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Elizabeth T. Lear

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CONTEMPLATING THE SUCCESSIVE PROSECUTION PHENOMENON IN THE FEDERAL SYSTEM

ELIZABETH T. LEAR*

I. INTRODUCTION

The federal system presents a peculiarly complex successive prosecution problem. The decentralized nature of the federal prosecution effort and the intricate interstate character of federal crimes may conspire to produce a series of related prosecutions arising from a common factual nucleus. Consider, for example, the procedural history of *United States v. Koonce*.[1] After mailing a package of methamphetamine to a government informant in South Dakota, Koonce was arrested at his home in Utah where authorities discovered firearms and additional quantities of drugs.[2] He was convicted on federal drug distribution charges in South Dakota and received a twenty-year sentence which included enhancements for both the drugs and guns confiscated in Utah.[3]

Apparently unsatisfied with the result, the United States convened a second grand jury, this time in Utah, to consider the same drug activity. The subsequent indictment charged Koonce with possession with intent to distribute methamphetamine and with the illegal possession of firearms.[4] Under the Federal Sentencing Guidelines,[5] conviction on the distribution count could yield only a

* Associate Professor of Law, University of Florida. B.A. 1981, University of North Carolina at Chapel Hill; J.D. 1987, University of Michigan. I am deeply indebted to Frank Allen, Charles Collier, Joel Friedman, Jerold Israel, Marc Miller, Michael Seigel, and Christopher Slobogin for their comments on earlier drafts of this Article, and to Bryan Aylstock, Deborah Ben-David, and Michael Winter for their outstanding research assistance.

1 United States v. Koonce, 884 F.2d 349 (8th Cir. 1989).

2 *Id.* at 353.

3 *Id.*

4 United States v. Koonce, 945 F.2d 1145, 1148 (10th Cir. 1991).

5 In 1984, Congress passed the Sentencing Reform Act, which created the United States Sentencing Commission [hereinafter the Commission] to design sentencing guidelines for the federal courts. *See* Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3586 (1988); 28 U.S.C. §§ 991-998 (1988). The resulting Guidelines became law on 1 November 1987. *See* FEDERAL SENTENCING GUIDELINES MANUAL 1, UNITED STATES SENTENCING COMM'N

concurrent sentence, while a conviction on the gun charge could add five years to an already extensive prison term.[6]

Though all three offenses could legally have been prosecuted in Utah,[7] the two United States Attorneys involved declined to consolidate the prosecution. Neither the double jeopardy clause nor federal statute required joinder, and splitting the case allowed both districts to take credit for the investigation and prosecution. Yet, federal tax dollars supported two grand juries, numerous prosecutors and federal defenders, and lengthy court proceedings.

The Koonce case provides a relatively clean example of piecemeal prosecution,[8] which this Article defines as the successive prosecution of legally distinct offenses premised upon the same set of factual circumstances. Although the decision to split the Koonce prosecution appears to have been "politically" motivated, other factors such as venue problems, investigative difficulties, and offense complexity more likely explain the bulk of piecemeal prosecution in the federal system. The frequency with which federal prosecutors engage in piecemeal prosecution is unclear. In today's climate, however, even limited multi-district reprosecution may be an unaffordable luxury. The ever-expanding criminal docket is rapidly crowding out legitimate civil litigation,[9] overloading prosecutors and defenders, and stretching the federal bench to the limit.

Constitutional scholars have long debated the relative merits of a conduct-based compulsory joinder rule.[10] The dialogue has centered on the meaning of the "same offence" language of the Double Jeopardy Clause, concentrating specifically on whether it includes the factual circumstances giving rise to criminal liability or applies only to

(1994-95) [hereinafter U.S.S.G.] (referred to throughout this article as the "Guidelines").

6 *See Koonce*, 945 F.2d at 1155. On the case's third trip to the court of appeals, the Tenth Circuit held that the reprosecution of the drug offense violated the Double Jeopardy Clause. The court allowed the gun count to stand. *See* note 88, *infra*. For an in depth discussion of the double jeopardy decision, see Elizabeth T. Lear, *Double Jeopardy, the Federal Sentencing Guidelines, and the Subsequent Prosecution Dilemma*, 60 BROOK. L. REV. 725 (1994).

7 The distribution prosecution in South Dakota technically originated in Utah. The crime was therefore subject to prosecution in either venue. *See* 18 U.S.C. § 3732(a) (1988).

8 For the purposes of this Article, piecemeal prosecution, also referred to as successive, redundant, or duplicative prosecution, refers to separate adjudications of separate statutory offenses which arise from a common factual nucleus. This Article concentrates almost entirely on redundant prosecution occurring in the multi-district or multi-venue context, rather than reprosecution in a single district.

9 *See infra* notes 90 to 118 and accompanying text.

10 *See, e.g.*, Comment, *Twice in Jeopardy*, 74 YALE L.J. 262, 296 (1965); Otto Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513, 534-42 (1949); Note, *The Double Jeopardy Clause as a Bar to Reintroducing Evidence*, 89 YALE L.J. 962, 967-70 (1980); George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 324, 377-80 (1986).

the statutory offenses charged.[11] Recently, however, the Supreme Court, in *United States v. Dixon*,[12] abandoned as "unworkable" a limited conduct-based approach it had fashioned just three years before in *Grady v. Corbin*.[13]

The Court is unlikely to embrace anything approaching a transaction-based offense definition in the near future.[14] Thus, it may be worthwhile to refocus the discussion away from constitutional definitions and purposes, and toward a meaningful policy analysis. Talking about successive prosecution in terms of costs and benefits has an advantage over constitutional debate. Instead of beginning with the Double Jeopardy Clause and fashioning a consistently applied rule to protect its purposes, this approach accounts for special problems created by increasingly complex federal prosecutions, concerns about efficiency, and fears that justice might suffer under a compulsory joinder regime.

This Article revisits the "transaction" rule debate in the context of a hypothetical statutory joinder requirement for the federal system.[15] Section II considers the sources of repeat prosecution in the federal arena, the impact of the Federal Sentencing Guidelines on prosecutorial charging behavior, and the costs traditionally attributed to successive prosecution. Section III examines the arguments in favor of and against a statutorily-imposed compulsory joinder approach, questioning whether either the definitional uncertainties of a transaction rule or the political benefits of the current approach are worth the individual and systemic costs inherent in an unchecked rep-

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11 *See, e.g.*, Comment, *supra* note 10, at 267-77; Kirchheimer, *supra* note 10, at 534-42; Note, *supra* note 10, at 963-69; Thomas, *supra* note 10, *passim*.

12 113 S. Ct. 2849 (1993).

13 495 U.S. 508 (1990). Under the Grady standard, double jeopardy bars a subsequent prosecution, "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 510.

14 *See Dixon*, 113 S. Ct. at 2860 ("'same-conduct' rule . . . is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy").

15 The "transaction" approach discussed in this Article is not specific; this Article uses "transaction" as a generic term referring to a factually driven inquiry for joinder purposes, as opposed to an approach like that employed under the Double Jeopardy Clause which concentrates on the elements of the offenses. A classic example of a transaction based compulsory joinder rule is one that Justice Brennan advocated in Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring), which would require prosecutors to join all offenses arising from a "single criminal act, occurrence, episode, or transaction." This Article discusses more limited approaches, such as the conduct-formula embraced by the Court in Grady v. Corbin, 495 U.S. 508, 510 (1990), and more expansive proposals, such as one requiring inclusion of all joinable offenses "which substantially overlap" in a single indictment, *see* Comment, *supra* note 10, at 298, under the rubric of the "transaction" approach.

rosecution power. Section IV offers preliminary observations on issues that must be resolved if compulsory joinder of any variety is to succeed in the federal environment.

