodge of rules and justifications, this Part attempts to formulate a set of defaults that better reflect the realities of the bargaining process.

Any attempt to invoke default rule analysis in the context of plea bargaining is open to the challenge that rules developed to address commercial exigencies should not govern relations between the powerful state and the beleaguered criminal defendant. Indeed, even in the commercial context, some have criticized default rule theorists for systematically ignoring "relational" considerations like "the role, status, and position of the parties."<sup>13</sup> There are at least three responses to this challenge.

First, as even those most solicitous of defendant rights have noted, general commercial contract principles will invariably provide a starting point in the interpretation of what seems very much like a

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12. Ayres and Gertner, 99 Yale L. J. at 94 (cited in note 5); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 Yale L. J. 615 (1990); Ian Ayres and Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 Yale L. J. 729, 733 (1992).

13. Jay M. Feinman, *Relational Contract and Default Rules*, 3 S. Cal. Interdisc. L. J. 43, 58 (1993).

standard executory contract. The question is simply how those principles will be applied.<sup>14</sup> Second, the existence of private information on both sides of the bargaining table when future charges are at issue makes this a particularly good place to apply principles that presuppose some degree of choice on a defendant's part.<sup>15</sup> Finally, and perhaps most importantly, the analytical framework proposed here does not deny the imbalance of resources. Its premise is rather that a regime recognizing the role of a defendant's private information is not necessarily inconsistent with one protecting him against abuses of state power.<sup>16</sup>

## II. THE LIMITATIONS OF FORMAL AND INSTITUTIONAL GUARANTEES OF REPOSE

Any analysis of the bargaining dilemmas that defendants face as a consequence of double jeopardy doctrine must begin by recognizing that for a great many, such matters are virtually irrelevant.

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14. See, for example, *United States v. Yemitan*, 70 F.3d 746, 747 (2d Cir. 1995) ("Plea agreements are construed according to contract law principles."); *United States v. Santiago-Gonzalez*, 66 F.3d 3, 6 (1st Cir. 1995) (noting that contract law principles often aid in construing plea agreements); *United States v. Ballis*, 28 F.3d 1399, 1409 (5th Cir. 1994) ("Plea bargain agreements are contractual in nature, and are to be construed accordingly."); *United States v. Martin*, 25 F.3d 211, 216-17 (4th Cir. 1994) (noting that contract law largely governs the judicial interpretation of plea agreements); *United States v. Robison*, 924 F.2d 612, 613 (6th Cir. 1991) (concluding that plea agreements ought to be interpreted and enforced pursuant to traditional contract law principles); Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1910-11 (1992) (evaluating plea bargains with classical contract theory). As Westen and Westin explain:

[I]nsofar as both the criminal justice system and the commercial world share a concern—albeit for different reasons—for the protection of expectations arising out of bargained-for agreements, the mature body of learning already developed for commercial agreements should help illuminate the formation of a law of plea agreements.

Peter Westen and David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Cal. L. Rev. 471, 535 (1978).

15. The informational asymmetries explored here cannot be generalized across all aspects of plea bargains. When, for instance, a plea agreement fails to restrict sufficiently the rigor or substance of the government's sentencing presentation, the failure generally cannot be attributed to the defendant's refusal to disclose private information. See, for example, *United States v. Benchimol*, 471 U.S. 453, 456 (1985) (holding that a defendant vainly challenges the government's failure at sentencing to explain why it had agreed to recommend a lenient sentence).

16. See Richard Craswell, *The Relational Move: Some Questions from Law and Economics*, 3 S. Cal. Interdisc. L. J. 91, 93 (1993) (responding to Jay Feinman's "relational" critique by noting that economic analysis "also requires extensive factual inquiries").



*A. The Search for Repose*

Every defendant facing criminal charges seeks repose: to end his exposure to criminal sanctions at the least cost to himself.<sup>17</sup> If the pending indictment covers the only charges that can be brought against him, the goal is simply to dispose of them with the lowest possible sentence. An acquittal at trial would do the trick. When faced with the likelihood of a higher sentence in the event of conviction at trial,<sup>18</sup> however, most defendants are sufficiently risk averse to prefer a guilty plea in exchange for or in expectation of sentencing leniency.<sup>19</sup>

Where an indictment does not include every charge that could be brought, a defendant's goal can be more complex. He desires not only a reduced sentence in the pending case, but also the avoidance of a second prosecution that could effectively nullify the sentencing concessions he obtained in the first case. The defendant must discount such concessions by the extent to which the plea will not protect him against future charges and the likelihood that those charges will actually be brought.

The possibility that a defendant may face a successive prosecution is partly a function of the doctrinal limitations of the Double Jeopardy Clause—the only rule of compulsory joinder in the federal system.<sup>20</sup> Under the *Blockburger* test,<sup>21</sup> which the Supreme Court re-

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17. A defendant may have other goals as well, as demonstrated by those cases where sentencing concessions are sought for co-defendants. See Bruce A. Green, "Package" Plea Bargaining and the Prosecutor's Duty of Good Faith, 25 Crim. L. Bull. 507, 548-49 (1989) (discussing multidefendant "package" plea agreements and objecting to offers of lenity to a defendant's loved one in order to induce a guilty plea by the defendant); *United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992) (discussing the possible impact of bargaining to aid a spouse); *United States v. Marquez*, 909 F.2d 738, 742 (2d Cir. 1990) (discussing the legality of plea agreements negotiated to help a third party).

18. In a 1990 sample of 300 representative counties, the mean prison sentence for felony defendants convicted after trial was 142 months; the median sentence for this group was seventy-two months. For defendants who pleaded guilty, the mean sentence was sixty-seven months; the median, forty-eight months. Maguire and Pastore, eds., *Sourcebook of Criminal Justice Statistics* at 539 table 5.62 (cited in note 4). Under the Federal Sentencing Guidelines, defendants who plead guilty are also more likely to obtain lighter sentences, particularly where the plea is the product of negotiations with the prosecution. United States Sentencing Commission, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* 77-81 (1991).

19. For a good description of a defendant's bargaining considerations, see Scott and Stuntz, 101 Yale L. J. at 1936-40 (cited in note 14).

20. While Federal Rules of Criminal Procedure 8(a) allows liberal joinder of offenses, the Federal Rules of Criminal Procedure do not require joinder, and will not preclude the bringing of a charge not brought in a previous proceeding. For recommendations that a rule of compulsory

cently enshrined as the exclusive analysis for successive prosecutions,<sup>22</sup> the Fifth Amendment will not protect a defendant against a subsequent prosecution as long as "each offense" charged in a trial or plea proceeding "contains an element not contained in the other."<sup>23</sup>

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joinder be adopted, see Elizabeth T. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. Crim. L. & Criminol. 625, 651 (1995); Allan D. Vestal and Douglas J. Gilbert, *Preclusion of Duplicative Prosecutions: A Developing Mosaic*, 47 Mo. L. Rev. 1, 43-46 (1982); Model Penal Code § 1.07 (ALI, Proposed Official Draft 1962) (advocating no "separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court"); Standards Relating to Joinder and Severance § 1.3 (ABA Project on Minimum Standards for Criminal Justice, Approved Draft 1968) ("A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense [defined as another offense 'within the jurisdiction of the same court' and 'based on the same conduct' or 'arising from the same criminal episode'] unless a motion for joinder of these offenses was previously denied or the right of joinder was waived.").

Many states, either by statute or application of a state constitutional provision, do provide protection against successive prosecution beyond the limits of federal double jeopardy law. See Ronald J. Allen and John P. Ratnaswamy, *Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. Crim. L. & Criminol. 801, 823-24 (1985) (listing state prohibitions on successive prosecutions); Lear, 85 J. Crim. L. & Criminol. at 665 & n.175 (cited in this note) ("At least twenty-three states are currently operating under some version of a transaction-based compulsory joinder regime.") (collecting state citations). I do not consider the effects of these diverse state provisions separately because (1) the majority of states do not provide significantly more protection than federal law, and (2) since no state goes so far as to bar the prosecution of a defendant for offenses that were not part of the same transaction or episode as the offenses initially charged, the negotiating issues discussed here still arise.

21. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (holding, in context of a multiple punishment claim, that two offenses are not the "same" for double jeopardy purposes so long as "each provision requires proof of a fact which the other does not") (citation omitted). See also Thomas, 71 Iowa L. Rev. at 333 (cited in note 8) (characterizing test as "the 'required evidence' or 'same evidence' approach").

22. *United States v. Dixon*, 509 U.S. 688, 710 (1993). Although the Justices produced five separate opinions in *Dixon*, the part of Justice Scalia's opinion that overruled *Grady v. Corbin*, 495 U.S. 508 (1990), and held *Blockburger's* analysis to be the exclusive test for successive prosecution claims had the support of Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. This line-up has, of course, survived recent changes in the Court's composition.

23. *Dixon*, 509 U.S. at 696. The *Blockburger* test has long been attacked as "inadequate to prove meaningful protection against multiple prosecutions." Thomas, 71 Iowa L. Rev. at 370 (cited in note 8). See, for example, Kirstin Pace, Note, *Fifth Amendment—The Adoption of the "Same Elements" Test: The Supreme Court's Failure to Adequately Protect Defendants from Double Jeopardy*, 84 J. Crim. L. & Criminol. 769, 798 (1994) ("The *Blockburger* test's focus on the elements of the offenses charged is inadequate due to the immense number, and overlapping nature, of offenses with which a defendant can be charged."); Otto Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 Yale L. J. 513, 543 (1949) (concluding that the same elements test "makes the double jeopardy guarantee meaningless"); Martin L. Friedland, *Double Jeopardy* 110 (Oxford U., 1969) ("By itself, the *Blockburger* rule is totally inadequate to prevent multiple prosecutions."); Walter T. Fisher, *Double Jeopardy: Six Common Boners Summarized*, 15 UCLA L. Rev. 81, 87 (1967) (concluding that it is a "mistake" to use *Blockburger* in successive prosecution context); Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 Yale L. J. 339, 349 (1956) (concluding that under the *Blockburger* test, "there is little to prevent prosecutors from planning cases, framing indictments and selecting evidence in such a manner as to secure innumerable prosecutions of the same defendant for the same criminal activity").

Thus, the defendant convicted for unlawfully transporting cocaine into the United States can be charged thereafter with possessing the same cocaine on an airplane without proper documentation, because the first charge required proof that the importation was unapproved while the second required proof that it was undocumented.<sup>24</sup> Even where the elements of one offense appear to be fully subsumed in the elements of another—as may occur with “RICO”<sup>25</sup> or “CCE”<sup>26</sup> counts that charge other violations as “predicate” crimes—the two offenses can likely be prosecuted separately, if such was the legislative intent.<sup>27</sup> Moreover, a successive prosecution that would otherwise be

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24. *United States v. Franchi-Forlando*, 838 F.2d 585, 589-91 (1st Cir. 1988). See also *United States v. Florez-Pereza*, 58 F.3d 164, 167-68 (5th Cir. 1995) (holding that *Blockburger* does not bar prosecution for unlawful entry into the United States following deportation, notwithstanding defendant's prior conviction, based on same entry, for the misdemeanor of unlawfully entering the United States at place other than as designated by immigration officers), cert. denied, 116 S. Ct. 782, 133 L. Ed. 2d 733 (1996); *Knapp v. Leonardo*, 46 F.3d 170, 178 (2d Cir. 1995) (holding that *Blockburger* was not violated when defendant acquitted of intentional murder was subsequently tried for reckless murder), cert. denied 115 S. Ct. 2566, 132 L. Ed. 2d 818 (1995); *United States v. Liller*, 999 F.2d 61, 62 (2d Cir. 1993) (finding no double jeopardy violation where defendant prosecuted first for being a felon in possession of gun, then for transporting same (stolen) weapon in interstate commerce); *Gray v. Lewis*, 881 F.2d 821, 823 (9th Cir. 1989) (finding conviction on second-degree rape after acquittal of first-degree rape not barred because first offense required proof of force and second offense required proof of victim's age).

Even more egregious scenarios can be imagined. See Lear, 85 J. Crim. L. & Criminol. at 629 (cited in note 20) (“[A] single sale of drugs may constitutionally give rise to a series of federal prosecutions for offenses ranging from distributing drugs within one hundred feet of a video arcade facility and using a telephone in connection with a drug transaction, to knowingly providing drugs to a pregnant woman.”); Note, *Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties*, 67 Yale L. J. 916, 928 n.43 (1958) (suggesting that a single sale of narcotics could be charged as nine separate federal offenses under same elements test); Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 Yale L. J. 962, 966-67 & n.27 (1980) (asserting that the same elements test would permit six successive trials for a single act of forcible rape).

25. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1994 ed.).

26. Drug Abuse Prevention and Control Act, 21 U.S.C. § 848 (1994 ed.) (penalizing those who engage in a “continuing criminal enterprise”).

27. This seems to be the rule that emerges from the Supreme Court's cases, at least after *Dixon*. See King, 144 U. Pa. L. Rev. at 118 (cited in note 8). Prior to *Dixon*, the Court held that the marijuana importation charge to which a defendant had pleaded guilty could thereafter be used as a predicate to a continuing enterprise charge, at least where the enterprise had continued after the earlier plea. *Garrett v. United States*, 471 U.S. 773, 791-92 (1985). The Court noted that Congress “intended to permit prosecution for both the predicate offenses and the CCE offense.” *Id.* at 786. Now that *Dixon* has made the *Blockburger* test the sole double jeopardy analysis (giving a defendant no greater protection against successive prosecutions than he has against multiple punishments), we can fairly expect the Court to allow the government to bring RICO or CCE charges after the separate prosecution of a predicate offense, even where no continuing conduct can be shown. The *Blockburger* test, we have been told, is not controlling where “there is clear indication of a contrary legislative intent.” *Missouri v. Hunter*, 459 U.S. 359, 367 (1983) (citing *Albernaz*, 450 U.S. at 340) (emphasis omitted). The requisite

barred under *Blockburger* may still proceed if it is brought by a separate "sovereign."<sup>28</sup> The defendant pleading guilty to federal charges will therefore have no protection against state charges brought by the local district attorney, based on the same criminal conduct. Nor will a state defendant have protection against subsequent federal charges, even if they arise out of the same investigation.<sup>29</sup>

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congressional "intent" to allow successive prosecutions for RICO and CCE offenses and their predicates will doubtless be found. See *United States v. Crosby*, 20 F.3d 480, 483 (D.C. Cir. 1994) ("The Supreme Court's decision in *Garrett* conclusively established that Congress intended CCE to be a separate offense from its predicate acts based on the language and history of the CCE statute. . . . We find the statutory language and legislative history of RICO dictate a similar conclusion."); *United States v. Bennett*, 44 F.3d 1364, 1373 (8th Cir. 1995) (applying *Garrett* test to RICO and finding Congress intended to permit separate prosecutions), cert. denied, 116 S. Ct. 98, 133 L. Ed. 2d 52 (1995); Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model*, 25 Conn. L. Rev. 95, 108-09 (1992) (asserting that Congress intended RICO and CCE to supplement substantive offenses). But see George C. Thomas III, *RICO Prosecutions and the Double Jeopardy/Multiple Punishment Problem*, 78 Nw. U. L. Rev. 1359, 1387-97 (1984) (arguing that Court's application of *Blockburger* in *Harris v. Oklahoma*, 433 U.S. 682 (1977) (per curiam), dictates finding a RICO offense the "same offense" as its predicates).

28. As the Supreme Court explained in its most recent opinion on the subject:

The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences." . . . Consequently, when the same act transgresses the laws of two sovereigns, "it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable."

*Heath v. Alabama*, 474 U.S. 82, 88 (1985) (citations omitted). Under this doctrine, each state is a separate sovereign, id. at 89, as is the federal government, *Abbate v. United States*, 359 U.S. 187, 194 (1959). Indian tribes have sovereign powers separate from the federal government. See *United States v. Wheeler*, 435 U.S. 313, 326-28 (1978) (holding that Indian tribes retain sovereignty over punishing offenses against tribal law committed by tribal members).

29. Although the dual sovereignty doctrine will not be applied where one "sovereign" is merely the "tool" of the other, *Bartkus v. Illinois*, 359 U.S. 121, 123-24 (1959); *United States v. Davis*, 906 F.2d 829, 832 (2d Cir. 1990), courts have made clear that two jurisdictions can cooperate against the same defendant without either's hands being tied, so long as each exercises its own discretionary responsibility. See *United States v. Koon*, 34 F.3d 1416, 1439 (9th Cir. 1994) (concluding that although the federal and state authorities cooperated in the Rodney King beating case, there was "no evidence that the federal prosecution was a 'sham' or a 'cover' for the state prosecution"), aff'd in part, rev'd in part on other grounds, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996); *United States v. Paiz*, 905 F.2d 1014, 1024 (7th Cir. 1990) (compiling list of cases where "Bartkus exception" was unsuccessfully claimed); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 60 (1992) ("[T]he published reports of state and federal decisions do not contain one case in which the [Bartkus] exception has been applied to bar a second prosecution."). See also *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 497 (2d Cir. 1995) (suggesting that "the entire dual sovereignty doctrine is in need of serious reconsideration"); Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. Rev. 1159, 1209 (1995) (arguing that dual sovereignty doctrine should be revised to protect defendants better against dual prosecutions arising out of federal-state drug task forces).

For a study of the dual sovereignty doctrine's historical roots, see Leonard G. Miller, *Double Jeopardy and the Federal System* (U. of Chicago, 1968). For a provocative critique of the

The Supreme Court's restrictive approach to the Double Jeopardy Clause is not the only reason why a defendant might discount his prosecutor's plea offer, however. Recall the savings and loan executive and drug dealer introduced above, each of whom participated in one or more criminal transactions not hinted at in his or her indictment. Not even the most expansive reading of the Double Jeopardy Clause would protect such defendants from future prosecution based on their uncharged conduct.<sup>30</sup> But the possibility that such charges could be brought might significantly reduce the value of whatever sentencing concessions the government were to offer on the pending indictments.

Why might the defendant who compounds for only a small subset of the charges that could potentially be brought against him feel cheated—or at least deprived of the full value of his initial plea bargain—if he were later prosecuted for the hitherto uncharged crimes? Having failed to “pay” for the uncharged offenses, why should he feel aggrieved for being unable to get something for nothing?

There are a number of answers to these questions. First, one should not underestimate the value to a defendant of making peace with the government and being able to plan his life, unthreatened by the risk of future prosecution. Indeed, this risk may be greater for the defendant who pleads guilty to only a subset of the crimes with which he can be charged than it is for the person who has never been charged at all. Once a prosecuting authority has focused attention on a defendant, it may come across proof that facilitates bringing another case. The prosecuting authority may acquire a motive to bring that case if it is somehow disappointed with the results in the first case. And its chances of prevailing in a subsequent case may even be increased once the defendant is handicapped with a criminal record.<sup>31</sup>

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doctrine on originalist grounds, see Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. Rev. 693 (1994).

30. See Thomas, 71 Iowa L. Rev. at 330 (cited in note 8) (canvassing definitions of “same offense” that have been proposed in double jeopardy caselaw and literature).

31. If a defendant takes the stand in his own defense, he can often be impeached with the introduction of a prior conviction. F.R.E. 609(a). Although the jury will generally be told to consider his prior offense only on the issue of his credibility, not his guilt, there is good reason to believe that the jury will disregard this instruction and be more likely to convict him. See Roselle Wissler and Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & Hum. Behav. 37, 47 (1985) (concluding that presenting evidence on prior offenses increases the likelihood of conviction and does not impact credibility); Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant With a Criminal Record*, 4 Colum. J. L. & Soc. Prob. 215 (1968). Should a defendant,

Another reason a defendant might discount concessions offered in exchange for a plea that does not address all of his potential liability is that such a partial resolution would deprive him of the advantages he could obtain through a global settlement. A future prosecution would bring new anxieties, and, should he pay for defense counsel, additional expense. Moreover, a defendant might get a lower cumulative sentence for all his crimes were he to plead to and be sentenced for all of them at once.<sup>32</sup>

### B. Formal Guarantees of Repose

Let us move from defendants' potential concerns to their actual ones. Given the limited scope of double jeopardy protection, one might imagine that—to the extent they are competently represented<sup>33</sup>—a great many defendants are radically discounting government plea offers; or, to put it another way, that prosecutors must regularly offer greater sentencing concessions to defendants exposed to future charges.<sup>34</sup> Such a conclusion would be simplistic, however, because the scope of double jeopardy protection is only one determinant of the extent to which defendants are protected against successive prosecutions.

A large class of defendants can obtain complete repose simply by pleading guilty either to all the charges against them (presumably

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fearing the consequences of such impeachment, be deterred from testifying, his ability to present a defense may be critically impaired. The jury may also hold his failure to testify against him. See *Castillo v. United States*, 34 F.3d 443, 446 (7th Cir. 1994) ("Whatever the law says, juries are apt to draw a negative inference from a defendant's failure to testify."). But see *Luce v. United States*, 469 U.S. 38, 41-43 (1984) (refusing to let defendant, allegedly deterred from testifying by trial court's refusal to bar impeachment use of his prior conviction, challenge that ruling).

32. See Paul H. Robinson and John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* 189-97 (Westview Press, 1995) (noting that the Federal Sentencing Guidelines as well as recent empirical data reflect the "multiple offense discount notion").

33. This is an optimistic assumption that I will later relax. See text accompanying notes 164-67.

34. Much of this discussion assumes that the government can make finely calibrated sentencing concessions. This may not always be true, and to the extent that it is not, the analysis loses some of its force. Recent studies of the Federal Sentencing Guidelines, however, show that fine prosecutorial calibrations are possible—indeed common—even where a fact-based grid is supposed to govern sentencing. See Michael Tonry, *Sentencing Matters* 83 (Oxford U., 1996) ("[B]ecause the guidelines are harsher than many judges and prosecutors believe reasonable, prosecutors often, in collusion with defense counsel, judges, or both, engage in 'hidden plea bargaining' so as to manipulate the guidelines in order to offer sentencing concessions that will induce guilty pleas."); Stephen J. Schulhofer and Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231, 260-64 (1989) (identifying some of the ways in which prosecutors can calibrate plea concessions). My experiences as an Assistant U.S. Attorney in the Southern District of New York confirm this point.

in exchange for a sentencing discount) or to enough of those charges to give jeopardy protection against the remainder. Consider a person who commits a street robbery at knife-point and scuffles with the arresting officer. This is his first, and last, run-in with the law. He finds himself charged with four offenses (which we will assume are the only ones that can be derived from this discrete episode): greater and lesser charges for the robbery, and greater and lesser for resisting arrest. If our defendant is confident there are no other criminal acts in which he can be implicated, and is prepared to plead to the two lesser charges, the Double Jeopardy Clause will allow him to rest secure in the knowledge that the local prosecutor's sentencing concessions will not be nullified in a future case.<sup>35</sup> However expansive federal criminal jurisdiction has become,<sup>36</sup> it has not yet reached this street crime. The dual sovereignty doctrine will therefore not even pose a theoretical threat to this defendant.<sup>37</sup>

Our hypothetical defendant could obtain roughly the same degree of confidence in the finality of his plea by entering a plea to just one offense—the greater robbery charge, for example—“in satisfaction of the indictment.” Were the prosecution later to renege and bring both resisting arrest charges, the defendant would still be able to seek their dismissal. Since jeopardy would never have attached as to either of those charges,<sup>38</sup> however, his claim would rest not on the

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35. In *Brown v. Ohio*, 432 U.S. 161, 167-69 (1977), the Court made clear that a plea to a lesser included offense gives jeopardy protection against a prosecution for the greater offense. Similarly, a plea to the greater offense bars a prosecution for the lesser one. See also *Payne v. Virginia*, 468 U.S. 1062, 1062 (1984) (per curiam) (noting that prosecution for a lesser offense following conviction of a greater offense is barred if the court cannot convict of greater without convicting of lesser).

36. As an ex-prosecutor trained to come up with federal charges for almost every criminal act imaginable, I had to give some thought to devising this example of a purely state crime. The expansion of federal criminal jurisdiction has continued unabated since the 1950s, Norman Abrams and Sara S. Beale, *Federal Criminal Law and Its Enforcement* 43-47 (West, 2d ed. 1993); Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 Am. Crim. L. Rev. 213, 242-54 (1984); Guerra, 73 N.C. L. Rev. at 1164-80 (cited in note 29), without serious constitutional challenge until 1995, *United States v. Lopez*, 115 S. Ct. 1624, 1631, 131 L. Ed. 2d 626 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's commerce clause authority).

37. I am assuming that our defendant does not fear future prosecution for crimes he knows he did not commit. A recent survey tells us, however, that 7.1% of the respondents were “not at all confident” that “a jury would reach a fair verdict if they were accused of a crime they did not commit.” Geoffrey A. Campbell, *In the Shoes of the Wrongly Accused*, 81 A.B.A. J. 32, 32 (1995). Moreover, 21.8% were “not very confident.” *Id.* If this survey is representative of criminal defendant attitudes, and if such defendants have as little confidence in prosecutorial charging decisions as they do in jury verdicts, my assumption is open to question.

38. See *United States v. Garner*, 32 F.3d 1305, 1311 n.6 (8th Cir. 1994) (“[J]eopardy never attached to the charges dismissed as part of a plea agreement”), cert. denied, 115 S. Ct. 1366,

Double Jeopardy Clause but on the Due Process Clause, which the Supreme Court has read to oblige the government to keep the promises it makes to induce a guilty plea.<sup>39</sup>

The enforcement mechanisms for the two constitutional provisions are somewhat different. Where charges are jeopardy barred, they must be dismissed.<sup>40</sup> Where a court finds that charges violate a plea agreement, however, it can either order their dismissal (specific performance of the agreement) or undo the defendant's original guilty plea (rescission).<sup>41</sup> This remedial uncertainty generally should not affect a defendant's assessment of the size of the government's initial sentencing concessions. Either remedy would prevent the prosecution from retroactively reducing the price at which it had initially purchased the plea,<sup>42</sup> and, in any event, specific performance is the "preferred remedy" for breaches of plea agreements.<sup>43</sup>

The class of defendants who will be formally protected against successive prosecutions by pleas entered "in satisfaction" of a pending indictment<sup>44</sup> may be quite large, because prosecutors have considerable incentives to ensure that an indictment captures the complete range of a defendant's potential criminal liability. Thus, the prosecution is likely to include in an indictment not only all the offenses

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131 L. Ed. 2d 222 (1995); *United States v. Nyhuis*, 8 F.3d 731, 735 n.2 (11th Cir. 1993) (stating the same principle); *United States v. Soto-Alvarez*, 958 F.2d 473, 482 n.7 (1st Cir. 1992) (concluding that jeopardy does not normally attach to dismissed charges).

39. *Mabry v. Johnson*, 467 U.S. 504, 509 (1984); *Santobello v. New York*, 404 U.S. 257, 262 (1971).

40. *Menna v. New York*, 423 U.S. 61, 62 (1975).

41. See *Santobello*, 404 U.S. at 263 (remanding to the state courts to decide between specific performance and rescission); *Allen v. Hadden*, 57 F.3d 1529, 1534 (10th Cir. 1995) (holding that a court must remand the case for specific performance or rescission if the government breached the plea agreement), cert. denied, 116 S. Ct. 544, 133 L. Ed. 2d 447 (1995); *Margalli-Olvera v. I.N.S.*, 43 F.3d 345, 354-55 (8th Cir. 1994) (same); *United States v. Hayes*, 946 F.2d 230, 236 (3d Cir. 1991) (same); *United States v. Canada*, 960 F.2d 263, 271 (1st Cir. 1992) ("The choice of remedy rests with the court and not the defendant.") (citation omitted). But see Westen and Westin, 66 Cal. L. Rev. at 513 (cited in note 14) (arguing that defendant should be able to elect remedy).

42. This is not to say that bargaining positions will always be the same at renegotiation. The defendant, given his plea back, may find himself in a better position than he started if the government's case has deteriorated in the intervening time. Richman, 56 Ohio St. L. J. at 93 n.90 (cited in note 6). On the other hand, the defendant may have already served some of his sentence. Moreover, as in any renegotiation of a plea, the government may benefit from knowledge of the defendant's degree of risk aversion.

43. *Margalli-Olvera*, 43 F.3d at 355. See *United States v. Kurkculer*, 918 F.2d 295, 300 (1st Cir. 1990) (noting the court's preference for specific performance).

44. When referring to pleas "in satisfaction" of an indictment, I include pleas addressing charges that, although not in the indictment, were put on the bargaining table by the government. See, for example, *Bordenkircher v. Hayes*, 434 U.S. 357, 358-59 (1978) (finding that during negotiations, prosecutor threatened defendant charged with relatively minor felony with prosecution under habitual criminal statute carrying life sentence if he did not plead guilty).



chargeable for a particular episode, but also all charges from other episodes that conceivably can be joined. The tendency of prosecutors to pad indictments with as many counts as they can derive from the available facts—even when sentences will be concurrent—has long been recognized.<sup>45</sup> By mustering the longest list of charges possible, a prosecutor can cow a defendant into pleading, or at least allow a defense lawyer to obtain small (even meaningless) bargaining concessions that can grease the way to a plea.<sup>46</sup> If the case goes to trial, a maximal indictment might impress the jury, and help ensure that the government is allowed the broadest range of proof (with all the possibilities for spillover prejudice that might entail).<sup>47</sup> Moreover, as Justice Scaha noted in *United States v. Dixon*, the government would have “little to gain and much to lose” from a strategy of saving related charges for use in a later indictment because “an acquittal in the first prosecution might well bar litigation of certain facts essential to the second one—though a conviction in the first prosecution would not excuse the Government from proving the facts the second time.”<sup>48</sup>

Finally, and perhaps most importantly, the simple press of business will deter prosecutors from intentionally keeping potential

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45. See Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 85-105 (1968). See also *United States v. Zabawa*, 39 F.3d 279, 283-84 (10th Cir. 1994) (reversing district court's order limiting the government to twenty counts of a seventy-count fraud indictment).

46. See Alschuler, 36 U. Chi. L. Rev. at 95 (cited in note 45) (“[P]rosecutors may simply wish to give defense attorneys a ‘selling point’ in their efforts to induce defendants to plead guilty.”).

47. See Sarah Tanford, *Decision-Making Processes in Joined Criminal Trials*, 12 Crim. Justice & Beh. 367, 384 (1985) (containing empirical study demonstrating that “joining charges within a realistic trial setting increases the likelihood that a defendant will be convicted on a particular charge, regardless of the similarity of the charges or the evidence”); Sarah Tanford, Steven Penrod, and Rebecca Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 L. & Human Beh. 319, 335 (1985) (concluding, based on experiments in which subjects watched videotaped trials, that convictions were more frequent when charges were joined, particularly when joined charges were similar). See also Kenneth S. Bordens and Irwin A. Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 L. & Human Beh. 339, 349 (1985) (reviewing empirical psychological literature on the prejudicial effect of joining criminal offenses).

48. *Dixon*, 509 U.S. at 710 n.15. A defendant may invoke principles of collateral estoppel to bar the government from relitigating factual issues that it lost in a prior trial. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); King, 144 U. Pa. L. Rev. at 131-32 (cited in note 8); Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 Harv. L. Rev. 1729 (1996). Courts have generally refused, however, to apply collateral estoppel against defendants. *United States v. Pelullo*, 14 F.3d 881, 890-97 (3d Cir. 1994). But see *id.* at 890 (collecting cases in which defendants were estopped).

criminal charges off the bargaining table.<sup>49</sup> This is particularly true in the federal system for charges related to the conduct set out in the indictment. The facts underlying those charges are likely to be factored into the defendant's initial sentence as "relevant conduct,"<sup>50</sup> which under the Federal Sentencing Guidelines generally cannot constitute a basis for additional prison time in a second prosecution.<sup>51</sup> Thus, even were the government's resource allocation decisions based solely on the maximization of total sentences without regard to the distribution of sentences among defendants,<sup>52</sup> the federal sentencing scheme would still limit the incentives of prosecutors to keep charges

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49. See *Dixon*, 509 U.S. at 710 n.15 ("Surely . . . the Government must be deterred from abusive, repeated prosecutions of a single offender for similar offenses by the sheer press of other demands upon prosecutorial and judicial resources."); Lear, 85 J. Crim. L. & Criminol. at 648 (cited in note 20) ("Every duplicative prosecution means that [Assistant United States Attorneys] must ignore, abandon, or downgrade another case.").

50. U.S. Sentencing Guidelines Manual § 1B1.3 (1995) ("U.S.S.G."). See Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 U.C.L.A. L. Rev. 1179, 1179 (1993) (disputing the constitutionality of including unconvicted criminal conduct as an aggravating factor in sentencing); William W. Wilkins, Jr. and John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990); David Yellen, *Illusion, Illogic and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 402, 403 (1993) (criticizing the use of related-offense sentencing by the Sentencing Guidelines).

51. U.S.S.G. § 5G1.3(b). See *Witte v. United States*, 115 S. Ct. 2199, 2208-09, 132 L. Ed. 2d 351 (1995) ("Because the concept of relevant conduct under the Guidelines is reciprocal, § 5G1.3 operates to mitigate the possibility that the fortuity of separate prosecutions will grossly increase a defendant's sentence."); Lear, 85 J. Crim. L. & Criminol. at 642 (cited in note 20) ("Even if the government considers the ultimate sentence inadequate [in an initial prosecution], in many cases the Guidelines will deter a second prosecution because the subsequent sentence is likely to be concurrent.").

This is not to say that § 5G1.3 will always prevent the same conduct from being deemed "relevant" to the calculation of a defendant's sentence in two different cases under the Federal Sentencing Guidelines. See, for example, *United States v. McCormick*, 58 F.3d 874, 879 (2d Cir. 1995) (per curiam) (upholding consecutive sentence for defendant based, in part, on conduct deemed relevant in calculation of sentence in prior case). Moreover, a subsequent prosecution that includes counts with statutory mandatory minimum sentences will, if not barred by *Blockburger*, lead to additional prison time (usually a lot more time), since statutory provisions are not a matter of Federal Sentencing Guidelines calculation. Thus, in *United States v. Robinson*, 42 F.3d 433 (7th Cir. 1994), a defendant previously convicted of state narcotics charges received a concurrent sentence for a federal conviction based on the same conduct, but a consecutive five year sentence on the 18 U.S.C. § 924(c) (1994 ed.) count. *Id.* at 433 & n.2.

52. This is a questionable assumption. A prosecutor may indeed "attempt[] to obtain the maximum deterrence from his available resources . . . by bringing new prosecutions until the marginal deterrence available from investing extra resources in a given prosecution is the same as the return available from investing in some other prosecution." Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Stud. 289, 295-96 (1983). See William M. Landes, *An Economic Analysis of the Courts*, 14 J. L. & Econ. 61, 63 (1971) (concluding that a prosecutor seeks "to maximize the expected number of convictions weighted by their respective [sentences] subject to a constraint on the resources or budget available to his office"). But the marginal gains in general deterrence from prosecuting someone who has already pleaded guilty and been sentenced on serious criminal charges may be quite limited.

off the table<sup>53</sup> and would increase the formal protection offered by a plea in satisfaction of an indictment.