Two points require clarification. First, this Article does not assess the frequency with which federal authorities prosecute joinable offenses separately. While such information ultimately is necessary to determine the absolute dollar costs of repeat prosecution, this Article concentrates on the opportunities to abuse power that the current approach leaves open to federal prosecutors. In addition, this Article does not precisely define the "transaction rule." The purpose of this Article is not to offer yet another definition of the criminal transaction, but to explore the implications of imposing any compulsory joinder requirement on the federal system. Thus, the "transaction rule" discussed herein generically denotes a factually-driven joinder requirement that might range in scope from the conduct formula embraced in *Grady v. Corbin*[16] to a sweeping mandate that prosecutors include all joinable offenses "which substantially overlap" in a single indictment.[17]

II. Redundant Prosecution in the Federal System

The federal criminal justice system operates with few limits on duplicative litigation. Although the Double Jeopardy Clause prohibits reprosecution of the "same offence," the successive prosecution protection is extremely narrow.[18] As long as "each offense contains an

16 Grady v. Corbin, 495 U.S. 508, 510 (1990).

17 Comment, *supra* note 10, at 298.

18 Under traditional analysis, the Double Jeopardy Clause encompasses two separate, but related doctrines. It prohibits multiple punishment and multiple trials for the same offense. *See* Kenneth G. Schuler, Note, *Continuing Criminal Enterprise, Conspiracy and the Multiple Punishment Doctrine*, 91 Mich. L. Rev. 2220, 2223 (1993); George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 Ill. L. Rev. 827, 830 (1989). This Article focuses entirely on the multiple trials, or successive prosecution, prohibition. The Blockburger test governs the multiple trials prong, *Dixon*, 113 S. Ct. at 2860, authorizing successive prosecutions of separate statutory offenses if each offense "requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932).

The multiple punishment inquiry has generally focused on congressional intent. *See* Missouri v. Hunter, 459 U.S. 359, 368-69 (1983). Under this analysis, even offenses which would technically be the same under the Blockburger test may draw cumulative punishment if prosecuted in one proceeding. *See Dixon*, 113 S. Ct. at 2883 (Souter, J., concurring and dissenting). Thus, multiple punishment may be allowed for some offenses for which multiple trials would be forbidden under the Double Jeopardy Clause. In addition, a collateral estoppel component of double jeopardy theoretically provides some additional successive prosecution protection. Facts once litigated, which are essential to the initial judgment, may not be reconsidered at a subsequent proceeding. *See* Ashe v. Swenson, 397 U.S. 436, 443 (1970). The general verdict in criminal cases undermines the potency of collateral estoppel in the criminal context. In most cases, it is impossible to determine upon what fact the jury rested its verdict, or whether it engaged in nullification. Thus, in

element not contained in the other"[19] separate prosecutions of the factually related offenses are constitutionally acceptable. This approach concentrates on the statutory offense rather than the underlying factual scenario. Thus, 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[20] and using a telephone in connection with a drug transaction,[21] to knowingly providing drugs to a pregnant woman.[22] And the proliferation of federal statutes criminalizing all aspects of a single course of conduct has only exacerbated the potential for duplicative prosecution.[23]

No federal statutory or judicially created mechanism supplements the double jeopardy protection. The Federal Rules of Criminal Procedure permit liberal joinder of offenses,[24] but do not require joinder in any instance. Nor have the federal courts embraced a common law or prudential compulsory joinder requirement beyond that which the Double Jeopardy Clause provides.

The only significant constraint on reprosecution in the federal system comes from an internal Justice Department policy which officially discourages more than one prosecution based on "the same act, acts or transaction."[25] Section 9-2.142 of the United States Attorney's Manual sets forth the "Dual Prosecution and Successive Federal Prosecution Policies" of the Department of Justice.[26] Often referred to as

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the vast majority of successive prosecutions, collateral estoppel does not impede the government's ability to contest facts litigated in the initial proceeding and provides no useful constraints on duplicative prosecutions. *See* Note, *supra* note 10, at 971-74.

19 This formula is called the Blockburger test because it originated in *Blockburger*, 284 U.S. at 304. The Court in *Dixon* officially embraced the Blockburger test in the successive trials context. *Dixon*, 113 S. Ct. at 2860.

20 21 U.S.C. § 860(a) (Supp. V 1993).

21 21 U.S.C. § 843(b) (1988).

22 21 U.S.C. § 861(f) (Supp. V 1993).

23 As the Supreme Court pointed out in Ashe v. Swenson, there has been an "extraordinary proliferation of overlapping and related statutory offenses." 397 U.S. 436, 445 n.10 (1970); *see* Thomas, *supra* note 10, at 374. Professor Thomas' hypothetical involving an astonishing series of overlapping statutes in the RICO context aptly illustrates this point. *See id.* at 1371-87.

24 FED. R. CRIM. P. 8(a) provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Id.

25 UNITED STATES ATTORNEYS' MANUAL 9-2.142(A)(3) (1995) [hereinafter U.S.A.M. (1995)].

26 The policy applies to federal prosecutions initiated after a successful state prosecution ("dual prosecution") and federal prosecutions initiated after the completion of an-

the Petite Policy because it was first announced in *Petite v. United States*,[27] Section 9-2.142 theoretically limits federal prosecutors in the exercise of their discretion to initiate prosecution of federal crimes.[28] It prohibits successive prosecutions in the absence of a "compelling federal interest."[29] In addition, the policy forbids a district from initiating a subsequent prosecution in the absence of express authorization from an Assistant Attorney General.[30] To obtain such authorization, the district must generally submit proof that the prior "proceeding left substantial federal interests demonstrably unvindicated" and that the proposed prosecution will likely yield a more extensive sentence.[31]

Although the Petite Policy appears to have substantial bite, the scope of the interests considered potentially "compelling" and the wide range of instances which warrant reprosecution leave the federal reprosecution power almost entirely intact. The policy requires identification of "substantial federal interests" on a case-by-case basis, yet goes on to state that "cases coming within priority areas of the Department—such as civil rights cases, organized crime cases, tax cases, firearms cases, and cases involving crimes against federal officials, witnesses or informants—are, of course more likely to meet the compelling federal interest requirement."[32] The policy also recognizes that a "subsequent prosecution may . . . be warranted where there is a substantial basis for believing that" prosecutorial, judicial, or jury actions in the initial proceeding were affected by any of the following: "incompetence, corruption, intimidation, undue influence," judicial or "jury nullification," or the unavailability of evidence "either because it was not timely discovered or because it was suppressed on an erroneous view of the law."[33] Perhaps most importantly, the policy does not preclude reprosecution of charges that could not have been included in the original prosecution,[34] such as closely connected crimes

other federal action ("successive prosecution"). *Id.* This Article is concerned only with successive federal prosecution.

27 361 U.S. 529, 530 (1960).

28 *See* Rinaldi v. United States, 434 U.S. 22, 27 (1977).

29 U.S.A.M. (1995), *supra* note 25, at 9-2-142(A); *see also* United States v. Thompson, 579 F.2d 1184, 1191 (10th Cir. 1978); Gerald A. Feffer, *Criminal Tax Investigations*, C254 ALI-ABA 1, 26-28 (1988).

30 *See* U.S.A.M. (1995), *supra* note 25, at 9-2.142 (A).

31 See U.S.A.M. (1995), *supra* note 25, at 9-2.142(A)(2)(b) & (A)(3).

32 *Id.* at n.8.

33 *Id.*

34 The Petite Policy specifically exempts situations in which prosecutors could have joined the offenses charged in the second prosecution with those charged in the first: "The successive federal prosecution policy does not apply and authorization need not be obtained where the second or subsequent prosecution could not have been brought together with the initial federal prosecution of the defendant." U.S.A.M. (1995), *supra* note

excluded from the first indictment on venue grounds. Thus, the Petite Doctrine has only limited applicability to classic multi-venue situations, to a vast array of priority prosecutions such as drugs and firearms, and to cases in which the Department of Justice questions the wisdom or accuracy of a prior verdict or sentence.[35]

A. SOURCES OF REPEAT PROSECUTION IN THE FEDERAL SYSTEM

Successive prosecution in the federal system[36] is probably best described as an inter-district rather than intra-district phenomenon. Both the Petite Policy and resource allocation decisions likely discourage intra-district reprosecution. Particularly in cases ending in acquittal, a single district has little incentive to rededicate resources[37] to a second prosecution which may yield the same result as the first prosecution. Moreover, prosecutors in a particular district consistently appear before the same judges. The relationship between the federal judiciary and the U.S. Attorneys' Offices is an important one, and the bench, understandably, is hostile to the use of precious judicial resources to rehash events already litigated.

On an inter-district level, however, the structure of the federal prosecution effort may encourage duplicative litigation. The next several subsections consider the characteristics which seem most likely to generate redundant prosecution.

1. The Structure of the Federal Prosecution Effort

The federal approach to criminal prosecution is decidedly decentralized. Though this structure ideally produces a prosecution strategy responsive to particular concerns of a given district,[38] it may

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25, at 9-2.142 (A)(2)(b).

35 Moreover, because it is a federal prosecutorial policy, not a matter of constitutional law, *see* United States v. Booth, 673 F.2d 27, 30 (1st Cir. 1982), it creates no enforceable right for the accused. *See* United States v. Harrison, 918 F.2d 469, 475 (5th Cir. 1990); *Booth*, 673 F.2d at 30 (the "doctrine does not create a . . . right in the accused"); United States v. Thompson, 579 F.2d 1184, 1189 (10th Cir. 1978) (characterizing the notion that a departmental policy is capable of giving rise to an enforceable right as "ill-founded").

36 This Article makes no attempt to assess the pervasiveness of the successive prosecution problem in the federal arena. Such an effort would ideally involve an empirical study well beyond the scope of its undertaking.

37 *See infra* Part I.C.

38 *See* JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES 6 (1978) (stating that differences in the composition of the districts' geographic location, population, economies, and political environments produce diverse characteristics and behavior). For example, districts located in Southern and Border states prosecute the most defendants charged with illegally distilling alcohol, while the districts which contain the chief financial centers, such as the Southern District of New York, handle most of the corporate fraud cases. *Id.* Furthermore, the internal organizational schemes vary widely among the districts as each is organized to meet its own specialized needs. *Id.*

exacerbate existing tendencies for repeat prosecution. United States Attorneys have traditionally operated with almost complete autonomy.[39] Even today the Justice Department rarely interferes in the charging decisions of local offices.[40] For the most part, the local offices initiate investigations and pursue prosecutions with little if any central oversight.[41] Thus, if prosecuting a particular offense is consis-

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39 When the first Congress authorized the appointment of U.S. Attorneys in the Judiciary Act of 1789, it did not establish a supervisory authority for U.S. Attorneys. EISENSTEIN, *supra* note 38, at 9; DANIEL J. MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 6 (1980). The U.S. Attorneys could maintain private practices, received their compensation by taking a percentage of fees and recoveries, and could represent the federal government as they wished. EISENSTEIN, *supra* note 38, at 9-10. The first official grant of supervisory power over the U.S. Attorneys did not come until 1830, when a bill introduced by Senator Daniel Webster became law. MEADOR, *supra*, at 7. The law empowered the Solicitor of the Treasury to instruct the U.S. Attorneys in all matters which interested the United States. *Id.*; Act of May 29, 1830, Ch. 153, 4 Stat. 414 (1830). Although the law gave the U.S. Attorneys official supervision, they remained almost completely autonomous, and no effective means for nationwide coordination between the U.S. Attorneys existed before the advent of the Civil War. MEADOR, *supra*, at 9. It was not until 1870, when Congress established the Department of Justice, that the Attorney General gained any formal power to review the decisions of a U.S. Attorney. *See* Act of June 22, 1870, ch. 150, §§ 3, 15-16, 16 Stat. 162, 164 (corresponds to 28 U.S.C. §§ 518-519, 543 (1970). For a discussion of the history of the office of the Attorney General, see MEADOR, *supra*, at 4-13; Griffin B. Bell, *The Attorney General: The Federal Government's Chief Law and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1050-57 (1978).

40 Harold H. Bruff, *Independent Counsel and the Constitution*, 24 WILLAMETTE L. REV. 539, 559 (1988). The Justice Department has made some attempts to bring consistency to federal prosecution through the use of a computerized reporting system and by distributing the *Principles of Federal Prosecution*, a handbook printed for U.S. Attorneys' offices. John Dombrink & James W. Meeker, *Racketeering Prosecution: The Use and Abuse of RICO*, 16 RUTGERS L.J., 633, 640-41 (1985). The effectiveness of *Principles of Federal Prosecution* in achieving uniform guidelines is undermined by its explicit authorization for the U.S. Attorneys to modify the principles as appropriate. *Id.* at 642. Furthermore, U.S. Attorneys can manipulate the computerized statistics generated at the Justice Department by controlling the information made available to the Department. *See* EISENSTEIN, *supra* note 38, at 80. U.S. Attorneys also employ other strategies and tactics to thwart attempts by the Justice Department to exercise its authority. For example, a federal prosecutor can circumvent the need for department approval to dismiss an indictment by tacitly or openly asking the judge to dismiss it. *Id.* at 85. Another effective technique prosecutors use is to stall. *Id.* at 84. Because the Department recognizes that an attorney's lack of enthusiasm for a particular case will reduce the level of attention it gets, and thus reduce the chances for success, the department may not insist on prosecuting the case. *Id.*

Some commentators have concluded that the substantial autonomy of the U.S. Attorneys' offices militates against the Justice Department imposing any effective and efficient external controls on those offices. *See* EISENSTEIN, *supra* note 38, at 123; Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 248-49 (1980).

41 The Department of Justice does exert control over some classes of investigations. For instance, the Department clears all RICO prosecutions. *See* U.S.A.M. (1995), *supra* note 25, at 9-110.101 ("No RICO criminal indictment or information or civil complaint shall be filed, and no civil investigative demand shall be issued, without the prior approval of the Criminal Division."). The Department also requires approval from Washington before the dismissal of an indictment. EISENSTEIN, *supra* note 38, at 88. In addition, anec-

tent with district goals, the fact that the United States has elsewhere prosecuted the defendant for a related offense may be of little interest.

The Justice Department's emphasis on objective indicia of productivity probably contributes more to any successive prosecution problem than does the sheer number of United States Attorney's offices.[42] Productivity in prosecutor-speak means convictions, and the Department of Justice requires offices to report overall prosecution and conviction information.[43] Although the statistics have no official significance, the Department of Justice publishes them and undoubtedly considers them in assessing the budgetary needs of its offices.[44] The quality of the convictions may therefore matter less than the quantity; it does not appear that a central authority at the Department of Justice determines whether reported convictions involve defendants already prosecuted in another district.[45] Because a defendant already convicted of a related offense is a much easier plea bargain target,[46] a subsequent prosecution may be a reasonably easy way to increase productivity.[47]

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dotal information suggests that the Department will occasionally intervene to resolve disputes between districts regarding jurisdiction to pursue a particular investigation or prosecution.

42 There are currently 94 United States Attorneys. *See* THE U.S. GOVERNMENT MANUAL 1993/94, at 370-72 (1994); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1731 n.11 (1993).

43 The Department of Justice collects and compiles statistical data in convenient form. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (Kathleen Maguire et al., eds., 1993). The Department collects statistics on the type of crime, manner of disposition, sentence length, time from filing to disposition, and most importantly, conviction rate.

44 The Department of Justice uses its tight control over expenditures as an important check on the U.S. Attorneys. JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: AN EMPIRICAL ANALYSIS OF THE OFFICE OF UNITED STATES ATTORNEY IV-22 (1968). The budget staff of the Department of Justice's Office of the Controller is responsible for department-wide budget formulation and execution functions. 1984 ATT'Y GEN. ANN. REP. 22. The staff controls appropriations, reimbursements, employment ceilings, outlays, and other legal or administrative limitations pursuant to congressional or OMB directives. *Id.*

45 *Cf.* U.S.A.M. (1995), *supra* note 25, at 9-2.142(A)(a) (admonishing U.S. Attorney's offices to "make a reasonable effort to determine whether there are related federal proceedings pending before initiating new federal proceedings").

46 Because in many cases a second but related prosecution will yield only a concurrent sentence under the guidelines, *see* U.S.S.G., *supra* note 5, § 5G1.3(b), a defendant's incentive to contest the subsequent indictment may be low. *See infra* text accompanying notes 80 to 81. Even in cases in which a second conviction will extend defendant's sentence, the prosecutorial advantages derived from the first trial and the likelihood that the defendant will not take the stand due to the related conviction, *see* FED. R. EVID. 404(b), may induce a guilty plea.

47 In fact, because conviction rates are the primary criterion for excellence that the individual districts use, a defendant's previous conviction on a related offense may increase the likelihood of successive prosecution. *See* Robert L. Rabin, *Agency Criminal Referrals in the*

In addition, the emphasis on statistics may encourage districts to divide up the prosecution of related offenses.[48] In coordinated investigations the prosecutors, as well as the DEA and FBI agents on whom they depend, need to obtain "credit" for the resources expended on the investigation.[49] Equitably splitting the prosecutorial duties between cooperating districts ensures that they receive the appropriate credit and that their personal efforts are recognized.[50]

Political forces also play a role in the successive prosecution puzzle. More than one United States Attorney has harbored political ambitions.[51] High-profile prosecutions provide a unique and generally

Federal System: An Empirical Study of Prosecutorial Discretion, 24 STAN. L. REV. 1036, 1045 (1972). There exists a certain sense of interdistrict rivalry to obtain the highest conviction rate, and this desire to be the "best" may spark a desire in the U.S. Attorneys' offices to obtain as many sure-fire convictions as possible for any given offense. *See id.*

48 The Petite Policy specifically states that it "does not generally permit the dividing of a single criminal transaction for separate prosecution within the same or different judicial districts." U.S.A.M. (1995), *supra* note 25, at 9-2.142(A)(1)(b). Artful pleading, for instance, not charging a continuing offense which can be prosecuted in two districts, may avoid this problem. Some cases, such as United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991), suggest that prosecutors ignore this aspect of the Petite Policy. In addition, the broad scope of interests considered "compelling" under the Petite Policy, *see supra* notes 31-36, may generate fragmented prosecutions. Also, the policy does not define the terms "act" and "transaction;" a narrow view of the "transaction" may allow districts to share a prosecution. *See* U.S.A.M. (1995), *supra* note 25, at 9-2.142.