### C. Informal Guarantees

The class of defendants able to contemplate a plea offer without fear of reprosecution goes far beyond those whose potential criminal liability will be fully addressed by the Double Jeopardy Clause or the explicit contractual protection of a plea in satisfaction of the indictment. Many defendants lacking such formal coverage may rely upon the informal protections arising from the prosecutor's repeat-player status and reputational concerns.<sup>54</sup>

The individual defendant cannot create value for his plea bargaining concessions through other than formal means. If the law permitted him to withdraw his plea freely, or to retain his legal claims, his plea would be of little value unless he explicitly renounced those rights. Anything short of an enforceable renunciation of these rights would give no comfort to prosecutors (and would therefore minimize sentencing discounts) because most defendants are one-shot players—who neither internalize the costs of litigation<sup>55</sup> nor have any interest in bargaining reputation. Defendants' interests as a class are thus well served by broad default rules of claim forfeiture<sup>56</sup> that

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53. In *Witte v. United States*, 115 S. Ct. 2199, 2206-08, 132 L. Ed. 2d 351 (1995), the Court made clear that while the Federal Sentencing Guidelines can limit the government's ability to increase a defendant's sentence with a second prosecution, neither the Federal Sentencing Guidelines nor the double jeopardy doctrine bar the government from bringing this second case. However, the degree to which a sentencing judge can use her discretion to reduce the sentence of a defendant prosecuted twice for essentially the same conduct was recently highlighted in *Koon v. United States*, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996) (finding no abuse of discretion when sentencing judge departed down based on finding that a "federal conviction following a state acquittal based on the same underlying conduct . . . significantly burden[ed] the defendants") (quoting *United States v. Koon*, 833 F. Supp. 769, 790 (C.D. Cal. 1993)).

54. See David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 Harv. L. Rev. 373, 394 (1990) ("[C]ontracts that formally provide for legal sanctions depend upon nonlegal sanctions for their effectiveness whenever the legal sanctions are ineffective in inducing the promiser to perform.").

55. See Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render Ineffective Assistance of Counsel*, 68 Ind. L. J. 363, 379 n.102 (1993) (noting that 85% of criminal defendants in the District of Columbia financially qualify for court-appointed counsel); Robert L. Spangenberg and Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 L. & Contemp. Probs. 31, 31 (1995) ("It is not uncommon for indigent defense programs to represent up to 90 percent of all criminal defendants in a given felony jurisdiction.").

56. See generally Stephen A. Saltzburg, *Pleas of Guilty and Loss of Constitutional Rights, the Current Price of Pleading Guilty*, 76 Mich. L. Rev. 1265 (1978); Peter Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214 (1977) (examining the concepts of forfeiture and waiver); Peter Westen, *Forfeiture*

maximize a guilty plea's value to the government and avoid the transaction costs of explicit bargaining over such claims.<sup>57</sup>

In contrast, the resource allocation and reputational concerns that come with the government's repeat-player status confer value on its concessions over and above that created by operation of law. The same resource allocation concerns that push the government toward including all conceivable charges in an indictment<sup>58</sup> also militate against bringing omitted charges against a defendant who has already pled. And the government's reputational considerations may be even more significant. If prosecutors in any jurisdiction regularly brought new cases against defendants who had just pleaded in exchange for sentencing concessions, the government would soon either get far fewer pleas, or would have to offer far greater sentencing concessions to compensate defendants for the risk. By developing a reputation for not pursuing successive prosecutions—and for restraining other jurisdictions from bringing such cases—a prosecuting authority can help maximize the value that defense lawyers, who are also repeat players,<sup>59</sup> will place on its plea commitments.<sup>60</sup>

Although loath, at least in the federal system,<sup>61</sup> to adopt default rules of protection going beyond the Double Jeopardy Clause, the

*By Guilty Plea—A Reply*, 76 Mich. L. Rev. 1308 (1978). Default claim forfeiture rules will not apply where a defendant explicitly reserves the right to raise a claim after sentence. Such "conditional pleas" are authorized by Federal Rules of Criminal Procedure 11(a)(1). See Note, *Conditional Guilty Pleas*, 93 Harv. L. Rev. 564 (1980).

57. Judge Easterbrook has noted of the various claim forfeiture and plea withdrawal rules:

These rules have a common rationale. The defendant cannot sell his rights and exercise them too. The principal sources of the sentencing differential are the defendant's surrender of his opportunity to be acquitted and the defendant's surrender of his right to impose costs on the prosecutor. Unless the defendant's rights are indeed surrendered, there is little support for the reduced sentence. A defendant who enters a conditional guilty plea must accept a smaller reduction to take account of the fact that he gives up less. A defendant who enters an unconditional plea and then raises some objection to the proceedings is attempting to get something for nothing.

Easterbrook, 12 J. Legal Stud. at 319 (cited in note 52). See Kenneth W. Simons, *Rescinding a Waiver of a Constitutional Right*, 68 Geo. L. J. 919, 944 (1980).

58. See notes 45-53 and accompanying text.

59. See Richman, 56 Ohio St. L. J. at 109-10 (cited in note 6); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 Va. L. Rev. 761, 832-33 (1989). Reputational sanctions may have considerable effectiveness, even where many lawyers (and clients) are uninformed. Charny, 104 Harv. L. Rev. at 417 n.144 (cited in note 54); Alan Schwartz and Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Pa. L. Rev. 630, 640-51 (1979) (discussing the behavior of markets with imperfect information).

60. See Jason Scott Johnston, *Default Rules/Mandatory Principles: A Game Theoretic Analysis of Good Faith and the Contract Modification Problem*, 3 S. Cal. Interdisc. L. J. 337, 345 & n.17 (1993) (noting how the market "may provide a reputational penalty" for opportunistic behavior).

61. See note 20.

government capitalizes on its repeat-player status by issuing non-binding guidelines promising restraint.<sup>62</sup> Regulations, for example, that discourage federal prosecutors from bringing more than one prosecution "based on substantially the same act(s) or transaction(s)," and from bringing any prosecution where the criminal activity has already been the subject of a successful state prosecution,<sup>63</sup> are far from ironclad,<sup>64</sup> and, in any event, have been made unenforceable.<sup>65</sup> To the extent they are respected, however, they increase the value of federal plea concessions, and subsidize state concessions as well.

The fragmentation of prosecutorial authority in the United States obviously limits the reliability of these informal guarantees for defendants exposed to charges in multiple state and federal jurisdictions. Although all authorities within a state will be treated as a

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62. See Charny, 104 Harv. L. Rev. at 377-78 (cited in note 54) (noting the role of explicitly non-binding commitments in other contexts).

I do not mean to suggest that the *Petite* policy, see note 63, was devised for plea-bargaining purposes; I simply note its effect in that area. The policy itself may be as much a product of grace as of self-interest. Long before any formal departmental promulgation, the Supreme Court confidently observed:

It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.

*Fox v. Ohio*, 46 U.S. (5 Howard) 410, 435 (1847).

63. U.S. Dept. of Justice, 3(a) *United States Attorneys' Manual* 9-2.142 (Dec. 14, 1994 revision). The strictures enunciated in these regulations are known as the "*Petite* policy"—so named after *Petite v. United States*, 361 U.S. 529 (1960), in which the government filed a motion to vacate a conviction, noting a "general policy . . . that several offenses arising out of the same transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." *Id.* at 530. Justice Department officials have praised the *Petite* policy for ensuring that dual prosecutions occur only in exceptional cases. See Harry Litman and Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 *Annals Am. Acad. Pol. & Soc. Sci.* 72 (1996).

64. See Joseph S. Allerhand, Note, *The Petite Policy: An Example of Enlightened Prosecutorial Discretion*, 66 *Geo. L. J.* 1137, 1159-61 (1978) (discussing the administration of the *Petite* policy and suggesting improvements for greater fairness and efficiency); Anthony Amsterdam, 1 *Trial Manual 5 for the Defense of Criminal Cases* § 177 at 302 (ALI, 5th ed. 1988) ("'*Petite* policy' is frequently violated in practice through inadvertence, and defense counsel may have to remind the federal prosecutor of it in cases in which it applies."); Lear, 85 *J. Crim. L. & Criminol.* at 629-31 (cited in note 20) (discussing exceptions to the *Petite* policy); Guerra, 73 *N.C. L. Rev.* at 1196 n.178 (cited in note 29) (listing examples of recent cases in which the *Petite* policy was violated).

65. See Abrams and Beale, *Federal Criminal Law and Its Enforcement* at 771-72 (cited in note 36) (collecting cases where courts have refused to consider the merits of alleged violations of the *Petite* policy).

single unit under double jeopardy doctrine,<sup>66</sup> as will all federal offices, the semi-autonomous status of each prosecuting office<sup>67</sup> decreases the extent to which one office will internalize the reputational and allocational concerns of another office. Nevertheless, the common interest of prosecuting offices in maximizing the value of their concessions, and the sense that there is enough crime to go around, still give these guarantees considerable weight for most defendants.

#### *D. The Limits of Formal and Informal Guarantees*

Notwithstanding the various formal and informal protections against reprosecution, a significant class of defendants remains at risk even after having entered pleas disposing of pending charges. This is because a prosecutor's allocational and reputational concerns may be trumped by other factors.

New evidence may come to light suggesting that a defendant has committed other crimes and/or has far greater culpability with respect to the crimes charged in the indictment than was previously thought.<sup>68</sup> Political considerations may lead a prosecutor to bring new charges against a defendant the prosecutor feels received a comparatively light sentence the first time around.<sup>69</sup> Important

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66. See *Waller v. Florida*, 397 U.S. 387, 394-95 (1970) (concluding that a state's political subdivisions are not separate sovereign entities).

67. See James Eisenstein, *Counsel for the United States: U.S. Attorneys in the Political and Legal Systems* 101-25 (John Hopkins U., 1978) (examining "patterns of interaction" between U.S. Attorneys and the Department of Justice); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. Chi. L. Rev. 246, 249-50 (1980) (noting the independence of U.S. Attorneys' Offices).

68. In addition, the evidence may have been available to prosecutors at the time of the defendant's initial indictment, but not acted upon. Such was the case in *Grady v. Corbin*, 495 U.S. 508 (1990), where the district attorney's office, although aware that a victim had died, failed to prevent the defendant from pleading to two misdemeanors arising out the same conduct. *Id.* at 511-12. *Grady* was not the first case where a prosecutorial coordination failure in the wake of a car crash led to a successive prosecution later challenged in the Supreme Court. See *Illinois v. Vitale*, 447 U.S. 410, 419-21 (1980) (remanding case for a determination as to whether failure to slow and avoid an accident is a lesser included offense of manslaughter); *Illinois v. Zegurt*, 452 U.S. 948, 948 (1981) (denying certiorari in case where the state court found a reckless homicide prosecution to be barred by a prior conviction for crossing over a highway median); *Thigpen v. Roberts*, 468 U.S. 27, 30-33 (1984) (barring manslaughter prosecution following the defendant's conviction on misdemeanor charges).

69. See, for example, *United States v. Prusan*, 967 F.2d 57, 62 (2d Cir. 1992) (Newman, J., dissenting) (suggesting that the defendant was reprosecuted in the second district because the government was dissatisfied with the initial sentence); *State v. Jones*, 789 S.W.2d 856, 857 (Mo. Ct. App. 1990) (finding that new charges were brought by newly elected prosecutor who thought prior plea agreement was "too lenient"); *United States v. Padilla*, 589 F.2d 481, 486 (10th Cir. 1978) (Logan, J., concurring) (suggesting that the federal prosecutor brought the additional charge because, while in county attorney's office, he had been frustrated with the low sentence given to the defendant); *Jordan v. Commonwealth*, 217 Va. 57, 225 S.E.2d 661, 662 (1976)

charges may have been withheld from the initial indictment to avoid disclosing the extent of the government's investigation, in order to permit it to pursue other targets. And these possibilities all assume that the prosecutor acted in good faith to begin with, which may not have been the case.

Likewise, all defendants cannot be confident that other prosecuting offices will respect the finality of a deal. Even where offices coordinate actions, they may feel compelled to bring separate indictments in light of venue concerns<sup>70</sup> or by a jurisdiction's constraints on the use of evidence.<sup>71</sup> Or they may chose to bring multiple prosecutions as part of a concerted campaign to harass a disfavored defendant.<sup>72</sup> Coordination or reciprocity may also be

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(finding that greater charges were brought "apparently following some public criticism" of an earlier plea bargain). See also Frank W. Miller, *Prosecution: The Decision to Charge a Suspect With a Crime* 188 (Little, Brown, 1969) (discussing second prosecutions resulting from "feeling of outrage by prosecutors at the disposition of the first case"); Lear, 85 J. Crim. L. & Criminol. at 635 (cited in note 20) ("Though incentives to re prosecute for political gain arise only occasionally, the temptation may be substantial. This phenomenon is not restricted to the multidistrict re prosecution scenario; the desire to appear 'tough on crime' may also invite this sort of resource allocation in a single office."); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. Legal Stud. 43, 50 (1988) (asserting that the "somewhat simplified" goal of a chief prosecutor "is to maximize his electoral majority").

That a prosecutor agreed to the initial deal does not mean he believes the resulting sentence appropriate. He might have been surprised by judicial leniency; he may have felt constrained by the weakness of his case; or he may have entered the agreement fully aware of the possibility, likelihood, or even certainty that additional charges would be brought.

70. See, for example, *United States v. McCormick*, 993 F.2d 1012, 1013 (2d Cir. 1992) (allowing successive prosecutions where defendant engaged in a series of fraudulent transactions with banks in two federal districts) (discussed in Lear, 85 J. Crim. L. & Criminol. at 635 & n.58 (cited in note 20)).

71. Where a state's exclusionary rule, for example, excludes evidence that a federal court would not, charges that depend on the excluded evidence might be kept out of an initial state prosecution and saved for a federal case. Jill E. Fisch, *Turf Wars: Federal-State Cooperation and the Reverse Silver Platter Doctrine*, 23 Crim. L. Bull. 509, 509-19 (1987).

72. See *United States v. Easley*, 942 F.2d 405, 406-07, 409 (6th Cir. 1991) (allowing multiple obscenity prosecutions, with each mailing charged as different offense); Patrick Ingram, Note, *Censorship by Multiple Prosecution: "annihilation, by attrition if not conviction"*, 77 Iowa L. Rev. 269, 269-71 (1991) (discussing Justice Department efforts to drive distributors of sexually oriented materials out of business through the threat of successive prosecutions in multiple districts); Lear, 85 J. Crim. L. & Criminol. at 639 (cited in note 20) (discussing the Justice Department's successive prosecution campaign against those who distribute obscene materials).

Where successive prosecutions, although not barred by the Double Jeopardy Clause, can be characterized as an effort to punish a defendant for exercising a legal right or deter him from doing so, a defendant may be able to invoke the Due Process Clause and obtain additional formal protection. See, for example, *United States v. P.H.E., Inc.*, 965 F.2d 848, 860 (10th Cir. 1992). See also *Easley*, 942 F.2d at 412. Absent such claims of vindictiveness tied to the exercise of an identifiable legal right, however, the Due Process Clause has not generally been read, at least recently, to create a broad prohibition against all successive prosecutions that, intentionally or otherwise, tend to harass a defendant. But see King, 144 U. Pa. L. Rev. at 134

threatened where offices endeavor to boost their conviction rates,<sup>73</sup> perhaps to justify more funding, or respond to law enforcement agencies trying to do the same.<sup>74</sup> And, of course, a prosecutor may simply feel that another jurisdiction has not punished a defendant enough.<sup>75</sup>

### III. CONTRACT THEORY AND BARGAINING FOR ADDITIONAL PROTECTION

The defendant seeking repose who knows that a pending indictment does not include all possible charges<sup>76</sup> but who is not satisfied with existing formal and informal protections against re prosecution has another option: He can negotiate a plea agreement—with more than one prosecuting office, if necessary—that will give immunity well beyond the scope of the indictment. The agreement could cover all charges related to a transaction; those arising out of the defendant's role in an enterprise (legal or illegal); those within the scope of the government's investigation; or those based on the actions of the defendant occurring within a specified time frame—the possibilities abound.<sup>77</sup>

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(cited at note 8) (arguing that a "meaningful due process limit would entail a *presumption* of had faith whenever a prosecutor fails to join offenses of sufficient similarity, reutable by an 'abuse-neutral' reason, or some similar explanation").

73. See Lear, 85 J. Crim. L. & Criminol. at 644 (cited in note 20) (noting that because defendants facing sentences that are likely to be concurrent may lose little by pleading guilty, "for districts seeking to improve their conviction statistics or public image, the Guidelines may actually encourage successive prosecution"). See also Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 Stan. L. Rev. 1036, 1045 (1972) (finding that "convictions are the central performance standard" in U.S. Attorneys' Offices).

74. See Eisenstein, *Counsel for the United States* at 168-69 (cited in note 67) (describing strategies of U.S. Attorneys to address agency interest in statistics).

75. See Guerra, 73 N.C. L. Rev. at 1207-08 nn. 245-46 (cited in note 29) (citing examples of successive prosecutions by state and federal authorities); Litman and Greenberg, 543 Annals Am. Acad. Pol. & Soc. Sci. at 77 (cited in note 63) (noting that the federal government brings "fewer than 150 dual prosecutions each year").

Sister Helen Prejean tells how Louisiana authorities, not satisfied with the three consecutive life terms given to Robert Willie in federal court for his role in a brutal kidnapping/murder, sought (and eventually procured) his execution on state capital murder charges. Helen Prejean, *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* 119, 139-40 (Random House, 1993).

76. The hypertechnical state of current double jeopardy doctrine makes it inevitable that many defendants, if not adequately represented, will not even realize that they can be re prosecuted. See notes 21-29 and accompanying text. For now, I will focus only on those defendants who recognize their plight.

77. Although this Article focuses on bargaining concerning future *criminal* charges, the same analysis can be applied to bargaining over a defendant's related *civil* exposure (fines, forfeiture, etc.). This is particularly true where the relevant government agency needs to have



But the defendant who seeks greater coverage risks exposing crimes or culpability of which the government was not aware. The government may have had strategic reasons for keeping this information out of the indictment, but the defendant probably would not know this. He will thus risk identifying himself as someone deserving of, and ready to accept, a higher sentence than he would have received after a plea to just the indictment.

#### A. Blockburger as a "Penalty Default"

If our defendant's plight sounds familiar, maybe that is because it is not unique to the criminal context. Think back to the rule in *Hadley v. Baxendale*:<sup>78</sup> Where the operative default awards only foreseeable consequential damages, the miller worried about losing profits while his crank shaft is being transported can choose to "inform[] the carrier of the potential consequential damages and contract[] for full damage insurance."<sup>79</sup> Revealing information about his special needs to the carrier, however, will undoubtedly increase the price of shipping.<sup>80</sup> A default rule of limited liability thus acts as what Ayres and Gertner call a "penalty default,"<sup>81</sup> inducing the miller, "as the more informed party[,] to reveal that information to the carrier,"<sup>82</sup> and allowing the carrier to increase his rates accordingly.<sup>83</sup>

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more information than is disclosed by a defendant's plea before the agency can proceed. The dilemma faced by the narcotics defendant who can, if he wants, make the forfeiture of a secret bank account part of a global settlement with the government is quite like the dilemma of a defendant aware of unbrought criminal charges. See Mireya Navarro, *When Drug Kingpins Fall, Illicit Assets Buy a Cushion*, N.Y. Times A1 (Mar. 19, 1996) ("[D]efendants are often able to negotiate lighter sentences by offering to lead prosecutors to property hidden around the world."). See also *Ursery*, 116 S. Ct. at 2149 (concluding that because "in rem civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause," the clause does not bar the government from seeking forfeiture of an individual's property in one proceeding and criminally prosecuting him in another).

78. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

79. Ayres and Gertner, 99 Yale L. J. at 101 (cited in note 5).

80. *Id.* at 101-02.

81. See *id.* at 91 ("Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer.").

82. *Id.* at 101.

83. See Melvin Aron Eisenberg, *The Principle of Hadley v. Baxendale*, 80 Cal. L. Rev. 563, 597 (1992) ("[B]uyers who invest in information are often put to the choice of communicating the information to the seller, and thereby incurring a loss of all or part of that value, or foregoing damages that are the reasonably foreseeable consequences of the seller's breach."); Johnsten, 100 Yale L. J. at 636 (cited in note 12) ("[I]f a carrier has some market power—that is, some ability to set his price according to the shipper's value from the contract and willingness to

Minimalist double jeopardy doctrine creates a similar sort of information-forcing penalty default for the defendant aware of uncharged criminal liability and dissatisfied with the standard formal and informal guarantees.<sup>84</sup> To obtain maximum formal protection, he will have to identify himself as a high-value defendant to all potentially concerned prosecutors. And since a prosecutor is essentially a monopolist with respect to the charges his office could bring, each will try to extract a sentence from the defendant commensurate with the seriousness of the uncharged liability. Minimalist doctrine thus promotes a "separating equilibrium,"<sup>85</sup> allowing prosecutors to distinguish between two defendants charged with the same crimes but having very different potential culpability and/or risk aversion.<sup>86</sup> The tendency is thus to maximize the "toll" society can exact for criminal conduct and minimize the expenditure of prosecutorial resources.

A nice model—defendants seeking full repose must fully discharge their "debts to society." Yet the model is a simplistic one, which ignores the dynamics of the bargaining process. An examination of these dynamics reveals why even the well-represented defendant fearing reprosecution might not reach, or even seek, the global settlement that would give him repose.

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pay—then . . . [t]he carrier could offer a menu of contracts, which vary by charging a different price for different levels of carrier liability for consequential damages.").

84. There may be some limits to the usefulness of the *Hadley* analogy. The revelation of the miller's private information will, Ayres and Gertner note, create value and allow the parties to split a "bigger pie." 99 *Yale L. J.* at 99 (cited in note 5). But see Eisenberg, 80 *Cal. L. Rev.* at 587-98 (cited in note 83) (minimizing efficiency benefits of the *Hadley* rule). In the plea bargaining context, the societal gain is more elusive. Society benefits to the extent that criminal activity is revealed and punished, and defendants benefit to the extent they can buy protection against future prosecutions at a discounted rate. But does society benefit when the defendant gets a lower aggregate sentence than he would otherwise have received? This depends on the objective likelihood that he would have been prosecuted a second time and one's view of the marginal benefits to society from foregone years of incarceration. The *Hadley* analogy, however, does highlight the bargaining dynamics discussed here.

85. See Ayres and Gertner, 99 *Yale L. J.* at 94-95 (cited in note 5) ("In 'separating' equilibria, the different types of contracting parties, by bearing the costs of contracting around unwanted defaults, separate themselves into distinct contractual relationships."); Baird, Gertner, and Picker, *Game Theory and the Law* at 314 (cited in note 5) (defining "separating equilibrium" as "[a] solution to a game in which players of different types adopt different strategies and thereby allow an uninformed player to draw inferences about an informed player's type from that player's actions") (emphasis omitted).

86. For a discussion of how varying attitudes toward risk can affect commercial actors' readiness to address future contingencies explicitly, see Clayton P. Gillette, *Commercial Relationships and the Selection of Default Rules for Remote Risks*, 19 *J. Legal Stud.* 535, 552-62 (1990).

### B. Transaction Costs

The failure of contracting parties to address explicitly a future contingency in their agreement can be explained by two different, but not mutually exclusive, stories.<sup>87</sup> One explanation frequently offered for such contractual gaps is transaction costs: The costs of negotiating a comprehensive agreement can outweigh its benefits.<sup>88</sup> These costs may well figure in the failure of plea bargaining parties to reach a global agreement covering all of a defendant's potential criminal liability.

The conventional plea agreement looks to the contours of the indictment—that is, the description and number of the charges therein. In contrast, an agreement reaching uncharged offenses must be carefully customized, bringing the usual risk to all parties when express terms are constructed in lieu of “off the rack” provisions.<sup>89</sup> The involvement of other prosecuting offices will entail even more procedural complexities. These negotiating expenses might loom particularly large in the calculus of the government, which will have resource considerations that defendants generally lack.

### C. Strategic Bargaining Obstacles

Whatever role transaction costs play in the creation of “gaps” in plea agreements is likely dwarfed, however, by the strategic bargaining obstacles that Professors Ayres, Gertner,<sup>90</sup> and Johnston<sup>91</sup> have highlighted in their analyses of the *Hadley* rule.<sup>92</sup>

Consider the strategy of the defendant whose critical private information is knowledge of his uncharged criminal conduct. His goal is to pay the smallest possible price for that conduct. His decision will thus turn on the sentence he thinks he will face, discounted by the probability that he will be held to account for the unbrought charges.

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87. Ayres and Gertner, 99 Yale L. J. at 92-94 (cited in note 5).

88. Goetz and Scott, 73 Cal. L. Rev. at 265 (cited in note 9) (defining transaction costs as “resource-oriented costs of time, effort, and expertise expended in the negotiation and drafting of agreements”); Ayres and Gertner, 99 Yale L. J. at 92 (cited in note 5) (“Scholars have primarily attributed incompleteness to the costs of contracting.”).

89. Goetz and Scott, 73 Cal. L. Rev. at 266 (cited in note 9). See also Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. Legal Stud. 597, 609 (1990) (noting “bias against unconventional risk assignments”).

90. Ayres and Gertner, 99 Yale L. J. at 87 (cited in note 5).

91. Johnston, 100 Yale L. J. at 615 (cited in note 12).

92. See Ayres and Gertner, 99 Yale L. J. at 103 (cited in note 5).

Disclosure to the prosecution of the uncharged conduct will change the probability into certainty, and signal the high value he places on settlement.

The discounted price the government will likely demand for a defendant's uncharged crimes, however, might make disclosure worthwhile nonetheless. In part, this discount may reflect the sentencing benefits of "buying in bulk."<sup>93</sup> Yet it can also reflect advantages gained where the government does not already know about criminal conduct. Since the government may not have expended any investigative or adjudicative resources on unprosecuted crimes, it might be willing to share some of its "windfall profit" with the defendant in order to encourage such disclosures.<sup>94</sup> After all, in addition to saving resources, the defendant is allowing the government to avoid the risk of losing a future trial on the unbrought charges. Moreover, even were the government loath to cut the defendant any slack on uncharged crimes, its failure to have investigated such crimes might lead it to accept an account in which the defendant has mitigated the extent of his own culpability.<sup>95</sup>

Such are the factors that can induce disclosure. The considerations counseling against the negotiation of a global settlement can be even more powerful, however, particularly where the defendant thinks the risk of a second prosecution is low. Such a defendant might also figure that even a successful second prosecution would leave him with a lower total sentence than he would receive by rolling the new charges into a global settlement. By then, the government would already have invested additional investigative resources to develop the new charges, but, with a new indictment, the defendant would gain bargaining power from his ability to call on the government's adjudicative resources, exposing the prosecutor to the risk of acquittal at trial. Furthermore, even if the defendant were convicted

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93. See note 32.

94. The government may forego seeking any increase in the sentence of a defendant whose disclosures are particularly valuable, that is, where the information allows it to "clear" an unsolved crime, see Miller, *Prosecution* at 197-198 (cited in note 69) (noting that police will often urge a suspect to "clean himself up," informing him that the additional offenses he admits are "free"); Malcolm Young, *An Inside Job: Policing and Police Culture in Britain* 359-62 (Oxford U., 1991) (suggesting that police can enhance detection rates by obtaining confessions to uncharged crimes "taken into consideration" at sentencing), or to gather evidence against someone else. This last possibility, involving essentially a one-time exchange of information, is to be distinguished from "cooperation," which generally entails a longer-term relationship between the defendant and the government. See Richman, 56 *Ohio St. L. J.* at 73 (cited in note 6) (contrasting the relational character of a cooperation agreement to the executory nature of an agreement simply to plead guilty).

95. But see notes 101-02 and accompanying text (discussing how a prosecutor, aware of this risk, may be reluctant to promise broad immunity).

after trial in the second case, any relationship between the charges in the two cases might still lead to a reduction in the second sentence, as a matter of law or judicial discretion.<sup>96</sup>

Bargaining risks that arise out of the very process through which a defendant explores the costs of formal disclosure can also deter entry into global settlements. Once a defendant discloses his uncharged crimes or the uncharged extent of his culpability in the charged offense—as he must do for negotiations to advance—he runs the risk that the government will “misappropriate” his private information to increase his sentence in the pending case, or gather evidence for another prosecution. Rules limiting the government’s ability to use statements made during plea negotiations limit the risk somewhat, but prosecutors are free to develop new sources of evidence after the defendant points the way.<sup>97</sup> Those defendants interested in a global settlement but not prepared to commit themselves irreversibly to revealing private information may therefore choose not to pursue the matter.

The government’s own strategic considerations can also impede the negotiation of an agreement reaching uncharged crimes. Professor Johnston captures the carrier’s “strategic dilemma” in *Hadley*: “[I]f he persuades the shipper that the shipper will be better off with the high price, high liability [contract], then he may also persuade the shipper that the shipper in fact is better off not contracting with him at all, because the breach probability is too high, no matter what the extent of carrier liability.”<sup>98</sup> As a monopolist with respect to the charges it brings, the government need not worry about

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96. See U.S.S.G. § 5G1.3. See also *Koon*, 116 S. Ct. at 2044 (“Acknowledging the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances, . . . Congress allows district courts to depart from the applicable Guideline range if ‘the court finds that there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission . . . .’”) (quoting 18 U.S.C. § 3553(b)).

97. Federal Rule of Criminal Procedure 11(e)(6) and Federal Rule of Evidence 410(4) bar the admission against the defendant of statements made during plea discussions, but do not bar derivative use. Moreover, the government can demand waiver of these protections as a condition of negotiations.

In *United States v. Mezzanatto*, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995), the Court upheld a proffer agreement that permitted the government to use the defendant’s proffer statements “to impeach any contradictory testimony he might give at trial if the case proceeded that far.” *Id.* at 800. An issue remains as to whether the government can demand a waiver that would allow the free use of proffer statements in its case-in-chief in a trial on charges other than perjury and false statement. Three of the seven Justices in the *Mezzanatto* majority noted that such a waiver “would more severely undermine a defendant’s incentive to negotiate, and thereby inhibit plea bargaining.” *Id.* at 806 (Ginsburg, J., concurring).

98. Johnston, 100 Yale L. J. at 633 (cited in note 12).

the defendant's finding another prosecutor. Should the government try to push him to a global settlement through fear of future prosecution, however, he might radically discount the value of the government's plea offer in the pending case, or even to go to trial.<sup>99</sup> For this reason, and out of reputational considerations that go beyond the specific case,<sup>100</sup> the government must conceal its knowledge of uncharged crimes and the likelihood it would ever prosecute them.<sup>101</sup> Many defendants who might do better negotiating a global agreement might therefore overestimate the efficacy of informal protections against successive prosecution.

Another obstacle to the negotiation of global agreements is the government's reluctance to sell immunity for charges it has not fully investigated. No prosecutor wants to be in the position of having given up the power to charge for crimes committed during a particular time period, only to discover that the defendant's culpability was far greater than the prosecutor thought.<sup>102</sup> Yet in the absence of a resource-consuming investigation, the prosecution must rely on what may be a strategically motivated defendant proffer—an effort to obtain the broadest possible coverage while minimizing culpability.<sup>103</sup> In clear cases of fraudulent inducement, the government might be able to undo a plea agreement later,<sup>104</sup> but its underestimation of culpability will generally not be so easily remedied.

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99. See *United States v. Bouthot*, 878 F.2d 1506, 1509 (1st Cir. 1989) (noting that the state prosecutor negotiating the plea agreement with the defendant knew that the federal prosecutor was planning to bring charges based on the same transaction but did not tell the defendant "because he was afraid that such disclosure would prevent him from obtaining guilty pleas on the state charges").

100. The government has much to lose if it regularly focuses defense counsel's attention on the possibility that sentencing concessions may be nullified by future prosecutions. See notes 58-60 and accompanying text.

101. There may be other bargaining risks as well. Disclosure of this information might, for example, compromise an uncompleted investigation or tip off co-conspirators.

102. The aversion to such surprises can have many sources: fear of political embarrassment, interest in specific or general deterrence, concern for bargaining reputation, etc.

For a case where the prosecutor avoided the consequences of having let someone "get away with murder," see *State v. Allen*, 79 Or. App. 674, 720 P.2d 761, 764 (1986) (ruling that the defendant's plea agreement in satisfaction of the indictment did not bar prosecution for a murder he revealed during post-plea interview given to police).

103. The government's need to obtain a comprehensive understanding of a defendant's culpability in this context can be compared to cases in which a defendant negotiates to cooperate. There, because the government can withhold its pay-out until after the defendant has been subjected to more extensive scrutiny, and may even have testified, the risk of disappointment is far smaller. See Richman, 56 Ohio St. L. J. at 95-105 (cited in note 6) (describing cooperation agreements). See also *United States v. Hawes*, 774 F. Supp. 965, 971 & n.2 (E.D.N.C. 1991) (noting that agreements not to prosecute the defendant for "any transactions involved in this investigation" are generally reserved for testifying cooperators).

104. See *Mayes v. Galley*, 858 F. Supp. 490, 495-96 n.11 (D. Md. 1994) (collecting cases). See also *State v. Hall*, 32 Wash. App. 108, 645 P.2d 1143, 1145 (1982) (finding that the

There are thus two sorts of strategic obstacles at play here: those that can lead a defendant to forego assurances against the risk of another prosecution, and those that may lead the government to decline to offer or sell the assurance. Either may be enough to preclude bargaining, or at least to preclude global agreements that fully apportion the potential contractual gains.<sup>105</sup>

#### D. Resulting Agreements

These transaction costs and strategic obstacles explain why defendants who fear successive prosecutions for uncharged offenses may opt for a conventional agreement covering only the scope of the indictment, discounting the government's sentencing concessions to reflect the perceived risk of re prosecution. The existence of the barriers also suggests that defendants who negotiate expansive immunity provisions can pay dearly for them.

Yet agreements are regularly negotiated with a variety of such provisions. Some immunity provisions cover all charges that could have been brought based on the facts in the indictment.<sup>106</sup> Others are tied to the scope of the government's investigation.<sup>107</sup> Some reach all charges based on information that the government knew or should have known.<sup>108</sup> Others cover specified crimes far beyond the scope of

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defendant's use of a false name to induce a plea agreement was fraud and justified rescission by the prosecutor).

105. For a more elaborate discussion, in the *Hadley* context, of how strategic inefficiencies develop where, as in the plea agreement bargaining context, information is asymmetric and one side has market power, see Ayres and Gertner, 101 *Yale L. J.* at 729 (cited in note 12).

106. See, for example, *United States v. Abbamonte*, 759 F.2d 1065, 1072 (2d Cir. 1985) (discussing plea to "cover all charges that could have come about by the government arising out of these facts"); *United States v. Giorgi*, 840 F.2d 1022, 1027 (1st Cir. 1988) (discussing agreement for no further prosecution "for any criminal acts related to thefts or hijacking of vans" committed by the defendant prior to the specified date).

107. See, for example, *United States v. Ingram*, 979 F.2d 1179, 1182 (7th Cir. 1992) (agreement "not to file any additional criminal charges . . . which are known to [the prosecutor] arising from [the defendant's] criminal activities" in the district); *Hawes*, 774 F. Supp. at 967 (discussing agreement for no further prosecution "for any of the transactions involved in this investigation"); *United States v. Sutton*, 794 F.2d 1415, 1423 (9th Cir. 1986) (discussing agreement not to "file any charges against the Defendant based on conduct known to the government"); *United States v. Harvey*, 791 F.2d 294, 296 n.1 (4th Cir. 1986) (discussing agreement for no further prosecution for "any other possible violations of criminal law arising from the offenses set out in the indictment or the investigation giving rise to those charges").

108. See, for example, *State v. Smith*, 244 Kan. 283, 767 P.2d 1302, 1303 (1989) (discussing agreement for no further charges based on "information presently known or which should be known" by the district attorney's office) (emphasis omitted).

the government's investigation.<sup>109</sup> In still others, to limit the risk of misapprehending a defendant's culpability, the government ties immunity to the scope of defendant's proffer.<sup>110</sup> Some agreements also explicitly bind other prosecuting authorities,<sup>111</sup> or at least convey some assurance that other offices will not bring cases.<sup>112</sup>

This, then, is the stark world created by minimalist double jeopardy doctrine—a world where a plea-bargaining defendant aware of uncharged criminal liability, but unwilling to commit his fate to the vagaries of prosecutorial self-interest, must either significantly discount the value of the sentencing discount he is offered, or purchase additional protection by disclosing the uncharged offenses. As will be seen, this picture is incomplete, since courts have used the Due Process Clause to derive "expansive"<sup>113</sup> default rules that protect defendants beyond the explicit terms of their plea agreements. Nevertheless, an exploration of a world in which the Double Jeopardy Clause provides the only default protection—and in which defendants can be penalized for failing to volunteer private information about uncharged crimes—provides a vantage point from which to appreciate the effects of supplemental rules that allow some defendants to resolve their dilemmas without risk or disclosure.