49 Anecdotal information from former Assistant U.S. Attorneys suggests that a conviction in the district allows the agents to "take a stat" (*i.e.*, to close the file). Undoubtedly, some very understandable team emotion (beyond the mere interest in obtaining credit) accounts for the desire to see the defendant convicted by prosecutors with whom the agents have worked closely in their home district.

50 This may explain the two prosecutions described in the introduction. In United States v. Koonce, the investigation involved agents in both Utah and South Dakota. *See* United States v. Koonce, 945 F.2d 1145, 1147 (10th Cir. 1991). The interception of the package, and the negotiation for cooperation of the customer occurred in South Dakota. While an undercover investigation, and the arrest and search took place in Utah. *Id.*

51 New York City Mayor Rudolph Giuliani, the former United States Attorney for the Southern District of New York, is particularly well-known for using his position for political gain. *See* Connie Bruck, *Rudolph Giuliani*, AM. LAW., March 1989, at 99. His most famous exploit was outside the prosecution context when he and Senator Alphonse D'Amato (R - New York) donned army-surplus caps, designer sunglasses, and Hell's Angels jackets and were driven by drug-enforcement agents to Washington Heights in upper Manhattan to demonstrate the ease with which one may buy crack cocaine. *Your Tax Dollars at Work*, NEWSWEEK, July 21, 1986, at 66. Giuliani's office was responsible for a number of high-profile insider trading cases, including one in which he ordered the authorities to arrest and cuff executives at Goldman Sachs & Co. and Kidder Peabody & Co at their offices "as if they were most-wanted desperados about to leave to flee the country." Richard B. Stolly, *The Ordeal of Bob Freeman*, FORTUNE, May 25, 1987, at 66; Curtis Wilkie, *Prosecutor Seeks New N.Y. Spotlight; Some Pans Mix with the Raves as Giuliani Covets Mayoralty*, BOSTON GLOBE, March 21, 1989, at 1. The press criticized Giuliani's actions as unnecessarily harsh and publicity seeking. *See, e.g.*, Stolly, *supra*, at 66; Paul Richter, *Rudolph W. Giuliani; Crime Buster Finds Image is on Trial*, L.A. TIMES, March 27, 1987, § 1, at 1. ("These people can't resist those cameras; they have to make every bust a miniseries." (quoting the former chairman of the U.S. Commodities Futures Trading Commission)). Although the office touted

positive opportunity to gain public recognition. Though incentives to reprosecute for political gain arise only occasionally, the temptation may be substantial. This phenomenon is not restricted to the multidistrict reprosecution scenario; the desire to appear "tough on crime" may also invite this sort of resource allocation in a single office.

2. *Venue*

Because federal offenses target interstate criminal activity, the prosecution often confronts joinder problems generated by constitutional venue requirements.[52] Article III and the Sixth Amendment right to jury trial[53] limit the trial to the state in which the offense occurred[54] and specifically guarantee the accused a jury drawn from the district in which the crime was committed.[55] And unlike many procedural prerequisites to trial, courts do not presume that venue is correct;[56] the prosecution must prove it at trial.[57] Thus, even where Rule 8 of the Federal Rules of Criminal Procedure permits consolidation, constitutional venue problems may force offense splitting.[58]

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the arrests, it dismissed the indictments against the three men three months later. *The Case That Won't Vanish; Ex-prosecutor Giuliani and the Wall Street Three*, NEWSDAY, March 21, 1989, at 54. In addition, anecdotal information suggests that Giuliani's office was particularly difficult to work with due to his political ambitions. *See* Bruck, *supra*, at 99.

52 *See* Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. REV. 751, 752 (1962); Comment, *Multi-Venue and the Obscenity Statutes*, 115 U. PA. L. REV. 399, 399 (1967).

53 Technically, Article III establishes "venue" by requiring that the government try the defendant in the "State in which the Crime was committed." U.S. CONST. art. III. The Sixth Amendment, on the other hand, sets forth a jury composition, or vicinage, requirement. Instead of insisting that the trial be in a particular place, the Sixth Amendment requires that the jury come from a particular place—the "district in which the crime was committed." U.S. CONST. amend VI. For the purposes of this Article, the distinction is not important. For a more detailed discussion of the differences between venue and vicinage, see WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE 737-41 (2d ed. 1992).

54 Article III of the United States Constitution states: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed. . . ." U.S. CONST. art. III, § 2, cl. 3.

55 The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

56 Other prerequisites, such as a valid preliminary hearing bindover, are assumed to be present in the absence of a defense showing to the contrary. *Id.* at 746.

57 Although the federal courts do not treat venue as a material element of the crime, they do require that "the facts supporting venue be established by a preponderance of the evidence." *Id.*

58 United States v. McCormick, 993 F.2d 1012 (2d Cir. 1992), provides a good example of venue-driven case splitting. John McCormick engaged in a series of fraudulent transactions with banks in Vermont and Connecticut. *Id.* at 1013. The transactions were related in that the same fraudulent documents were presented at each bank to obtain the loans and the same individuals assisted McCormick in his crimes. *Id.* Federal grand juries in

Although a defendant may waive venue, and there is no legal impediment to joining an offense for which venue is lacking in a single indictment,[59] the incentive to coordinate with another district in this manner may be low. The threat of prosecution in another district is an excellent way to coerce the recalcitrant defendant into a plea agreement. Moreover, the joinder of offenses for which venue is lacking may be considered poaching in light of the conviction rate consciousness discussed above.[60] And including counts for which venue is absent may be risky. Although the federal courts have generally held that when venue is patently absent, the defendant's failure to object before trial constitutes waiver,[61] even this standard requires the gov-

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Connecticut and later Vermont returned separate indictments charging the various banking offenses. *Id.* Had the crimes been committed wholly within one of the states, all offenses could have been joined in a single indictment. Instead, the Connecticut charges proceeded to trial first. McCormick was convicted on all counts, and at sentencing, the conduct forming the basis for the Vermont charges was used to enhance McCormick's sentence. After he was sentenced, the government proceeded with the charges in Vermont. *Id.*

The Vermont prosecution may also have been motivated by a desire to obtain restitution for the victims of the Vermont frauds. *See id.* at 444 (Mahoney, J., concurring and dissenting) ("restitution could not be imposed in the Connecticut prosecution for Vermont Frauds not charged there"). A footnote in the Petite Policy suggests that victim restitution might provide a sufficient basis for a second prosecution. *See* U.S.A.M. (1995), *supra* note 25, at 9-2.142(A)(3) at n.8.

59 The U.S. Attorneys' Manual technically prohibits presenting offenses for which venue is lacking to the grand jury. U.S.A.M. (1995), *supra* note 25, at 9-11.121. "Nevertheless, it is common for a grand jury to investigate matters occurring at least partly outside its own district. . . . [A] grand jury is under no obligation to determine venue early in its investigation." *Id.*

60 *See supra* notes 42 to 46 and accompanying text.