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109. See, for example, *Austin v. State*, 49 Wisc. 2d 727, 183 N.W.2d 56, 57-59 (1971) (describing Wisconsin's "read in" procedure: after a defendant pled in satisfaction of the indictment, other uncharged crimes could be "read in" and considered at sentencing; the defendant had the protection of the statutory maximums of the charged crimes and could not thereafter be prosecuted for the "read in" offenses).

110. See, for example, *United States v. Nyhuis*, 8 F.3d 731, 733 (11th Cir. 1993) ("The government agrees not to bring additional criminal charges against the defendant in [one federal district] arising out of his involvement in the distribution of marijuana and those transactions disclosed by the defendant in the proffer already made to the government."); *BNA Criminal Practice Manual* 71:118 ¶ 5 (Pike & Fischer, Inc., 1996) (providing sample agreement that bars further charges against defendant "based on occurrences prior to the execution of this agreement, provided that such offenses are known or could with reasonable diligence have been discovered by the government by that date, or are disclosed to the Government by the defendant").

111. See, for example, *Allen v. Hadden*, 57 F.3d 1529, 1531 (10th Cir. 1995) (discussing the defendant's parallel state and federal agreements regarding state and federal charges arising out of drug conspiracy; *United States v. Crumbley*, 872 F.2d 975, 976 (11th Cir. 1989) (discussing defendant's joint plea agreement with state and federal prosecutors regarding state capital murder charges and federal narcotics charges).

112. See, for example, *Hawes*, 774 F. Supp. at 967 (discussing the government's representation "that it has contacted [the local district attorney] and can represent to the Court that the State of North Carolina will not pursue any prosecution of this Defendant for any of the transactions involved in this investigation").

113. The term comes from Johnston, 100 Yale L. J. at 618 (cited in note 12).



## IV. CONTRACT INTERPRETATION: GAP-FILLING DEFAULT RULES

The analysis thus far has assumed that the only default rule of formal protection against successive prosecution is the Double Jeopardy Clause: Absent an explicit immunity provision, a defendant's only recourse is *Blockburger*. This Part relaxes this assumption and examines the patchwork of judicially created due process protections that offer defendants immunity from future prosecution beyond the explicit terms of their plea agreements and double jeopardy doctrine. The goal is to explore how these expansive defaults offset the bargaining dynamics, and then to critique the justifications offered for this additional protection.

A. *The Rules*

Some courts impose on prosecutors a reasonably narrow good faith obligation that bars sandbagging. These courts hold that the government may not intentionally nullify the explicit protections of a plea agreement by bringing a charge that it could easily have brought before and that is related to the offenses the agreement did address.<sup>114</sup> Other courts go beyond this focus on intent, extending default immunity to all charges that stem from the transactions referred to in the indictment and that the prosecution could have anticipated making when it entered into the agreement. Where a defendant pleads guilty pursuant to an agreement that makes no reference to possible murder charges and the victim later dies, for example, these courts bar the

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114. See *United States v. Burns*, 990 F.2d 1426, 1435 (4th Cir. 1993) (concluding that the government would have violated Due Process Clause if, in the first case, it had deliberately delayed charging defendant with offense that it later brought in the second case, "in order to reap the benefits of his bargained guilty plea while denying him the opportunity to seek a concurrent sentence for related offenses"). See also *United States v. Alessi*, 544 F.2d 1139, 1154 (2d Cir. 1976) (having first determined that defendant's agreement with the U.S. Attorney in the Eastern District of New York did not bar the subsequent Southern District of New York prosecution, the court noted: "We would, of course, have a different case if there were evidence to show that the Eastern District was attempting to evade its own obligations by transferring a prosecution across the East River; but there is none"); *United States v. Laskow*, 688 F. Supp. 851, 855 (E.D.N.Y. 1988) (reaching same conclusion), *aff'd*, 867 F.2d 1425 (2d Cir. 1988).

Prosecutors may feel themselves bound to avoid sandhagging even when the law does not so require. Frank W. Miller found that even though a Kansas statute barred "a subsequent prosecution only for those offenses known to the prosecutors before the first trial and of which evidence is admitted in the first trial," one Kansas prosecutor "stated that the underlying policy against harassment by successive prosecutions expressed in this statute" would bar him from charging any prior offense of which he had knowledge at the time of a defendant's trial, even though evidence of the uncharged crime "was not admitted or even admissible" at the first trial. Miller, *Prosecution* at 188 n.5 (cited in note 69).

successive murder prosecution that could not even have been brought at the time of the defendant's plea.<sup>115</sup> At least one state court has gone further, presumptively barring any future charges that arise out of the transactions referenced in the charges to which the defendant pled.<sup>116</sup> Whether or not a prosecutor should have been able to anticipate making the successive charges does not appear to be relevant in this analysis.

Finally, in the absence of any explicit indication as to whether a plea agreement binds other prosecuting offices within the same sovereign's jurisdiction, some courts presume that the other offices are bound.<sup>117</sup> Although these default rules generally do not protect

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115. See *State v. Carpenter*, 68 Ohio St. 3d 59, 623 N.E.2d 66, 68 (1993) (barring prosecution on greater charges following victim's death noting that all parties anticipated risk of this contingency); *State v. Nelson*, 23 Conn. App. 215, 579 A.2d 1104, 1106-07 (1990) (same). But see *People v. Latham*, 609 N.Y.S.2d 141, 631 N.E.2d 83, 86 (1994) (finding no immunity for murder charges in absence of evidence that "both the defendant and the prosecution intended the plea to close the matter forever").

Long-established double jeopardy doctrine holds that even where *Blockburger* would otherwise bar the bringing of homicide charges after a defendant's conviction of a lesser included offense, the second prosecution can go forward if the victim was still alive when the defendant was first convicted. See *Grady v. Corbin*, 495 U.S. 508, 516 n.7 (1990) (noting the *Brown v. Ohio* exception); *Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977) (noting that an exception to the *Blockburger* analysis "may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence"); *Diaz v. United States*, 223 U.S. 442, 449 (1912) (finding no double jeopardy bar where the victim died after defendant was convicted of assault and battery); *In re Saul S.*, 213 Cal. Rptr. 541, 546 (Cal. App. 1985) (collecting state cases).

116. *State v. Lordan*, 116 N.H. 479, 363 A.2d 201, 203 (1976) ("Where the defendant commits several offenses in a single transaction and the prosecutor has knowledge of and jurisdiction over all these offenses and the defendant disposes of all charges then pending by a guilty plea to one or more of the charges, the prosecutor may not prefer additional charges arising from the same transaction unless either he has given notice on the record at the time of the plea of the possibility that he may prefer further charges or the defendant otherwise knows or ought reasonably to expect that further charges may be brought."). I am assuming that the *Lordan* court did not believe that a defendant's knowledge of his own conduct gave sufficient notice of the risk of future prosecution; a contrary assumption would render its rule virtually meaningless. See also *United States v. Bouthot*, 878 F.2d 1506, 1512 & n.5 (1st Cir. 1989) (noting that the state prosecutor had no duty to tell defendant that the federal prosecutor was planning to bring charges based on the same transaction, but reserving judgment as to whether such a duty would arise had both prosecutors been instituted under the same sovereign).

117. See *United States v. Harvey*, 791 F.2d 294, 296 n.1, 303 (4th Cir. 1986) (concluding that in the absence of explicit indications to contrary, a plea agreement stating that "[t]he Eastern District of Virginia further agrees not to prosecute [the defendant] for any other possible violations of criminal law arising from the offenses set out in the indictment or the investigation giving rise to those charges" and containing references to the "Government" generally should be read to bind the entire U.S. government); *State v. Burson*, 698 S.W.2d 557, 560 (Mo. Ct. App. 1985) (presuming that the decision of one county attorney binds another); *People v. Wantland*, 78 Ill. App. 3d 741, 397 N.E.2d 548, 552 (1979) (same). See also *Margalli-Olvera*, 43 F.3d at 353 ("[U]nless a plea agreement uses specific language that limits the agents bound by the promise, ambiguities regarding the agencies bound by the agreement are to be interpreted to bind the agency at issue."). But see *United States v. Russo*, 801 F.2d 624, 626 (2d

defendants against future charges arising out of transactions not alluded to in the indictments to which they plead, such rules do provide substantial additional immunity, particularly where charges in the indictment are broadly framed.

The expansive default rules that courts have devised may vary, but they all rest on the same general rationale. As the Fourth Circuit explained in *United States v. Harvey*:<sup>118</sup> While drawing on the rules for commercial contracts to resolve plea agreement disputes,

the courts have recognized that those rules have to be applied to plea agreements with two things in mind which may require their tempering in particular cases. First, the defendant's underlying "contract" right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law. Second, with respect to federal prosecutions, the courts' concerns run even wider than protection of the defendant's individual constitutional rights—to concerns for the "honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government."<sup>119</sup>

This rationale has supported expansive rules that generally construe contractual ambiguities against the government and impose a broad duty of good faith dealing on prosecutors—a duty that protects defendants against many contingencies not explicitly addressed by their plea agreements.<sup>120</sup>

Even as *Harvey* reflects what Professor David Charny has called a "fairness-based" conception of contract,<sup>121</sup> there is a different line of cases resolving plea disputes—a line reflecting more of an

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Cir. 1986) (concluding that a plea agreement binds only the U.S. Attorney in the district where the plea was entered unless "it affirmatively appears that the agreement contemplates a broader restriction") (emphasis omitted) (quoting *United States v. Annabi*, 771 F.2d 670, 672 (2d Cir. 1985)); *In re Grand Jury Proceedings 90-1 (Bullick)*, 754 F. Supp. 829, 832 & n.4 (D. Colo. 1990) (following *Russo* and rejecting *Harvey*); *Laskow*, 688 F. Supp. at 854 (following *Annabi*).

118. 791 F.2d 294 (4th Cir. 1986).

119. *Id.* at 300 (quoting *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972)). See also *United States v. Herrera*, 928 F.2d 769, 772 (6th Cir. 1991) ("Both constitutional and supervisory concerns require holding the government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements.") (quoting *Harvey*, 791 F.2d at 300); *United States v. Olesen*, 920 F.2d 538, 541-42 (8th Cir. 1990) (discussing the limits of the contract law analogy); *United States v. Smith*, 648 F. Supp. 495, 498 (S.D. Tex. 1986) ("Unlike contracts, [p]lea [b]argains involve a myriad of collateral considerations such as expectations of fundamental fairness by the Defendants, efficient administration of justice, and the integrity of the Government's promises.").

120. See, for example, *United States v. Clark*, 55 F.3d 9, 12-13 (1st Cir. 1995) (finding that the government's sentencing presentation "effectively" violated its promise not to oppose a three-level guidelines reduction for the defendant's acceptance of responsibility).

121. Charny, 104 Harv. L. Rev. at 386 (cited in note 54).

"autonomy-based" conception.<sup>122</sup> Less than a month after *Harvey*, the Fourth Circuit noted in *United States v. Fentress*:<sup>123</sup>

The prosecution owed [the defendant] no duty but that of fidelity to the agreement. Neither the Constitution nor the Federal Rules of Criminal Procedure requires that a plea agreement must encompass all of the significant actions that either side might take. If the agreement does not establish a prosecutorial commitment on the full range of possible sanctions, we should recognize the parties' limitation of their assent.<sup>124</sup>

On one level, the two Fourth Circuit cases can easily be reconciled: The contract in *Harvey* was found to be ambiguous; that in *Fentress* was not.<sup>125</sup> In their recognition that the failure of an agreement to address a particular contingency can reflect a defendant's conscious decision not to bargain any further, however, *Fentress* and other cases<sup>126</sup> embody a very different approach to plea agreement "gap" filling.<sup>127</sup>

122. *Id.* at 380. The two lines largely mirror what Clayton Gillette has called the "polar extremes" of commercial contract analysis:

At one pole are bargains between "rugged" individuals who have no legal obligation to assist each other in the absence of explicit agreements. . . . Each party has only those obligations inferred from a literal reading of the contract. . . . At the other extreme lies a more communitarian view of commercial relationalism. . . . [T]his conception of long-term relationships views commercial contract as necessarily (or at least presumptively) a cooperative mechanism for reducing the risks that both parties face from an uncertain future.

19 *J. Legal Stud.* at 538-40 (cited in note 86).

123. 792 F.2d 461 (4th Cir. 1986).

124. *Id.* at 464 (citations omitted). *Fentress* relied on *United States v. Benchimol*, 471 U.S. 453 (1985) (per curiam), where the Supreme Court overturned an appellate decision that implied from the government's plea agreement promise to recommend a sentence a duty to "express the justification for it." *Id.* at 454 (citation omitted). While the government could have committed itself to explaining its recommendation, the Supreme Court noted, it did not do so here and "it was error for the Court of Appeals to imply as a matter of law a term which the parties themselves did not agree upon." *Id.* at 456.

125. *Fentress* does not cite to *Harvey*, but the Fourth Circuit, distinguishing *Harvey* elsewhere, has noted: "Where a written plea agreement is unambiguous, and there is no evidence of governmental overreaching, the agreement should be interpreted and enforced according to the terms contained therein." *United States v. United Medical and Surgical Supply Corp.*, 989 F.2d 1390, 1400-01 (4th Cir. 1993).

126. See, for example, *United States v. Peglera*, 33 F.3d 412, 413 (4th Cir. 1994) ("[T]he government is held only to those promises that it actually made to the defendant."); *United States v. Alessi*, 544 F.2d 1139, 1154 (2d Cir. 1976) (refusing to infer an agreement to bind other districts); *State v. Jones*, 789 S.W.2d 856, 858 (Mo. Ct. App. 1990) ("All authorities are agreed that the construction of [a plea] agreement is to be had by the court from the record as a whole and if the agreement is unambiguous there is no need to resort to so-called auxiliary rules of construction or extraneous circumstances.") (citation omitted).

127. See Ayres and Gertner, 99 *Yale L. J.* at 120 (cited in note 5) ("Th[e] question of when a contract is incomplete is identical to the question of what is sufficient to contract around a default.").

An approach that declines to extend protection to defendants who could have paid for it, but did not, has a particular allure in the context of uncharged crimes. Consider, by way of contrast, a dispute over a common provision in plea agreements: the government's explicit promise to remain silent at sentencing. In the absence of any explicit provision to the contrary, should the government also be required to remain silent during post-conviction proceedings in which the defendant moves for a reduction of sentence?<sup>128</sup> In this context, a default rule obliging the government to remain silent would simply compensate for a lapse in the imagination of defense counsel. The defendant would have risked nothing in asking for an explicit commitment to such silence, and the government would likely not even have "charged" the defendant for such a provision, since the essence of the deal is to leave the sentence in the judge's hands.<sup>129</sup> A very different story, however, might lie behind an agreement's failure to address explicitly whether a charge that is not jeopardy-barred can be brought in the future. Because this "lapse" might well reflect a defendant's decision to minimize his sentence by concealing the full extent of his criminal liability, expansive default immunity rules may be harder to justify.

### *B. Costs of Expansive Default Rules*

Before critiquing the use of these expansive defaults, we start with the Coasean question: Why do they matter?<sup>130</sup> So long as the government knows that courts will impose a default rule of protection, it can reduce its sentencing concessions to reflect the possibility of uncharged culpability immunized by the default rules; it can decline to enter agreements with those defendants most likely to benefit from the added protection, or it can bargain around the defaults, explicitly overriding them in provisions that limit an agreement's scope. For their part, defendants remain free to obtain larger concessions by disavowing a need for the extra immunity.

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128. See Daniel Frome Kaplan, Note, *Where Promises End: Prosecutorial Adherence to Sentence Recommendation Commitments in Plea Bargains*, 52 U. Chi. L. Rev. 751, 759-64 (1985).

129. See *id.* at 771-72 (arguing for such a default rule); *State v. Wills*, 244 Kan. 62, 765 P.2d 1114, 1120 (1988) (adopting rule). But see *Brooks v. United States*, 708 F.2d 1280, 1281-82 (7th Cir. 1983) (concluding that the prosecutor did not violate promise to make no sentencing recommendation by opposing the defendant's later motion for reduction of sentence).

130. See Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960). See also Johnston, 100 Yale L. J. at 624 (cited in note 12) (describing Coasean contractual theory).

In reality, however, the bargaining over future jeopardy will never be so frictionless. To start, strategic considerations can deter the government from routinely overriding the defaults—or at least from trying to eliminate all risk of ambiguity from plea agreements. If a prosecutor singles out a defendant and, by reserving the power to re prosecute, makes him fear that informal protections will not suffice, the defendant might seek a global settlement. But the risk is that such disclosure will cause him to discount radically the government's sentencing concessions and even take the case to trial. Selective reservations will therefore have a cost. The aggregate cost could be particularly high, since the risk-averse prosecutor—lacking knowledge of future contingencies such as how a judge will sentence, how an investigation will develop, or how the community will respond to a plea agreement—will likely preserve the option of future prosecution more often than necessary.<sup>131</sup>

Alternatively, to avoid sending selective signals that would lead more defendants than necessary to discount informal protections, the government could use standard form agreements that explicitly override the default rules for all defendants. If all contracts were to include these provisions, a rational and fully informed defendant would have no greater reason to fear future prosecution than he would under a regime without the provisions. The success of this approach, however, would depend on the ability of defense counsel to understand the irrelevance of the explicit disclaimers for most defendants and to explain them away to their clients' satisfaction, an ability the government is likely to doubt exists across the defense bar. To be sure, defense counsel often receive criticism for pressuring clients to plead, irrespective of the consequences.<sup>132</sup> Nonetheless, an unambiguous announcement of the possibility that future charges will be brought would surely deter some pleas.<sup>133</sup> Moreover, the last thing

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131. The risk-averse prosecutor will also fear that defaults turning on such slippery matters as prosecutorial intent or the nature of the initially charged transaction will be applied liberally, even erroneously, by judges who, with their own resource concerns, rarely see the virtue of successive prosecutions.

132. See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L. J. 1179, 1180-81 (1975) (asserting that the plea bargaining system encourages defense attorneys to disregard their clients' best interests); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 Hastings Const. L. Q. 625, 672 (1986) (describing plea bargaining as a "mechanism for relieving the defender of the need to prepare that case"); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L. J. 1979, 1988-90 (1992) (describing the incentives defense attorneys have to avoid trial); *Poor Man's Justice: A Special Report on Indigent Defense, Thirty Years After Gideon*, Am. Law. 45 (Jan./Feb. 1993) (discussing inadequacies of various indigent representation schemes).

133. I do not pretend to know the extent to which such an announcement would deter defendants from pleading. I suspect that defendants now pleading guilty have learned to

the government would want in this high-volume business would be for large numbers of defense counsel to seek agreements precisely tailored to their clients' immunity needs.<sup>134</sup> In the face of these strategic obstacles, the frequency of cases in which the government has failed to contract around expansive default rules is not surprising.

There are two possible systemic consequences of the government's tendency to rely upon the defaults. The first is that prosecutors are reducing the sentencing concessions that they offer to defendants whom they believe might benefit from the mandated protection of the default rules.<sup>135</sup> The risk-averse prosecutor, generally lacking information about the contingencies that might lead to a subsequent decision (by his or another office) to re prosecute, thus makes many defendants "pay" for protection that they do not need. Analogy can be made to insurance law, where, as Professor Kenneth Abraham has shown, judicial decisions purporting to protect insureds' "expectations interests" by mandating greater coverage than that explicitly offered by a policy lead the insurer to increase policy prices for everyone.<sup>136</sup> In both contexts, rulings motivated by concerns about unequal bargaining power create a "pooling equilibrium" that discourages individuals who desire additional formal protection from identifying

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discount the judge's advice as to the "maximum possible penalty provided by law." F.R.Cr.P. 11(c). Perhaps they could also be taught to discount references to the possibility of successive prosecution. I suggest only that the government would prefer not to place even greater reliance on defense counsel's ability to reassure clients.

134. See Eisenberg, 80 Cal. L. Rev. at 596 (cited in note 83) (noting in the context of the *Hadley* rule: "Most high-volume sellers of homogeneous commodities will not utilize information concerning special circumstances to stratify precaution because the cost of processing the information, stratifying precaution, or both will exceed the expected value of the stratification.").

135. See *Original Great American Chocolate Chip Cookie Co., Inc. v. River Valley Cookies Co., Ltd.*, 970 F.2d 273, 282 (7th Cir. 1992) (Posner, J.) ("Courts deciding contract cases cannot durably shift the balance of advantages to the weaker side of the market; they can only make contracts most costly to that side in the future, because the [disfavored party] will demand compensation for bearing onerous terms."); Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. Cal. Interdisc. L. J. 59, 80 (1993) ("Since the application of relational standards will increase the cost to type A parties of dealing with type B parties, the use of such standards may decrease contracting opportunities for type B parties.").

136. Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 Va. L. Rev. 1151, 1188 (1981) (noting that one "possible byproduct of the risk spreading entailed in the expectations decisions is that they will limit the insured's freedom of choice by involuntarily increasing the scope of the coverage he purchases. Any increase in a policy's package of insurance protection will often increase its price"). See also Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory, and Public Policy* 123-24 (Yale U., 1986).

themselves and paying for it.<sup>137</sup> This adverse selection problem is particularly unfortunate in the plea bargaining context, since the defendants saddled with unnecessary coverage are less criminally culpable than those who benefit.<sup>138</sup>

This problem would be avoided if defendants who felt no need for the protection of the defaults explicitly renounced such protection in exchange for deeper sentencing discounts. But just as defendants who do not need additional protection cannot be expected to ignore a standard term overriding the defaults,<sup>139</sup> so will they also lack the knowledge and confidence to negotiate for less immunity. Moreover, even if, over time, defense lawyers were to realize and convince their clients that protection-renouncing provisions did not increase the risk of reprosecution, there would be little incentive to pursue such provisions. Lacking the confidence to distinguish between those defendants who eschewed protection because of limited liability and those more culpable individuals who were merely gambling on the sufficiency of informal guarantees, the government would probably not reward waivers.

To the extent that the government cannot shift the costs of the additional immunity afforded by the judicial default rules to defendants, there is, of course, a very different consequence: The defendants who strategically choose to avoid disclosing private information and negotiating an expensive global settlement are getting some or all of the benefits of that settlement at no cost.<sup>140</sup>

### *C. Critiquing the Justifications for Expansive Defaults*

Judicially created default rules are not necessarily a bad idea merely because they disregard strategic behavior by defendants and may have adverse distributional consequences—that is, higher sentences for less culpable defendants or windfall protection for the more

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137. See Baird, Gertner, and Pickner, *Game Theory and the Law* at 145 (cited in note 5) (noting that laws imposing mandatory terms can “destroy an efficient separating equilibrium by inhibit[ing] the flow of privately held information”). I do not mean to suggest that, in the absence of default rules, the Double Jeopardy Clause would create a separating equilibrium; indeed, I have argued the contrary. See Part III. But the pressure the clause places on defendants to produce information is significantly relieved by the default rules.

138. See Abraham, 67 Va. L. Rev. at 1187 (cited in note 136) (“Other things being equal, it would seem fairer to pool risks where insureds have no control over risk-increasing characteristics than where they do.”).

139. See notes 132-33.

140. See *United States v. Standefer*, 948 F.2d 426, 431-32 (8th Cir. 1991) (finding that defendant's plea to federal narcotics charges in Idaho did not bar related federal conspiracy charges in Arkansas, the court notes that defendants had “tried but failed to negotiate a provision in [the] Idaho plea agreement barring further prosecution in Arkansas”).



culpable. If notions of fair play and a sovereign's obligations to all citizens demanded that the limitations on the government's freedom of action be presumed to go beyond the explicit terms of a plea agreement and the minimalist protection of the Double Jeopardy Clause, we would accept such costs. But these costs do put pressure on the justifications offered for such rules. Does fairness really dictate them?

Pressure also comes from prevailing double jeopardy doctrine. As a normative matter, some might applaud the dynamic created by minimalist protection, which can penalize defendants who fail to disclose the full extent of their potential criminal liability. Others might find such coercion offensive to the values of both the Double Jeopardy Clause and the privilege against self-incrimination. So long as *Blockburger* reigns, however, presenting defendants with the strategic dilemma described above, those who would devise expansive defaults that eliminate or ease the dilemma must justify this additional protection.

Few would doubt the propriety, as a general matter, of imposing some duty of good faith on prosecutors. Courts have broadly imposed such a duty on all contracting parties.<sup>141</sup> And a prosecutor is no ordinary party, but "the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."<sup>142</sup> Given that double jeopardy doctrine has developed without reference to whether a defendant pleaded guilty or went to trial, it seems entirely appropriate to look to the Due Process Clause or, if necessary, judicial supervisory powers to promote the integrity of the bargaining process and to protect defendants against government overreaching in that context. The issue is thus not whether special obligations should be imposed on the government at all, but whether the justifications offered for expansive defaults satisfactorily explain the rules chosen, or indeed counsel the imposition of any specific defaults, particularly of defaults that mitigate the information-forcing effects of double jeopardy doctrine. Generally speaking, they do not.

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141. Restatement (Second) of Contracts § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369, 404 (1980) (collecting cases that explicitly recognize a general duty of good faith in every contract).

142. *Berger v. United States*, 295 U.S. 78, 88 (1935).

## 1. Reasonable Expectations

When imposing defaults, courts often look to a defendant's "reasonable expectations."<sup>143</sup> This is an appropriate starting point, given the Supreme Court's plea bargaining analysis: A defendant's waiver of his sixth amendment rights cannot stand unless it was intelligently given, and it cannot be intelligent if the defendant does not fully understand the benefits and limits of the government's plea concessions.<sup>144</sup> Although a waiver approach, taken to its logical conclusion, might argue for a purely subjective inquiry into a defendant's expectations, courts have always looked to objective reasonableness.<sup>145</sup>

But how is one to determine what expectations are reasonable? Again, there are parallels to insurance law. Professor Abraham distinguishes between cases holding an insurer to those expectations it directly created, through its policy or its conduct, and cases in

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143. See, for example, *Harvey*, 791 F.2d at 302-03 (4th Cir. 1986) (concluding that one could reasonably understand the agreement as prohibiting further prosecutions by any agency of the government); *State v. Carpenter*, 68 Ohio St. 3d 59, 623 N.E.2d 66, 68 (1993) (finding that the defendant reasonably expected that by pleading "he was terminating the incident and could not be called on to account further on any charges regarding this incident").

144. See *Mabry v. Johnson*, 467 U.S. 504, 509 (1984) (noting that a due process challenge exists if the defendant is not fully informed of the consequences of his or her plea); *Brady v. United States*, 397 U.S. 742, 755 (1970) ("Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and the apparent likelihood of securing leniency should a guilty plea be offered and accepted."); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (concluding that a defendant's guilty plea must be voluntary and intelligent); *United States v. Birdwell*, 887 F.2d 643, 645 (5th Cir. 1989) (same); *Harvey*, 791 F.2d at 300-01 (same). See also *Westen and Westin*, 66 Cal. L. Rev. at 501-12 (cited in note 14) (discussing how the intelligence requirement for a waiver of a constitutional right can be satisfied by directing specific performance of a plea bargain); Kaplan, Note, 52 U. Chi. L. Rev. at 768-69 (cited in note 128) (discussing the need for an intelligent waiver of a constitutional right); George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 Tex. L. Rev. 193, 214-15 (1977) (discussing the need for intelligence or awareness and how it differs from voluntariness).

145. See *United States v. Partida-Parra*, 859 F.2d 629, 633 (9th Cir. 1988) ("Any dispute over the terms of the agreement must be resolved by determining, under an objective standard, 'what the parties to the plea bargain reasonably understood to be the terms of the agreement.'") (quoting *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985)); *United States v. Giorgi*, 840 F.2d 1022, 1029 (1st Cir. 1988) ("Any mistaken belief held by [the defendant as to the scope of his plea agreement] was purely subjective and poses no bar to the instant prosecution"); *United States v. Caporale*, 806 F.2d 1487, 1517 (11th Cir. 1986) ("It is well established in this Circuit that a defendant's belief as to the scope of the plea agreement does not control the scope of the agreement."); *United States v. Oliverio*, 706 F.2d 185, 187 (6th Cir. 1983) (holding that the defendant "cannot now rely on his mistaken subjective impression of the effect of his earlier guilty plea as a bar to [further] prosecution").

The analysis here is restricted to the Due Process Clause. Where defense counsel is responsible for creating objectively unreasonable expectations as to the scope of a plea agreement, the defendant may still pursue an ineffective assistance of counsel challenge to his conviction. See *Correale v. United States*, 479 F.2d 944, 949 (1st Cir. 1973) (stating that failure of defense counsel to know the relevant law will amount to ineffective assistance of counsel); *Ex parte Griffin*, 679 S.W.2d 15, 17 (Tex. Crim. App. 1984) (concluding that guilty plea is invalid if induced by defense counsel's misrepresentations about the State's promised concessions).

which the insurer cannot fairly be held responsible for creating the insured's expectations. In the latter instance, a court's expectations analysis may mask the importation of some principle of substantive fairness.<sup>146</sup>

The easy cases are those in which the government affirmatively misleads the defendant as to the scope of a written plea agreement.<sup>147</sup> We need not address expansive default rules in this context. Even a minimalist conception of the government's due process obligations would bind the prosecutor who failed to correct misimpressions she herself created.

The more difficult cases are those in which the government does nothing to suggest that a plea agreement might give a defendant any immunity beyond that explicitly promised by the agreement or offered by double jeopardy doctrine. In such cases, as in the insurance context, vague talk of defendant expectations may mask judicial discomfort with the Supreme Court's minimalist approach to double jeopardy doctrine. The judge who, for example, wishes that the Supreme Court had adopted Justice Brennan's transaction-based analysis of successive prosecution double jeopardy questions<sup>148</sup> instead of *Blockburger*, might presume that a defendant's expectation of immunity encompasses all offenses related to charged transactions.<sup>149</sup>

The question thus becomes whether expectations-based immunity decisions rest on something besides conscientious objection. To ask whether a particular defendant would have entered his plea if he had realized that additional charges could still be brought<sup>150</sup> does not

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146. Abraham, 67 Va. L. Rev. at 1180 (cited in note 136).

147. See, for example, *United States v. Jefferies*, 908 F.2d 1520, 1525 (11th Cir. 1990) (holding that although the text of the plea agreement made no reference to fines, the agreement precluded fine imposition because the government had indicated that "no fine would be imposed"); *In re Arnett*, 804 F.2d 1200, 1202-03 (11th Cir. 1986) (holding that without express warning in written plea agreement, it was reasonable for defendant to rely on prior oral understanding with prosecutor).

148. See *Brown*, 432 U.S. at 170 (Brennan, J., concurring) (noting that the Double Jeopardy Clause "requires the prosecution in one proceeding . . . of 'all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction'") (quoting *Ashe v. Swenson*, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring)).

149. Because plea agreement issues will generally be perceived as fact-bound, a lower court judge chafing at the Supreme Court's minimalist double jeopardy doctrine will likely be insulated against Supreme Court, or even rigorous, appellate review if she bases her finding of immunity on the Due Process Clause (or supervisory powers) and her reading of the agreement.

150. See, for example, *State v. Nelson*, 23 Conn. App. 215, 579 A.2d 1104, 1107 (1990) (barring the prosecution of new charges based on the victim's death after the defendant had negotiated a plea, the court notes: "We question whether the defendant would have given her assent to a prison term if she thought that additional, more serious charges could be brought later. . . . It would be illogical to conclude that the defendant would have agreed to a three-year

advance the analysis, given the consensus that a purely subjective standard is to be avoided. If the standard is to be objective reasonableness, however, how does one distinguish between agreements whose failure to address an unbrought charge reflects an expectation of coverage and those whose gap reflects an unsuccessful gamble that informal protections would suffice?<sup>151</sup>

A fair inquiry into a defendant's expectations about the scope of future immunity would have to consider how his private knowledge of his own conduct might have shaped those expectations. Not surprisingly, courts are loath to pursue this avenue, but their failure to do so renders talk of "expectations" rather hollow.<sup>152</sup>

Ultimately, inquiries into objective expectations focus on what a defendant legitimately might expect of his bargaining counterpart. Indeed, this must be the case if one is to justify giving defendants who plead guilty protections that are unavailable to those who stand trial. No one has ever suggested using the Due Process Clause to protect the expectations, however reasonable, of the defendant who chooses trial because he mistakenly thinks he will never be prosecuted again. The "reasonable expectations" analysis thus tends to collapse into an examination of the scope of "good faith duty."

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term of imprisonment if she believed that it was perhaps only the first installment on a lengthier term to be imposed if [the victim] died."); *Carpenter*, 623 N.E.2d at 68 (reaching the same conclusion).

151. Rejecting a defendant's claim that his agreement in the Eastern District of New York bound prosecutors in the Southern District of New York, Judge Friendly noted:

We can only conclude that insofar as the plea bargain can be understood to confer an immunity from narcotics law prosecutions greater than that given by the Double Jeopardy Clause, it was not in the contemplation of either side that anyone outside of the Eastern District U.S. Attorney's or Strike Force Offices was bound. While this gave the defendants less than complete protection, their attorneys were doubtless more interested in nailing down the substantial concessions they had already achieved than in having further inquiry made. From [the prosecutor's] point of view, the limitation is certainly intelligible; he had good cause for not wanting to bind another Office which he had not consulted.

*Alessi*, 544 F.2d at 1154.

152. See Craswell, 3 S. Cal. Interdisc. L. J. at 101-02 (cited in note 16) (questioning the persuasiveness of arguments that demand respect for party expectations irrespective of legitimacy or social utility).

The common inability to process low probability events correctly, see Gillette, 19 J. Legal Stud. at 553 (cited in note 86); Oliver E. Williamson, *The Logic of Economic Organization*, 4 J. L. Econ. & Org. 65, 68-69 (1988), might counsel solicitude for defendants who disregard or unduly discount the risk of re prosecution. We first need a theory, however, as to why we should compensate for the errors of a defendant who pleads guilty to specified crimes when we do not compensate for the errors of a rational but careless defendant who has miscalculated the risks of prosecution. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968). Indeed, the defendant prosecuted once is generally less likely to face another case. See Part II.B and C.

## 2. Good Faith Duty

All courts that have spoken on the issue have suggested that, notwithstanding a plea agreement explicitly addressing only pending counts, the government cannot charge a defendant with a different count, arising out of the same transaction(s), that it could easily have brought the first time.<sup>153</sup> But what if the new charge arises out of a *different* transaction? On this question, courts are less consistent.<sup>154</sup> Moreover, they have yet to establish a clear framework for deciding when one prosecuting office's cooperation with other authorities amounts to a bad faith circumvention of its contractual obligations.<sup>155</sup>

The caselaw's ambiguity as to the scope of any good faith duty in the context of plea bargaining is understandable given the indeterminacy of contract theory on this point. Indeed, Professor Robert Summers, whose work "substantially influenced the recognition and

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153. See note 114. See also *United States v. Krasn*, 614 F.2d 1229, 1234 (9th Cir. 1980).