61 *E.g.*, United States v. Systems Architects, 757 F.2d 373, 378 (1st Cir. 1985) (venue waived if not objected to prior to trial when defendant aware of alleged defect since filing of indictment); United States v. Levasseur, 816 F.2d 37, 45 (2d Cir. 1987) (indictment gave clear notice of venue defects, therefore appellants waived objection to venue by failing to raise it before trial); United States v. Turley, 891 F.2d 57, 61 (3d Cir. 1989) (defendants waive objection to venue if they do not raise it in a timely manner. "Timeliness is viewed as 'at least prior to the close of the government's case . . . and perhaps before the trial begins.'") (quoting United States v. Polin, 323 F.2d 549, 577 (3d Cir. 1963)); United States v. Melia, 741 F.2d 70, 71 (4th Cir. 1984) ("rule that the objection must be made before trial applies . . . when the defect is apparent on the face of the indictment."); United States v. Dryden, 423 F.2d 1175, 1178 (5th Cir. 1970) ("Defects relating to venue are waived unless asserted prior to trial."); Harper v. United States, 383 F.2d 795, 795 (5th Cir. 1967) ("waiver ensues where the objection to venue is not lodged prior to trial."); United States v. McMaster, 343 F.2d 176, 181 (6th Cir.) (venue waived if not challenged prior to verdict), *cert. denied*, 382 U.S. 818 (1965); United States v. Bohle, 445 F.2d 54, 58-59 (7th Cir. 1971) (where "improper venue is apparent on the face of the indictment, it has been uniformly held that the objection [to venue] is waived if not presented before the close of the Government's case and perhaps if not presented before commencement of trial."); United States v. Haley, 500 F.2d 302, 305 (8th Cir. 1974) (stating "[t]here is a vast amount of circuit court authority supporting our view that appellant's attack upon venue comes too late."); Gilbert v. United States, 359 F.2d 285, 288 (9th Cir.) (venue waived where defend-

ernment to proceed somewhat uncertainly, never knowing if the defendant will object at the eleventh hour, resulting in a waste of valuable time spent in trial preparation.[62]

3. Nature of Federal Crimes

The increasingly intricate character of federal offenses, such as RICO and Conspiracy, also generates a certain degree of redundancy. Conspiracy prosecutions, although not involving a technically "complex" offense, often produce a series of related prosecutions.[63] Jury confusion inherent in the multi-defendant nature of the conspiracy prosecution often militates against joining related conspiracies and the underlying substantive offenses, particularly when many defendants have unrelated substantive offenses alleged against them. Yet, a second prosecution rehashes much of the factual information reviewed in the initial prosecution.

The successive prosecution problems in the RICO[64] context are more extreme than those generated by conspiracy actions. RICO "charges are generally based on allegations of criminal behavior extending over long periods of time, sometimes occurring in locations

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ant makes specific motion to acquit at close of government's case without challenging venue), *cert. denied*, 385 U.S. 882 (1966); United States v. Daniels, 986 F.2d 451, 453 n.2 (appellant waived objection to venue by failing to raise it prior to trial), *modified, in part, on reh'g*, 5 F.3d 495, 496 (11th Cir. 1993) (finding that indictment contained a proper allegation of venue so that defendant had no notice of a defect of venue until the Government rested its case and thus the objection was timely when made at the close of the evidence—but venue objection was without merit).

62 The government may be able to settle the matter fairly early in the pretrial period by bringing the venue irregularity to the attention of the judge and asking the court to set a time by which the defendant must object to venue. *See* FED. R. CRIM. P. 12(b) (allowing pretrial motions raising, inter alia, objections based on "defects in the institution of the prosecution"); FED. R. CRIM. P. 12(c) (allowing the court to set a date by which defendants must make all pretrial motions, unless a local rule otherwise provides).

63 *See, e.g.*, United States v. Felix, 112 S. Ct. 1377, 1380 (1992) (Government prosecuted substantive offense then obtained conspiracy indictment alleging that offense as an overt act); United States v. Gambino, 729 F. Supp. 954, 959 (S.D.N.Y.), *aff'd in part and rev'd in part, remanded*, 920 F.2d 1108 (2d Cir. 1990), *vacated*, 112 S. Ct. 1657 (1992) (in light of United States v. Felix, 112 S. Ct. 1377 (1992)) (prosecution of two related conspiracies, the second arguably encompassing the first); United States v. Calderone, 917 F.2d 717 (2d Cir. 1990), *vacated*, 112 S. Ct. 1637 (in light of United States v. Felix, 112 S. Ct. 1337 (1992)) (first attempt to convict for larger conspiracy was unsuccessful and was followed by a prosecution for a related but smaller conspiracy). For an in depth analysis of the double jeopardy implications of repeated conspiracy prosecutions, see Anne B. Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95, 117-30 (1992); see also Note, *"Single vs. Multiple" Criminal Conspiracies: A Uniform Method of Inquiry for Due Process and Double Jeopardy Purposes*, 65 MINN. L. REV. 295 (1981); Timothy R. Coyne, Note, *"Totality of Circumstances" Test Used in Conspiracy Defendants' Double Jeopardy Cases*, 33 VILL. L. REV. 674 (1988).

64 8 U.S.C. §§ 1961-1968 (1988). RICO is shorthand for the Racketeer Influenced and Corrupt Organizations Act. *Id.*

distant from one another and involving a long cast of criminal actors."[65] The pattern of racketeering must be based upon specific predicate acts supported by proof beyond a reasonable doubt.[66] A RICO investigation may spawn a dizzying sequence of prosecutions. For example, according to Professor George Thomas, a defendant who "conspires to take over a legitimate business that engages in interstate commerce" by committing a robbery, an extortion, an act of bribery, and an act of mail fraud could be charged with at least nine separate offenses, and subjected to seven consecutive trials.[67]

4. *Newly Discovered Evidence*

Newly discovered evidence often explains a subsequent prosecution based upon facts already litigated. Though the explanation is by no means unique to the federal system, both the sheer size of the system and the local character of the investigations may exacerbate the extent to which new evidence accounts for subsequent prosecutions. When ninety-four districts[68] are independently assessing the strength of evidence for internal prosecution decisions, evidence related to a prosecution in another district may be overlooked. Although FBI and DEA agents, as well as Assistant United States Attorneys (AUSAs), often coordinate their investigations, the significance of particular information may not be immediately obvious. Moreover, subsequent decisions by witnesses to cooperate likely account for much new evidence. And such cooperation may hinge upon a grant

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65 Poulin, *supra* note 63, at 107.

66 The "government must prove *beyond a reasonable doubt* that defendant has in fact committed . . . the racketeering acts alleged, . . . and that predicate acts have some effect on enterprise." United States v. Carlock, 806 F.2d 535, 546 (5th Cir. 1986), *cert. denied*, 480 U.S. 949, 950 (1987) (emphasis added); *see* Poulin, *supra* note 63, at 107.

67 Professor George Thomas III uses this hypothetical to demonstrate dramatically the inadequacy of the successive prosecution protection under the Blockburger test. *See* George C. Thomas III, *RICO Prosecutions and the Double Jeopardy/Multiple Punishment Problem*, 78 Nw. U. L. Rev. 1359, 1370-86 (1984). The hypothetical reads in its entirety: "X conspires to take over a legitimate business that engages in interstate commerce; in achieving the goal, X commits one robbery, one extortion, one act of bribery, and one act of mail fraud." *Id.* at 1370. If one assumes that the defendant is charged with the following offenses

> a substantive RICO violation (based on a pattern of racketeering activity involving the bribery and the mail fraud); a RICO conspiracy; a conspiracy under the general federal conspiracy statute, section 371 alleging the bribery as the overt act of the conspiracy; a conspiracy under section 894(a) (conspiring to use extortion to collect an extension of credit); a conspiracy under section 1951(a) (conspiring to use robbery to affect interstate commerce); a substantive violation of 894(a) (using extortion to collect an extension of credit); a substantive violation of section 1951(a) (affecting interstate commerce by robbery); and a substantive bribery and mail fraud violation,

id. at 1370-71, an application of the Blockburger test authorizes seven separate federal prosecutions. *Id.* at 1386.

68 There are currently 94 United States Attorneys, one for each district. *See* The U.S. Government Manual 1993/94, *supra* note 42, at 372 (1994).

of immunity[69] or a favorable plea bargain, which may, in turn, depend upon prosecution decisions in another district.

5. *Executive Enforcement Priorities*

In some situations, the executive may make a conscious choice to embrace a successive prosecution strategy. Consider, for example, the Justice Department's deliberate abuse of the successive prosecution power as part of its campaign against obscenity. After the publication of the Report of the Attorney General's Commission on Pornography,[70] the Justice Department officially designated obscenity prosecutions a major priority[71] and formed the National Obscenity Enforcement Unit (NOEU).[72] Obscenity prosecutions were formally exempted from the Petite Policy,[73] and the NOEU actively pursued prosecutions in multiple districts to coerce guilty pleas and bankrupt defendants.[74] Such a strategy in pornography enforcement is especially tempting because the federal obscenity laws treat every delivery of obscene material as a separate offense.[75] In cases involving national publications, prosecutions are theoretically possible in every district.

This strategy is easy to export to other enforcement initiatives. It is possible to dissect many crimes involving the use of the mails or transportation in interstate commerce into an alarming number of individual offenses. The general federal venue statute allows prosecution of such offenses "in any district from, through, or into which such commerce or mail matter moves,"[76] thus vesting in the executive the

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69 A formal offer of immunity requires the approval of an appropriate Assistant Attorney General upon the United States Attorney's certification that "(1) the testimony or other information from such individual may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify . . . on the basis of his privilege against self-incrimination." 18 U.S.C. § 6003 (1994).

70 U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT (1986).

71 *See* Patrick Ingram, Note, *Censorship by Multiple Prosecution: "Annihilation, by Attrition if not Conviction,"* 77 IOWA L. REV. 269, 278, 285 (citing UNITED STATES ATTORNEYS' MANUAL 9-75.001 (1988) [hereinafter U.S.A.M. (1988)]).

72 Attorney General Edwin Meese inaugurated the National Obscenity Enforcement Unit on 22 October 1986 pursuant to recommendation 12 of the report issued by the Attorney General's Commission on Pornography. U.S.A.M. (1988), *supra* note 71, at 9-2.142(A)(3).

73 *See* U.S.A.M. (1988), *supra* note 71, at 9-75.310.

74 Ingram, *supra* note 71, at 269.

75 *See, e.g.*, 18 U.S.C. §§ 1461-1465 (1988).

76 18 U.S.C. § 3237(a) (1994) provides:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

ability to use a successive prosecution strategy in a variety of circumstances.

6. *Inadequate Punishment*

A major incentive to reinitiate a prosecution in any system is the belief that the defendant has been inadequately punished. The Petite Policy specifically notes that a second prosecution might be warranted if a "substantial basis" exists for believing that prosecutorial incompetence, or judge or jury nullification affected the verdict or the "severity of the sentence."[77] Thus, reprosecution remains a viable option to the federal prosecutor who feels that the defendant's punishment was insufficient.

B. THE RELATIONSHIP OF THE FEDERAL SENTENCING GUIDELINES TO THE SUCCESSIVE PROSECUTION PUZZLE

The Federal Sentencing Guidelines should theoretically reduce the number of repeat prosecutions in the federal system. The Guidelines embrace a modified real offense scheme, which allows the court to punish a defendant for related, but unadjudicated crimes at sentencing.[78] For example, under the Guidelines' relevant conduct pro-

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Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

77 UNITED STATES ATTORNEYS' MANUAL 9-2.142(A)(3)(a) & (b) (1992) [hereinafter U.S.A.M. (1992)]. This rationale likely explains the reprosecution of Salvatore Salamone and his co-defendants in the Middle District of Pennsylvania after trial in the Southern District of New York. Federal Agents from both New York and Philadelphia heavily pursued the investigation of what eventually became known as the "Pizza Connection" case. RALPH BLUMENTHAL, LAST DAYS OF THE SICILIANS: AT WAR WITH THE MAFIA: THE FBI ASSAULT ON THE PIZZA CONNECTION 165-66 (1988). Prosecution of an indictment filed in Philadelphia was ultimately stayed in favor of a larger indictment filed in the Southern District of New York. *Id.* Lasting more than sixteen months, the first "Pizza Connection" trial was the longest and most expensive federal criminal trial in federal judicial history. SHANA ALEXANDER, THE PIZZA CONNECTION 80 (1988). When the Southern District failed to obtain a satisfactory verdict against Salvatore Salamone (he was acquitted of the most serious charges), the Middle District of Pennsylvania reinitiated the dormant prosecution which arose from the same criminal transaction as the New York conspiracy prosecution. *See* United States v. Salamone, 869 F.2d 221, 222-23 (3d Cir. 1989). The Middle District of Pennsylvania had apparently intended to dismiss the prosecution once an acceptable verdict was obtained in New York. Instead, Salamone was required to defend allegations based on the same evidence twice. *Id.* at 228-29. Interestingly, the Third Circuit's reversal of some of Salamone's Pennsylvania convictions was vacated and remanded back to the Third Circuit by the Supreme Court on the basis of Dowling v. United States, 493 U.S. 342 (1990). United States v. Salamone, 493 U.S. 1038 (1990). The Third Circuit ultimately affirmed Salamone's convictions on all counts. United States v. Salamone, 902 F.2d 237, 240 (3d Cir. 1990), *cert. denied*, 498 U.S. 1030 (1991).

78 Real offense sentencing allows judges to consider factors outside the offense of con-

vision,[79] a defendant convicted on one count and acquitted on another count may often be sentenced as if convicted on both

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viction in arriving at the appropriate sentence length. "At its most expansive, a real offense model might base punishment decisions on the following factors: The current conviction and attendant circumstances; nonconviction offenses committed contemporaneously with the conviction offense; nonconviction offenses committed after the conviction offense; prior conviction and nonconviction offenses; and perhaps a host of biographic components from good works to employment history." Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1193 (1993). The Guidelines are considered a "modified" real offense system because they engage in a much more limited inquiry than that described above. Reliance on most offender characteristics, ancient criminal history, and other criminal conduct unrelated to the offense of conviction is for the most part prohibited.

At the other extreme lies a charge, or conviction, offense system. Under such a regime the offense of conviction determines the sentence. Uncharged or unconvicted offenses are excluded from the sentence calculation. The Sentencing Commission preferred a real offense scheme because it theoretically blunts the effects of prosecutorial charging and plea bargaining decisions on sentence severity.

Although the real offense aspects of the guidelines may ultimately reduce the number of redundant prosecutions in the federal system, the constitutional, moral, and social objections to the approach far outweigh that benefit. For this reason, nothing in this Article should be taken as praise for the Guidelines' real offense choice. *See id*; Lear, *supra* note 6.

[79] *See* U.S.S.G., *supra* note 5, § 1B1.3. The relevant conduct provision requires the sentencing court to take into account certain related conduct and offenses when calculating the defendant's "base offense level." Section 1B1.3 provides:

Relevant Conduct (Factors that Determine the Guidelines Range)

(a) *Chapter Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1)(A) All acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

(2) solely with respect to offenses of a character for which 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense or conviction.

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions . . . .

Designated the "cornerstone" of the guidelines' approach by Former Commission chairman William Wilkins, *see* William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495 (1991), the relevant conduct provision has provoked an enormous amount of commentary which is almost uniformly hostile. *See, e.g.*, Daniel Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L. J. 1681, 1741-52 (1992); Gerald Heaney, *Reality of Guideline Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 185-225 (1991); David Yellen, *Illusion, Illogic and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 402, 433-54 (1993).

counts.[80] The real offense approach thus allows the prosecutor to repair inadequacies in either the indictment[81] or trial presentation at the sentencing stage. In cases where the government is disappointed in the original verdict or has discovered additional evidence of a related, but uncharged crime, the Guidelines should reduce the incentives to pursue a second indictment.

Even if the government considers the ultimate sentence inadequate, in many cases the Guidelines will deter a second prosecution because the subsequent sentence is likely to be concurrent.[82] The Sentencing Commission sought to prevent prosecutors from manipulating sentence length by either dismissing or adding related counts, or by fragmenting the prosecution of counts into several proceedings.[83] In cases in which a district pursues a subsequent indictment for offenses already accounted for as relevant conduct in an earlier

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[80] *See, e.g.*, United States v. Rivera-Lopez, 928 F.2d 372, 372-73 (11th Cir. 1991) (conviction on charge of distributing two kilograms of cocaine and acquittal on charge of distributing three kilograms in a separate transaction require the same sentence defendant would have received had she been convicted of both counts); United States v. Manor, 936 F.2d 1238, 1243 (11th Cir. 1991) (acquittal on conspiracy count irrelevant).

Not all acquittals result in sentences identical to those defendants would have received had they been convicted of the acquitted conduct. For example, in cases involving acquittals for use of a gun in connection with a drug offense, 18 U.S.C. § 924(c), the Guidelines prescribe a "two-level" enhancement, U.S.S.G. *supra* note 5, § 2D1.1(b), while conviction requires a 5 to 30 year mandatory consecutive sentence depending on the type of firearm involved. 18 U.S.C. § 924(c) (1994).

[81] *See, e.g.*, United States v. Andrews, 948 F.2d 448, 448-50 (8th Cir. 1991) (using defendant's admitted participation in five uncharged bank robberies to increase sentence for aiding and abetting a single armed bank robbery).

[82] In cases involving the subsequent prosecution of related offenses which were included in the initial sentence pursuant to the relevant conduct provision, § 5G1.3(b) arguably requires that a sentence imposed after the related prosecution run concurrently with the first. *See* U.S.S.G., *supra* note 5, § 5G1.3, Background Commentary (The "guideline is intended to result in an appropriate incremental punishment for the instant offenses that most nearly approximates the sentence that would have been imposed had all the sentences been imposed at the same time."). Section 5G1.3(b), entitled "Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment" provides:

> If . . . the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment.