154. In *Krasn*, the prosecutor negotiating the defendant's plea to gratuity and bribery charges knew that an antitrust investigation into the defendant's activities was pending, but said nothing. When antitrust charges were brought, and the defendant claimed bad faith, the Ninth Circuit noted that, in certain cases, the prosecutor's "duty of good faith would encompass an obligation to inform a defendant during plea bargain negotiations of other possible criminal charges which may be filed. This, however, was not such a case." 614 F.2d at 1234. Critical to the court's analysis was the fact that the antitrust charge involved "independent" criminal transactions, and that the antitrust probe had been in "at most, only . . . a preliminary stage" when the defendant had entered his plea. *Id.* The court noted that, had the antitrust case been ready to be "submit[te]d" to the grand jury during the plea negotiations on the gratuities charges, then a different result might be required." *Id.*

But in *United States v. Strawser*, 739 F.2d 1226 (7th Cir. 1984), the court noted that the government's knowledge, while negotiating a narcotics plea, of another narcotics transaction involving the defendant would not bar a subsequent prosecution based on the uncharged transaction. *Id.* at 1231 n.5. The court reasoned that the agreement, by its terms, "was only meant to cover the offenses charged in the first indictment." *Id.* See also *United States v. Ingram*, 979 F.2d 1179, 1186 (7th Cir. 1992) (noting that the defendant "cites no authority suggesting that the government must inform a criminal defendant about all known evidence concerning non-charged offenses, so that the defendant can seek to negotiate the preclusion of prosecution on those offenses").

155. In *Alessi*, after finding that the defendant's agreement with the U.S. Attorney in the Eastern District of New York did not bar a subsequent Southern District of New York prosecution, the court noted: "We would, of course, have a different case if there were evidence to show that the Eastern District was attempting to evade its own obligations by transferring a prosecution across the East River, but there is none." 544 F.2d at 1154. See also *Laskow*, 638 F. Supp. at 855 (reaching the same conclusion). In *Heath v. Alabama*, 474 U.S. 82 (1985), Georgia authorities, after extracting a murder plea from a defendant seeking to avoid the death penalty, proceeded to play a significant role in Alabama's capital murder prosecution of the same defendant for the same murder. *Id.* at 102 (Marshall, J., dissenting). Upholding the defendant's Alabama capital murder conviction, the Supreme Court addressed only the dual sovereignty double jeopardy issue, and said nothing about the conduct of the Georgia authorities. *Id.* at 91-93. See note 199.

conceptualization of good faith" in section 205 of the Second Restatement of Contracts,<sup>156</sup> has found virtue in that provision's lack of a determinative formulation and has celebrated it for proscribing "highly varied forms of bad faith, many of which become identifiable only in the context of circumstantial detail of a kind that defies comprehensive formulation in a single rule."<sup>157</sup> Yet whatever formulation is used, issues of good faith ultimately must turn on some conception of what it was that a promisor covenanted to furnish or forego.<sup>158</sup>

Any effort to ground expansive default rules on some notion of good faith thus must explain why our conception of what a prosecutor "really" sells in a plea bargain should be based on something other than the counts in the indictment—the legislatively defined unit of consideration used in prevailing double jeopardy doctrine. This is particularly true once we remember that a defendant may be better placed than the government to calculate how much of his potential criminal liability his plea has expressly addressed, and what risks of re prosecution therefore remain.<sup>159</sup>

Perhaps an argument of "customary practice" might be made:<sup>160</sup> Because a defendant who pleads guilty is rarely re prosecuted, he can legitimately expect some degree of repose greater than

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156. Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810, 810 (1982) (referring to Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195 (1968)).

157. *Id.* at 821. But see Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 Duke L. J. 619, 621-26, 643-47 (concluding that the concept of good faith is overbroad and internally incoherent).

158. See, for example, *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 188 N.E. 163, 167 (1933) ("[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing."); Burton, 94 Harv. L. Rev. at 373 (cited in note 141) ("Good faith performance . . . occurs when a party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation—to capture opportunities that were preserved upon entering the contract, interpreted objectively."); Eric M. Holmes, *A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation*, 39 U. Pitt. L. Rev. 381, 452 (1978) (noting that good faith consists of acting "according to reasonable standards set by customary practices and by known individual expectations").

159. See Burton, 94 Harv. L. Rev. at 386 (cited in note 141) (concluding that a breach of the good faith performance standard occurs "if a party uses its discretion for a reason outside the contemplated range—a reason beyond the risks assumed by the party claiming a breach").

160. *Id.* at 389 ("Expectations as to specific foregone opportunities may be inferred from the express contract terms in light of the ordinary course of business and customary practice, in accordance with the objective theory of contract interpretation."). See also Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. Cal. Interdisc. L. J. 115, 117-18 (1993) (arguing that defaults must be grounded in convention).

that defined by the indictment or express plea provisions. But this argument is unacceptably circular, and, in any case, is belied by the readiness of many defendants to contract expressly for the protection mandated by the various default rules.<sup>161</sup>

In the end, although "good faith" seems like something that prosecutors ought to have, the concept provides no more than conclusory support for any scheme of expansive defaults with respect to future jeopardy. This is particularly true for defaults that do not turn on prosecutorial intent or the substance of plea negotiations. Courts that derive special protections from this concept for all defendants who plead guilty, without more, may be doing equity, subsidizing the plea bargaining process, or encouraging prosecutorial efficiency. The doctrinal means they have chosen to further these ends, however, do not withstand serious analysis.

### 3. Sophistication of Parties

A more powerful argument for expansive default rules protecting against successive prosecutions arises out of concern about the quality of representation that most defendants receive. Even if knowledge of his own conduct could leave a defendant well-placed to deal with the risk of successive prosecution, he cannot plan without knowing what the default rule is and the extent of immunity that a plea will give him.

Professors Ayres and Gertner observe that where contracting parties have different information about the default rule,

[s]etting a default rule that least favors the better informed parties creates an incentive for the informed party to bring up the relevant contingency in negotiations. This can signal the uninformed party that the contingency is important and can cause her to become informed about the probability that the contingency will occur. Thus, the default rule can cause the parties to negotiate for explicit terms in the contract, thereby overriding the default.<sup>162</sup>

This point, they note, "is especially relevant in settings where a repeat player is contracting with a one-shot player."<sup>163</sup>

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161. Moreover, even if a "convention" could be said to exist, that, without more analysis, would not justify the creation of expansive defaults. See Clayton P. Gilletto, *Cooperation and Convention in Contractual Defaults*, 3 S. Cal. Interdisc. L. J. 167, 176-77 (1993) (criticizing Burton's analysis).

162. Ayres and Gertner, 101 Yale L. J. at 760-61 (cited in note 12).

163. Id. at 761. See also Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 886-88 (1992).

Although the defense lawyers who can advise defendants as to the risks assumed in a plea are generally repeat players,<sup>164</sup> we cannot be confident that their advice would sufficiently convey the extremely limited scope of double jeopardy doctrine—the default rule in the absence of due process-based extensions. This agency problem has two aspects, one factual and the other legal. While a defendant may indeed have private information about his uncharged culpability, our knowledge of the barriers to attorney-client communication<sup>165</sup> should preclude any assumption that he will pass this information on to his lawyer, especially given that his thoughts will likely center on the pending charges. For her part, defense counsel, paid to dispose of the pending case,<sup>166</sup> might be insufficiently interested in pursuing information about uncharged crimes. Moreover, even a lawyer fully informed of these facts would not be able to elucidate his client's options without a full understanding of the complexities of double jeopardy doctrine and default rules, certainly not an intuitively obvious area of law.<sup>167</sup>

These factors suggest that even where the government lacks access to information about a defendant's uncharged culpability, a prosecutor is generally in a far better position to understand the dimensions, and limitations, of a default than is a defendant. Such asymmetry of information as to the operative default argues for obliging the prosecutor who wants to profit from double jeopardy doctrine's minimalist protection to make the limitations of that doctrine clear in plea agreements, which are generally drafted by the government. Recognition of this information gap thus justifies a scheme of expansive defaults, but it certainly would not preclude considering the

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164. See note 59 and accompanying text. But see *United States v. Cronin*, 466 U.S. 648, 665 (1984) (refusing to presume that a real estate lawyer trying first criminal case will render constitutionally ineffective assistance of counsel).

165. See, for example, Jonathan D. Casper, *Criminal Courts: The Defendant's Perspective* (1978) (discussing how defendants view their public defenders); Stephen Ellman, *Lawyers and Clients*, 34 UCLA L. Rev. 717 (1987) (describing the control of lawyers over implementing and making client choices); Rey B. Flemming, *Client Games: Defense Attorney Perspectives on Their Relations With Criminal Clients*, 1986 Am. Bar Found. Res. J. 253 (examining relations between criminal defense lawyers and their clients and the lack of client control); Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No I Had a Public Defender*, 1 Yale Rev. L. & Soc. Action 4 (1971).

166. See Richman, 56 Ohio St. L. J. at 112-14 (cited in note 6).

167. See *Burks v. United States*, 437 U.S. 1, 9 (1978) (noting that the Supreme Court's double jeopardy decisions "can hardly be characterized as models of consistency and clarity"). Perhaps defendants truly at risk for reprosecution—like our hypothetical S & L executive—are somewhat more likely to be from that segment of society able to afford reliably high quality representation. But this is sheer speculation.



possibility that certain defendants may indeed be pursuing a conscious strategy of non-disclosure.<sup>168</sup>

#### *D. A Scheme of Default Rules*

Were defendants fully aware of the information-forcing pressures created by minimalist fifth amendment doctrine, notions of the government's "good faith" obligations or defendants' "reasonable expectations" would not satisfactorily justify the particular measures taken by courts to ameliorate their strategic dilemma. But we cannot presume defendant knowledge of relevant defaults, and, at the very least, our courts are ill-suited to distinguish among defendants based on their degree of sophistication or access to information.<sup>169</sup> Nor can we disregard the high costs or inefficacy of default rules—like the one prohibiting sandbagging—that turn on retrospective inquiries into prosecutorial motivation.<sup>170</sup>

The problem with the current hodgepodge of defaults, however, is that they tend to give an unjustified benefit to some defendants, and inadequate protection to others. Let us consider instead a rationalized regime of expansive defaults—a scheme that forces the government to clarify the limits of immunity where defendants are most likely to have misconceptions, but attempts to separate out those cases in which a defendant is most likely to be pursuing a conscious strategy of non-disclosure.

##### 1. Scenario A: The Separate Transaction

The first scenario is the least controversial. Where a defendant pleads guilty to offenses arising out of a single transaction, he should have no right to presume that his plea gives immunity from a second prosecution arising out of a different transaction. This is the case even where the government could easily have brought both sets

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168. See *United States v. Macchia*, 861 F. Supp. 182, 188 (E.D.N.Y. 1994) (finding that the plea agreement did not bar subsequent prosecution, the court notes the experience of defense counsel and observes that if the parties had intended the agreement to grant such immunity "they surely could have chosen words to effectuate this intent"), appeal dismissed, 41 F.3d 35 (2d Cir. 1994).

169. See Charny, 104 Harv. L. Rev. at 446 (cited in note 54) (discussing costs incurred by parties and courts where judicial readiness to enforce nonlegal commitments turns on the capabilities of transactors).

170. See Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. Pa. L. Rev. 1365, 1429-35 (1987) (discussing the systemic costs of doctrinal schemes that turn on prosecutorial intent).

of charges together, and where its second case effectively nullifies (perhaps intentionally) the sentencing concessions made in the first proceeding.<sup>171</sup> Because even the most marginally represented defendant should still recognize when an indictment and/or plea agreement is bereft of reference to a separate transaction, establishing an expansive default in this context would only reward those who have consciously declined to enter broader negotiations. Not surprisingly, few if any courts would consider such a rule.<sup>172</sup> It is simply too far a stretch to presume that the government's willingness to offer a deal on one crime implicitly promises immunity as to others. Thus, absent affirmatively misleading conduct by the government, no default rule of immunity from a second prosecution should be imposed—even where the government could have brought the subsequent charges at the outset. Since no restraint on the government is justified by the nature of the bargaining process, this defendant should have no more protection against successive prosecution than a co-defendant who stands trial in the initial case.<sup>173</sup>

## 2. Scenario B: The Additional Offense Relating to the Same Transaction

The second scenario involves charges arising out of a single transaction: Defendant pleads guilty to one count of a two-count indictment, pursuant to an agreement providing only that the remaining count will be dismissed at sentencing. At no point during negotiations or court proceedings does the government make or suggest any promise of additional immunity. Thereafter, the same prosecuting office charges the defendant with offense number three, based on the same transaction as the initial two counts. Offense number three might, for example, involve defendant's possession of a gun during the drug deal charged in the first indictment, if he is a convicted felon.<sup>174</sup>

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171. See *State v. Jones*, 789 S.W.2d 856, 856-57 (Mo. Ct. App. 1990) (finding that charges arising out of defendant's prior sale to undercover officer were brought after defendant was sentenced pursuant to plea agreement addressing charges arising out of raid on defendant's house).

172. See note 154.

173. The pleading defendant would thus have the same protection against "vindictive" successive prosecutions—that is, prosecutions brought to punish him for exercising a legal right, or to chill him from doing so—that his co-defendant has. See note 72.

174. See 18 U.S.C. § 922(g) (1994 ed.) (making it unlawful for a person convicted of any crime punishable by over one year of imprisonment to "possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce"). Because there is no overlap between the elements of this offense and those of drug distribution, the second prosecution would not violate *Blockburger*. See notes 21-23 and accompanying text.

There are several versions of this scenario:

In *version one*, the defendant's possession of the gun will not be private information in the first case, and the defendant will be aware of the symmetry. Either he will have volunteered that fact during negotiations, plea allocution, or some other context, or the government will have evidenced its knowledge. Where there is little likelihood that the defendant had any strategic reason for failing to ask that immunity against offense number three be included in his plea agreement, we may fairly presume that he expected such immunity, and that the government is simply trying to nullify its sentencing concessions. A default rule protecting this defendant in the absence of government clarification would thus seem eminently appropriate.

The breadth of such a rule should not be underestimated, since it would cover many situations where *Blockburger's* protection seems particularly illusory; for example, cases in which technical differences in statutory elements are all that distinguish two prosecutions.<sup>175</sup> In recognition of *Blockburger's* counterintuitive narrowness, this default rule could also be extended to presume protection against a subsequent charge that technically is not barred by *Blockburger*, but whose factual basis is not "materially" different from that of the counts to which the defendant pled. A defendant would thus not need to show that the government knew that the mails or wires had been used to commit a bank fraud before we would presume that a plea to bank fraud brought immunity against the same conduct charged as a mail or wire fraud.

In *version two*, our hypothetical gun is private information, so far as the defendant is aware. Neither he nor the government alluded to that fact during formal proceedings or negotiations.<sup>176</sup> The second prosecution may have resulted either from the government's belated discovery of the fact, or from intentional sandbagging. The cause should not matter; in either case, the defendant's immunity should not extend beyond the explicit terms of his plea agreement or double jeopardy doctrine. So long as the undisclosed fact is not one whose significance a defendant or defense lawyer is likely to miss (like

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175. See note 24.

176. *United States v. Flores-Peraza*, 58 F.3d 164 (5th Cir. 1995), shows a similar sequence of events. The defendant was arrested after illegally entering the country and immediately pled guilty to the misdemeanor of unlawful entry at a place other than as designated by immigration officers. *Id.* at 165. Two weeks later, after a fingerprint check showed him to have previously been deported, he was charged with being in the United States after deportation without authorization. *Id.*

whether defendant carried a gun during the crime), considerations of "good faith" or "reasonable expectations" no more demand the restriction of prosecutorial discretion here than they do where a successive prosecution arises out of a different transaction.

To be sure, where the government holds back on a charge in order to bring it in another case, it stands in the best position to predict that such a prosecution will be brought. Once recharacterized as the government's failure to disclose that it has information about the defendant's own conduct, however, sandbagging does not seem so reprehensible. Indeed, courts have long held that the government's due process obligation to disclose exculpatory evidence to a defendant does not extend to information that he already knows or that is otherwise available to him.<sup>177</sup>

Moreover, a rule against sandbagging, however easy to announce in the abstract, cannot easily be enforced, or even applied in specific cases. At what point is a charge ready to be brought, such that any further delay bespeaks an improper motivation? Is it when the government knows of the underlying conduct? When the prosecution has enough evidence to obtain an indictment? Or is it when the government has evidence sufficient to prevail at trial? The more subjective the measure, the harder the factfinding.<sup>178</sup> Moreover, assuming courts could negotiate these hurdles, issues of a motivation's propriety remain: Is it sandbagging when the government holds back a charge that would implicate another individual against whom investigation is not complete?<sup>179</sup> The intent would not be to nullify a plea deal, but the effect would be the same.

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177. See *Blackmon v. Scott*, 22 F.3d 560, 565 (5th Cir. 1994) (finding no due process violation in failure to reveal witness's statement about defendant's jealous nature because the defendant was aware of his own jealous tendencies); *United States v. Hicks*, 848 F.2d 1, 3-4 (1st Cir. 1988) (finding that the government does not have to disclose a witness's testimony where the defense is aware of the witness); *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982) (noting that evidence is not "suppressed" if the defendant was aware of it).

178. In its decisions making pre-indictment delay virtually unreviewable, the Supreme Court has recognized how difficult it would be for courts to ascertain when a case was "ready." See *United States v. Lovasco*, 431 U.S. 783, 793 (1977) (noting the procedural problems that would arise if the right to a speedy trial applied to the period before indictment); *United States v. Marion*, 404 U.S. 307, 321 n.13 (1971) (noting that reasonable minds can differ on when the prosecutor has sufficient evidence to obtain a conviction).

179. In *Lovasco*, when explaining why the government ought not be required to bring charges promptly once it has "assembled sufficient evidence to prove guilt beyond a reasonable doubt," the Court noted,

[C]ompelling a prosecutor to file public charges as soon as the requisite proof has been developed against one participant on one charge would cause numerous problems in those cases in which a criminal transaction involves more than one person or more than one illegal act. In some instances, an immediate arrest or indictment would impair the prosecutor's ability to continue his investigation, thereby preventing society from

Even without the oft-proclaimed, but never enforced, rule against sandbagging,<sup>180</sup> the proposed scheme would still protect a defendant against a future prosecution arising out of a fact of unknown significance. Such facts are most likely those integral to the charged transaction, and consequently should come out during the charging, negotiation, or sentencing process. At most, the absence of an expansive default would merely encourage defendants to develop a more complete factual record in their plea or sentencing allocutions.<sup>181</sup>

*Version three* also involves offenses arising out of a charged transaction, but here, information critical to the uncharged offenses is equally accessible to defense and prosecution. A defendant, for example, pleads to offenses relating to an automobile mishap, but then faces homicide charges after the victim dies.<sup>182</sup> Lacking any special insight into the victim's condition, he could reasonably understand the government's sentencing discount to reflect the possibility that his victim might die.<sup>183</sup> It does not matter what the default rule is here, as long as both parties know what it is. The prosecution's presumptively superior knowledge of defaults argues for a rule requir-

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bringing lawbreakers to justice. In other cases, the prosecutor would be able to obtain additional indictments despite an early prosecution, but the necessary result would be multiple trials involving a single set of facts.