Though it is not entirely clear what "fully taken into account" actually means, the language appears to be limited to situations involving related offenses factored into the original sentence pursuant to the relevant conduct provision. *See id.*, application note 2; THOMAS W. HUTCHINSON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE 619 (2d Ed. 1994).

[83] *See* U.S.S.G., *supra* note 5, § 5G1.3(b), Background Commentary (The guideline "is intended to result in an appropriate incremental punishment for the instant offenses that most nearly approximates the sentence that would have been imposed had all the sentences been imposed at the same time."); Ilene H. Nagel and Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 505 (1992); Freed, *supra* note 79, at 1713-14.

sentencing proceeding, the Guidelines eliminate the ability to increase the defendant's sentence length through the second prosecution.

However, not all related offense prosecutions yield concurrent sentences. The proliferation of offenses carrying consecutive mandatory minimum sentences have consistently undermined the uniformity goals of the Sentencing Commission.[84] In cases where the offense carrying the mandatory minimum is not charged in the initial prosecution, the lure of a significantly longer prison term may legitimize a second prosecution. In addition, related offenses that are either excluded by the Guidelines from the sentencing inquiry[85] or are accounted for in a way other than through a relevant conduct enhancement[86] will draw a consecutive sentence if prosecuted separately.

Similarly, if the subsequent indictment is returned for "political" reasons,[87] the existence of the Guidelines may increase the likelihood of a second indictment.[88] At the sentencing proceeding following the

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84 *See* Judge William W. Wilkins, Jr., Chairman, United States Sentencing Commission, *Testimony before the Subcommittee on Crime and Criminal Justice of the House of Representatives Committee on the Judiciary*, July 28, 1993, 6 FED. SENT. REP. 67, 67-69 (1993) (explaining how mandatory minimum sentencing adversely affects Guidelines' goals by creating disparity, undermining certainty, and generally interfering with the Guidelines' ability to work effectively).

85 Robbery is an example of an offense for which § 1B1.3(b) does not require aggregating the amounts stolen. Offenders who rob two banks and are convicted of only one bank robbery are sentenced only on the basis of proceeds taken in the robbery for which they were convicted. *See* Yellen, *supra* note 79, at 434-38 (discussing the bank robbery example).

86 Some conduct is categorized as "specific offense characteristics" and although specific offense characteristics are used in the sentence calculation, they are not accounted for pursuant to relevant conduct. For example, use of a gun in connection with a drug offense is not relevant conduct to a drug conviction. It is a specific offense characteristic under § 2D1.1(b)(1) and requires a two-level base offense level increase. A subsequent prosecution and conviction of the firearm offense would arguably fall outside the concurrent sentencing requirements of U.S.S.G., *supra* note 5, § 5G1.3(b), *see supra* notes 83 to 84 and accompanying text. It is arguable because the guideline requires a concurrent sentence when the subsequent conviction offense has been "fully accounted for" in the first sentencing determination. Application note 2 appears to confine the "fully accounted for" language to instances involving relevant conduct enhancements. U.S.S.G., *supra* note 5, § 5G1.3, Application note 2; *see supra* notes 79 to 83 and accompanying text.

87 Political reasons may include prosecutorial glory as well as conviction rate statistics padding. *See supra* note 50 and accompanying text.

88 The Second and Tenth Circuits prohibit the subsequent prosecution of offenses already punished through relevant conduct enhancements at the first proceeding. *See* United States v. McCormick, 992 F.2d 437 (2d Cir. 1993) and United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991), *cert. denied* 112 S. Ct. 1705 (1992). According to these courts, the sentence attached to the second conviction, even if concurrent, would violate the multiple punishment prohibition of the Double Jeopardy Clause. *McCormick*, 992 F.2d at 441; *Koonce*, 945 F.2d at 1153. Other Courts of Appeals have not followed suit. In fact, the Fifth Circuit recently denounced the Second/Tenth Circuit approach as inconsistent with long-

original conviction, the prosecutor may offer evidence of related criminal acts pursuant to the relevant conduct provision. If the government pursues a subsequent prosecution based upon the crimes already accounted for in the first sentence, the defendant will have little incentive to resist the second indictment. As noted, the sentence for a conviction in the second prosecution will run concurrently to the first. Thus, the defendant loses little by pleading guilty. And even if the defendant insists upon a trial, the government's job is made simpler by the first conviction. The prosecution will have obtained a preview of the defendant's defense at the original sentencing proceeding.[89] In addition, the defendant is unlikely to take the stand because the prosecutor may use the related conviction to impeach his testimony. Thus, for districts seeking to improve their conviction statistics or public image, the Guidelines may actually encourage successive prosecution.

The Guidelines are not the panacea for the federal successive prosecution problem. Although the Guidelines may eliminate some incentives for reprosecution in the federal system, substantial pressures favoring piecemeal litigation remain. Regardless of the legitimacy of these pressures, the costs associated with duplicative prosecution are potentially high. The next section examines the costs traditionally associated with successive prosecution.

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standing sentencing and double jeopardy jurisprudence. *See* United States v. Burger, 21 F.3d 70, 76 (5th Cir. 1994). Although the Fifth Circuit may be correct that the practice does not offend the Double Jeopardy Clause, this is because the clause is ill-designed to police successive punishment scenarios which do not involve convictions in the original proceeding. The Second and Tenth Circuits were correct that a constitutional violation occurred. Due Process was offended when the offense was originally punished in the absence of indictment and trial. *See* Lear, *supra* note 6. The likelihood that the courts will recognize the patent unconstitutionality of the Guidelines' real offense system is remote. Therefore, this Article discusses the successive prosecution problem as if no serious flaws in the Guidelines' scheme exist.

89 Sentencing hearings are theoretically informal proceedings, operating outside the scope of most constitutional protections and the rules of evidence. *See* Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 FED. SENT. REP. 96, 96 (1992). To obtain an enhancement for relevant conduct, the government needs only prove the conduct by a preponderance of the evidence. *See, e.g.*, United States v. Salmon, 948 F.2d 776 (D.C. Cir. 1991); United States v. Manor, 936 F.2d 1238 (11th Cir. 1991); United States v. Restrepo, 903 F.2d 648 (9th Cir. 1990). *But see* United States v. Kikumura, 918 F.2d 1084, 1101 (3d Cir. 1990) (recommending application of a clear and convincing standard in some unusual circumstances). Such proof often consists of a government agent's testimony regarding the substance of allegations made by an unidentified informant. Practically speaking, the defendant must put on an affirmative case to avoid enhancement. Thus, even in situations where the government fails to secure a sentencing enhancement for a related offense, it obtains an important preview of the facts supporting the defendant's defense. Such discovery allows the government to perfect its case in light of information it would not otherwise have.

C. POTENTIAL COSTS OF UNRESTRICTED REPROSECUTION

A number of commentators have questioned whether the criminal system might benefit from the civil system's approach to the successive litigation problem.[90] Duplicative litigation in the civil system is dealt with quite ruthlessly under the common law doctrine of res judicata, or claim preclusion.[91] Civil litigants receive one opportunity to settle disputes arising from a particular factual scenario. After the initial judgement, claim preclusion, or more specifically the rule against splitting,[92] bars any further attempt to litigate events arising from a common nucleus of operative fact.[93] The rule extends to litigated and unlitigated claims regardless of merit or legal theory. Plaintiffs omit weak, yet potentially viable claims at their peril.

Claim preclusion furthers both individual and systemic interests by "encourag[ing] reliance on judicial decision, barr[ing] vexatious litigation and free[ing] the courts to resolve other disputes."[94] By insisting that litigants resolve related disputes in a single proceeding, claim preclusion protects the limited resources of the courts. Efficiency is at a premium; "every dispute that is reheard means that another will be delayed."[95] Res judicata protects the individual from harassment by allowing dispute resolution to be final. Lastly, claim preclusion avoids the inevitable diminution in public confidence that accompanies inconsistent judicial pronouncements. As Professors Friedenthal, Kane, and Miller observe, "since there is no reason to suppose that the second or third determination of a claim is necessarily more accurate than the first, the first should be left undisturbed."[96]

The costs of unrestricted reprosecution both on a systemic and individual level are of potentially greater significance in the criminal system than in the civil system. The current approach leaves the defendant vulnerable to debilitating government harassment.[97] Re-

90 *See* Allan D. Vestal & Douglas J. Gilbert, *Preclusion of Duplicative Prosecutions: a Developing Mosaic*, 47 MO. L. REV. 1, 2-4 (1982); *see also* Kirchheimer, *supra* note 10, at 534-39 (advocating a transaction approach if the amendment rules are modified).