431 U.S. at 792-93.

180. See note 114

181. More complete allocutions can only add to reliability of pleas and encourage ostensible acceptance of responsibility. See *United States v. Harlan*, 35 F.3d 176, 181 (5th Cir. 1994) (finding that defendant who refused to acknowledge essential elements of offense at plea and sentencing was properly denied reduction under the Federal Sentencing Guidelines for "acceptance of responsibility").

Defendant candor at sentencing, or before, was recently encouraged through the enactment of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994), which created a "safety valve" provision, enabling certain non-violent drug offenders to escape harsh statutory mandatory minimum sentences by providing the government with truthful information about their crimes. 18 U.S.C. § 3553(f) (1994 ed.). See *United States v. Ivester*, 75 F.3d 182, 185 (4th Cir. 1996) ("[D]efendants seeking to avail themselves of downward departures under § 3553(f) bear the burden of affirmatively acting, no later than sentencing, to ensure that the Government is truthfully provided with all information and evidence the defendants have concerning the relevant crimes.").

182. See *Carpenter*, 623 N.E.2d at 67 (denying the state the right to file further charges on similar facts); *Nelson*, 579 A.2d at 1106-07 (same); *People v. Latham*, 609 N.Y.S.2d 141, 631 N.E.2d 83, 86 (1994) (finding no immunity for murder charges in absence of evidence that "both the defendant and the prosecution intended the plea to close the matter forever").

183. Again, analogy might be made to insurance law, particularly to the doctrine that an insured seeking coverage against a future contingency is not bound to disclose information about the risk that is equally available to the insurer. See the discussion of *Carter v. Boehm*, 97 Eng. Rep. 1162 (K.B. 1766), in Holmes, 39 U. Pitt. L. Rev. at 426-35, 445-46 (cited in note 158).

ing the government explicitly to reserve the power to bring homicide charges (if it wishes to have that option).<sup>184</sup>

### 3. Scenario C: Multiple Prosecutors Under the Same Sovereign

In Scenario C, the successive prosecution is not brought by the prosecutor who negotiated a defendant's plea agreement, but by another office operating within the same sovereign jurisdiction—another District Attorney or U.S. Attorney. Obviously, if the default scheme described in Scenarios A and B would not have presumptively barred the first prosecutor from pursuing the uncharged offenses, neither should it bar a different prosecutor from doing so. What happens, however, when the first prosecutor *would* be barred, and the agreement does not expressly disclaim an attempt to bar other offices?

To be sure, a defendant might prefer to negotiate only with the office that charged him, since another office might demand additional concessions. But he should not be penalized for pursuing such a strategy. Just as he cannot preclude interdistrict coordination, nor should we expect him to foster such consultation, once he has ensured that the relevant culpability information is on the table in his negotiations with the first prosecutor. Indeed, the fragmentation of prosecutorial authority and the flexibility of venue doctrine<sup>185</sup> may even prevent a defendant from knowing which other prosecutors might take an interest in a charged transaction or series of transactions. Under these circumstances, a default rule extinguishing the power of a second prosecutor to act where the first could not, absent an express limitation of an agreement's scope,<sup>186</sup> is

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184. The approach taken here is thus at odds with the conclusively reasoned result in *Latham* and supplies a better rationale for the results in *Carpenter* and *Nelson*.

185. See 18 U.S.C. § 3237 (1994 ed.) (“[A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be . . . prosecuted in any district in which such offense was begun, continued, or completed.”); *United States v. Ramirez-Amaya*, 812 F.2d 813, 816 (2d Cir. 1987) (“As to a charge of conspiracy, venue may properly be laid in the district in which the conspiratorial agreement was formed or in any district in which an overt act in furtherance of the conspiracy was committed by any of the co-conspirators.”); *United States v. Reed*, 773 F.2d 477, 480 (2d Cir. 1985) (stating that no single exclusive venue is required when the crime involves more than one location); *United States v. Gilboe*, 684 F.2d 235, 239 (2d Cir. 1982) (finding venue proper under 18 U.S.C. § 3237 since acts moved through different districts).

186. Questions would continue to arise as to the clarity of an express limitation. See, for example, *Ingram*, 979 F.2d at 1185 (concluding that agreement in which Colorado U.S. Attorney's Office promised “not to file any additional criminal charges in the District of Colorado which are known to this office arising from [the defendant's] criminal activities in the District of Colorado . . . unambiguously bound only the District of Colorado”).

appropriate.<sup>187</sup> Such a rule might also have the salutary effect of encouraging consultation and comity among offices within a sovereign jurisdiction, or at least force each to develop boilerplate terms specifying that its agreements bind no other office.<sup>188</sup>

Developing an analysis for determining when one prosecuting office's plea agreement should presumptively promise immunity against another office's charges may not be enough, however, since a finding of breach in this context may still leave an aggrieved defendant without a satisfactory remedy. Where, for example, domestic law bars one district attorney from binding another,<sup>189</sup> a court might not be able to halt the second's prosecution, and could offer a defendant only the rescission of his initial plea—a remedy of little use to the defendant pleased with the outcome of his initial negotiations.<sup>190</sup> Unless a sovereign jurisdiction that so limits its prosecutor's author-

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187. For an example of a case where the rule proposed here might have led to a different result, see *United States v. Quigley*, 631 F.2d 415 (5th Cir. 1980). In *Quigley*, a defendant who escaped from prison in Kansas, and was later caught with a gun in Texas, pled guilty to federal escape charges in Kansas and then found himself facing a federal gun charge in Texas. At a hearing, the Kansas prosecutor testified that he had not even known that the defendant was armed when arrested in Texas. *Id.* at 416. Upholding the district court's finding that the Kansas plea did not cover the Texas charges, the Fifth Circuit noted: "In the absence of inquiry by defense counsel, or of knowledge by the prosecutor that an additional charge might be filed in the other district, the latter was not obliged to clarify that the plea bargain concerned only the escape charge pending in his own district and did not concern non-prosecution on charges pending or to be filed in another district." *Id.* at 417.

Given that the seizure of a gun from the defendant at the time of his arrest was hardly private information that the defendant was withholding for strategic reasons, the only question left under the proposed scheme would be whether the gun possession was part of the transaction charged in Kansas. If escape were considered a continuing crime that encompassed the events at the time of the arrest, the Kansas prosecutor *would* be obliged to clarify the limitations of the agreement.

188. See *United States v. Mozer*, 828 F. Supp. 208, 209 (S.D.N.Y. 1993) (noting that plea agreement had "customary language" to the effect that it bound only the signatory U.S. Attorney's Office and did not bind "other federal, state or local prosecuting authorities"). The use of such terms, however, creates the risk that defendants will overestimate the chances of re prosecution and, therefore, undervalue sentencing concessions.

189. Compare *Staten v. Neal*, 880 F.2d 962, 964, 965-66 (7th Cir. 1989) (finding express waiver of prosecution by state's attorney in one Illinois county does not bind state's attorney in another county because first prosecutor lacked authority to do so under state law) with *Harvey*, 791 F.2d at 303 (finding immunity granted by plea agreement of one U.S. Attorney's Office would bind the entire United States Government, including the U.S. Attorney in South Carolina). See also *Thomas v. I.N.S.*, 35 F.3d 1332, 1339 (9th Cir. 1994) (finding that U.S. Attorney's Office has implied authority to bind Immigration and Naturalization Service in plea agreement); *Margalli-Olvera*, 43 F.3d at 353 (same).

190. Such a defendant may have already served his sentence. For example, in *State v. Parker*, 334 Md. 576, 640 A.2d 1104 (1994) the court held that it lacked the authority to order rescission of plea agreement provision governing how defendant would serve concurrent state and federal sentences because [the defendant] has already provided information, testified and served eleven years of his sentence".

ity also grants defendants double jeopardy protection going well beyond *Blockburger*—or unless well-established doctrine barring the invocation of principles of estoppel or apparent authority against the government is overturned,<sup>191</sup> the potential for unfairness is real but incurable.<sup>192</sup>

#### 4. Scenario D: Different Sovereigns

Another scenario in which remedial limitations may loom larger than questions of breach occurs when a defendant faces prosecution by two different sovereigns. Courts have long made clear that neither a state nor the federal government can be bound by a plea agreement in which its agents did not play a part.<sup>193</sup> Because some defendants would settle for the rescission of their initial plea,<sup>194</sup> however, we should still consider whether one sovereign's plea agreement should be construed to promise immunity from prosecution in another sovereign jurisdiction.

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191. The rule that "[e]stoppel and apparent authority normally will not substitute for actual authority to bind the United States government," is well established in federal law. *Thomas*, 35 F.3d at 1339. See *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (those who deal with the Government bear the risk of the Government agent acting outside of his authority); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1917) (stating that the United States is not bound by the acts of its agents when they act outside of what the law permits); *Margalli-Olvera*, 43 F.3d at 353 (finding actual authority to bind the I.N.S.); *Thomas*, 35 F.3d at 1343-46 (Kozinski, J., dissenting) (denying that Assistant U.S. Attorneys have implicit authority to bind the Government); J. Dennis Hynes, *Agency and Partnership: Cases, Materials and Problems* 180 (Bobbs-Merrill Co., Inc., 3d ed. 1989) ("The normal rules of apparent authority, estoppel, and so forth do not apply to the actions of federal government employees").

192. In an ideal world of well-represented defendants, prosecutors' reputational considerations might compensate for the absence of a satisfactory scheme of legal remedies. See Lewis A. Kornhauser, *Reliance, Reputation, and Breach of Contract*, 226 J. L. and Econ. 691, 703 (1983). But such is not our world.

193. See *United States v. Fuzer*, 18 F.3d 517, 520 (7th Cir. 1994) (state prosecutors cannot bind federal prosecutors unless the latter have knowledge); *United States v. Sackinger*, 704 F.2d 29, 32 (2d Cir. 1983) (defendant could not bind the federal government by reaching an agreement with the state government); *United States v. Padilla*, 589 F.2d 481, 484 (10th Cir. 1978) (United States is not bound by a state plea agreement); *Parker*, 640 A.2d at 1116-17 (noting the problems of binding federal prosecutors to a state prosecutor's promise or vice versa). See also *Heath*, 474 U.S. at 87-94 (holding that a plea agreement limiting the sentence to life imprisonment in one state does not preclude a second state from imposing the death penalty for the same murder. The Court limited its analysis to the dual sovereignty doctrine, without explicitly discussing the effect of the plea agreement).

194. See, for example, *United States v. Birdwell*, 887 F.2d 643 (5th Cir. 1989). In *Birdwell*, the defendant entered a federal plea agreement that incorporated a letter from the state prosecutor offering him an opportunity to plead to a single state count with a concurrent sentence. The defendant claimed that the plea agreement had been breached when, after execution of the agreement, the state brought two charges. Addressing the defendant's claim, the court noted: "If . . . the state offer was a significant factor in inducing [defendant] to plead guilty . . . his guilty plea is tainted." *Id.* at 645.



My analysis here is tentative. Certainly the dual sovereignty doctrine is far more easily grasped than the technicalities of a *Blockburger* analysis, and, especially after the Rodney King case,<sup>195</sup> even laypeople have a sense of its scope. It would thus seem that a defendant should have no more right to expect that an agreement with one sovereign will protect him against prosecution by another than he does to expect that a plea involving one transaction will cover charges arising out of an entirely different transaction.<sup>196</sup> In both situations, the operative default has always been "no protection," and there is no reason to believe that even the most unsophisticated defendants have failed to appreciate that fact. Moreover, the extraordinary, and perhaps antiquated,<sup>197</sup> notion of prosecutorial independence that underlies the dual sovereignty doctrine counsels against any default that would allow the unilateral actions of one sovereign to overturn the plea agreement of another.

Even if we hold a defendant to knowledge of our federal system, however, he should still be allowed to presume that the prosecutor with whom he negotiates a plea agreement will not turn around and help another sovereign seek further punishment. Consider the defendant in *Heath v. Alabama*,<sup>198</sup> who pled guilty in Georgia to avoid the death penalty, only to find himself facing murder charges in Alabama based on the same crime—with Georgia investigators all but sitting with Alabama prosecutors at counsel's table.<sup>199</sup> The Supreme Court relied on dual sovereignty principles in upholding Alabama's power to proceed, yet gave no consideration to the part that Georgia law enforcement officials played in Alabama's case.<sup>200</sup> The issue is not the double jeopardy question of whether Alabama was controlled by

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195. *United States v. Koon*, 34 F.3d 1416 (9th Cir. 1994), *aff'd* in part, *rev'd* in part, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996).

196. See *Bouthot*, 878 F.2d at 1512 (concluding that a state prosecutor has no duty to inform the defendant as to the likelihood of future federal prosecution arising out of the same transaction). See also Dennis E. Curtis, *The Effect of Federalization on the Defense Function*, 543 *Annals Am. Acad. Pol. & Soc. Sci.* 85, 95 (1996) ("The very existence of dual systems casts a shadowy threat of federal prosecution in almost every [state] case, even though the number of federal prosecutions is actually small compared with state prosecutions.").

197. See Guerra, 73 N.C. L. Rev. at 1163 (cited in note 29).

198. 474 U.S. 82 (1985).

199. *Id.* at 102 (Marshall, J., dissenting) ("[H]ad the Alabama trial judge not restricted the State to one assisting officer at the prosecution's table during trial, a Georgia officer would have shared the honors with an Alabama officer.").

200. The Court's failure to address this issue may well have been based on the limited nature of the certiorari grant. *Id.* at 101 (Marshall, J., dissenting) (noting that the grant was limited to the dual sovereignty issue).

Georgia in this matter,<sup>201</sup> but the due process question of whether Heath reasonably could have expected that his plea would end the efforts of Georgia authorities to seek his execution.

Line drawing may be difficult here. Dual sovereignty would be meaningless if Heath's plea prevented Alabama from obtaining evidence from Georgia officials. However, the active participation of those officials in the Alabama proceedings effectively nullified the sentencing concession on which Heath based his plea—and did so in a context where he could not possibly be said to have made a strategic choice.<sup>202</sup> Had a clear default rule forced Georgia's prosecutors to reserve explicitly the power to give this extraordinary assistance we could be far more certain that the defendant was not duped.

### *E. Conclusion*

Recognition of the potential for strategic behavior on both sides during plea negotiations thus counsels a scheme of defaults that looks more to each side's comparative advantage in acquiring information and understanding its significance than to slippery issues of actual knowledge and intent. This scheme gives content to vague notions of good faith and reasonable expectations. It also has the practical advantages of allowing courts to resolve disputes about a plea agreement's coverage without a hearing, and reducing the costs of negotiation by making defaults clear and predictable.

## IV. CONCLUSION

Perhaps all I have done, in a backhanded way, is argue against the minimalist double jeopardy doctrine adopted, or reaffirmed, by the Court in *Dixon*—an argument based on the unfairness of a scheme that frequently works to extract private information from defendants as the price of repose. For nothing here supports the strong normative claim that *Blockburger* is the "right" approach to the Fifth Amendment. And nothing here necessarily argues against the efforts of some to use the Due Process Clause to expand the protection of all

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201. See note 29.

202. In further proceedings, Heath alleged that his counsel made no effort to investigate Alabama's intentions. Georgia authorities swore that "during the plea negotiations, they did not make any representations about potential criminal penalties in Alabama." *Heath v. Jones*, 941 F.2d 1126, 1139 n.16 (11th Cir. 1991). For their part, Alabama authorities have avowed that it had always been their intention to charge Heath at the conclusion of the Georgia case. *Heath v. State*, 536 So.2d 142, 147 (Ala. Crim. App. 1988).

defendants—regardless of whether they plead guilty or stand trial—against government harassment through successive prosecutions.<sup>203</sup> But any inquiry into the dynamics of the bargaining that may or may not take place about a defendant's exposure to future prosecutions must at least start by taking the current state of double jeopardy doctrine as given. Certainly, this must be the stance of courts endeavoring to impose due process rules of fair play on the bargaining process, rules that offer expanded immunity against such prosecutions only to defendants who enter guilty pleas. Any such inquiry should appreciate that minimalist protection does have certain socially beneficial effects on that process, at least with respect to those defendants for whom double jeopardy doctrine makes much difference. Barriers to negotiation may limit the extent of these benefits, but courts should at least hesitate before ameliorating the strategic dilemma faced by those who would profit from the government's ignorance of their misdeeds.

The goal of this Article, however, is not simply to suggest a new way of looking at "gaps" in the plea agreements of a somewhat discrete class of criminal defendants—albeit a class to which prosecutors and the caselaw have given much attention. It is also to explore how recent applications of economic and game theory to contract law can contribute to our understanding of the dynamics of plea bargaining. A nuanced application of this literature does not demand that we equate the relative bargaining power of a criminal defendant vis-à-vis the prosecution with that of a party to an ordinary commercial negotiation. Indeed, an inquiry into each side's strategic calculus will frequently provide support for broader defendant protections. But the strategic focus of contract theory helps remind us that, in a criminal justice system in which plea bargaining is the dominant mode of adjudication, the chief significance of a much-vaunted constitutional right may lie in its value as a bargaining chip, and that the right's doctrinal dimensions are but one determinant of each player's strategy.

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203. See Amar and Marcus, 95 Colum. L. Rev. at 34 (cited in note 8); King, 144 U. Pa. L. Rev. at 132-34 (cited in note 8); Note, 109 Harv. L. Rev. at 1740 (cited in note 48).