91 Scholars and courts often use Res Judicata to refer to both claim and issue preclusion. JACK H. FRIEDENTHAL ET AL, CIVIL PROCEDURE, 614-17 (2d ed. 1993). This discussion focuses specifically on claim preclusion. Issue preclusion, or collateral estoppel, is a more limited doctrine applicable to criminal cases in some instances.

92 Claim preclusion is the modern term for the common law rule against splitting. *Id.* at 617-21.

93 *Id.* at 646.

94 Brown v. Felsen, 442 U.S. 127, 131 (1979).

95 FRIEDENTHAL ET AL., *supra* note 91, at 617.

96 *Id.* at 618.

97 This point is part of any constitutional discussion of the successive trials prohibition. *See, e.g.*, Comment, *supra* note 10, at 277 ("Double Jeopardy protects the defendant from continued distress, enables him to consider the matter closed and to plan ahead accord-

peated trials prevent individuals from "getting on with their lives"; defending an accusation of criminal wrongdoing is an all-consuming activity. But the real danger is more insidious than mere vexation.[98] The criminal law is the most powerful tool available to the government to silence its detractors.[99] There is no better way to undermine a political dissident's credibility, impair a candidate's ability to finance a campaign, or prevent a reporter from presenting a viewpoint than to subject her to a series of criminal trials. Under the current approach, only the grand jury[100] and the good faith of government actors stand between the activist and such harassment.[101]

Most importantly, repeated attempts to convict undermine the accuracy of the subsequent verdict.[102] An aggressive defense to a

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ingly."). The most compelling description of the general successive trials problem is probably Justice Black's oft-quoted statement in Green v. United States, 355 U.S. 184, 187-88 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The overt successive prosecution policies of the National Obscenity Enforcement Unit (NOEU) provide an excellent example of the potential for harassment. The NOEU pursues multi-district prosecutions hoping to bankrupt defendants or to force plea bargains. Ingram, *supra* note 71, at 269. While this strategy may be commendable in some instances, it becomes dangerous when the government erroneously believes that materials protected by the First Amendment are pornographic. It is dangerous, because it jeopardizes First Amendment rights as litigation costs may make vindication of those rights financially impossible. *Id.* at 271.

98 Comment, *supra* note 10, at 286.

99 *See* Akhil R. Amar, *The Bill of Rights as Constitution,* 100 YALE L.J. 1131, 1182 (1991).

100 Commentators typically describe the grand jury as both a shield and a sword. LAFAVE & ISRAEL, *supra* note 53, at 376. It operates as a sword in its performance as an investigative agency, and as a shield or screening agency by interposing itself between the government and the individual. *Id.* at 376. By refusing to indict when evidence is insufficient or when prosecutorial overreaching is present, the grand jury protects the individual citizen from unwarranted government prosecution. *Id.* But critics have long contended that the grand jury is a mere "rubber stamp" for the prosecution and that the protection to the individual theoretically provided by this body is illusory. *Id* at 693.

101 This does not mean that the federal government routinely uses the criminal sanction to harass its opponents. In fact, media scrutiny may render such a strategy politically impossible. On the other hand, the government has subjected political figures to criminal prosecution, Representative Dan Rostenkowski and Mayor Marion Barry providing recent examples. Certainly, the systematic harassment of Planned Parenthood by repeated IRS audits during the Reagan presidency implies that the government is capable of abusing the reprosecution power for political reasons, if only in the administrative context. *See* Robert Pear, *Planned Parenthood Groups Investigated on Use of U.S. Funds,* N.Y. TIMES, December 6, 1981, at A30; *Harassing Planned Parenthood,* N.Y. TIMES, December 15, 1981, at A30.

102 MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 4 (1969) (describing the possibility that an innocent person may be found guilty as the "core of the problem"); Green v. United States, 355 U.S. 184, 187-88 (1957) (stressing that repeated trials may cause the defendant to be

criminal accusation is an extremely expensive proposition. Few individuals can afford to mount such a defense more than once. The expense and the mental fatigue may induce an innocent defendant to accept a generous plea agreement. And even if the defendant fights on at a second trial, he is at a distinct disadvantage. The prosecution has had a dress rehearsal regarding the pertinent facts. The statutory offense may have changed, but the evidentiary basis remains the same. The prosecution benefits from the detailed account of the defendant's story set forth in the first proceeding. A second trial allows the government to review and perfect its original case.[103] Even an innocent defendant may be convicted by a well-choreographed presentation of the evidence. Repeated prosecutions based on a single factual scenario present a real danger to the defendant by dominating his time, depleting his finances, and possibly by incarcerating him wrongfully.

The extent of the systemic injury generated by repeat prosecution in terms of pure resource dedication is unclear. As noted, the volume of duplicative litigation will depend upon a number of variables, including executive enforcement priorities. Given that the potential for pervasive reprosecution exists, the systemic impact could be profound. The federal courts are in crisis; they have been overwhelmed by criminal cases without a corresponding increase in court personnel.[104] Every criminal case makes it less likely that a civil jury trial will go forward.[105] Each criminal trial requires the full attention

found guilty even though innocent).

[103] Interestingly, conversations with federal prosecutors revealed that they may not share this perception. Their view, especially in cases involving savvy defendants (such as organized crime figures), is that the government's case does not improve with age. The government's witnesses have also been cross examined and may well forget key information during the later trial.

[104] During the fifteen years between 1976 and 1991, district court judgeships grew nearly 42% to 531. *See* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1990, at 52 (Kathleen Maguire et al. eds., 1991) [hereinafter SOURCEBOOK 1990]; U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, at 73 (Kathleen Maguire et al. eds., 1993) [hereinafter SOURCEBOOK 1992]. This growth was far less than the corresponding growth of criminal offenses. Between 1982 and 1991, criminal cases pending in U.S. district courts grew more than 127%. SOURCEBOOK 1992, *supra*, at 494. Drug offenses accounted for much of this, growing 258% between 1980 and 1990. *Id.* at 485. In 1991, district court judges had an average of more than 70 cases pending before each of them. *Id.* at 494.

[105] The amount of time devoted to federal civil trials is dwindling. *See* Patrick E. Logan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663, 669 (1993). Between 1973 and 1992, the number of civil trials in the district courts fell by more than three percent, despite a 230% increase in civil filings and a 61% increase in the number of authorized district judgeships. *See id.* and citations therein. In the year ending 30 June 1987, the median time from filing a complaint to disposition by trial for the middle 80% of cases was 20 months. MECHAM, ANN. REP. OF THE DIRECTOR OF THE ADMIN.

of the district court, thus delaying other pending motions and hearings.[106] In the Guidelines environment, the need for repeated sentencing hearings alone may constitute a significant commitment of judicial resources.[107] Continual reconsideration of a criminal act may be a luxury that the federal courts cannot afford.

The resource drain potentially created by successive prosecutions extends to both the federal prosecutors and federal defenders offices. Assistant United States Attorneys juggle impressive caseloads.[108] Every duplicative prosecution means that they must ignore, abandon, or downgrade another case. The problem from the federal defender's perspective may be even more acute.[109] There are fewer federal de-

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OFFICE OF THE U.S. COURTS 213 (1987). This clogging of the federal courts undoubtedly fosters the settlement of meritorious civil claims. *See* Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions to Require the Payment of Money*, 70 B.U. L. REV. 623, 625 n.12 (1990) (95% of the civil cases in U.S. District courts that were terminated during the year ending 30 June 1987 were settled or otherwise disposed of before trial) (citing MECHAM, *supra*, at 211).

The median amount of time from filing to disposition of criminal cases in the federal courts in the year ending 30 June 1991 was 4.8 months, and where a jury trial took place, the mean time amounted to 7.6 months. SOURCEBOOK 1992, *supra* note 104, at 502. That year, district courts conducted 8925 criminal trials and 19,949 civil trials. *Id.* at 500.

106 District Judge Aubrey E. Robinson, Jr. remarked that "[w]hile the total number of criminal filings [has] remained [stable], [judges] are receiving more indictments involving complex conspiracies, multiple defendants and multiple counts, 25, 30, 40 count indictments seem to be run of the mill now and a number of these cases are going to trial. One result of the complexity of our civil and criminal litigation is an increase in the amount of time that our judges are spending in jury trials." Proceedings of the 47th Annual Judicial Conference of the District of Columbia Circuit, 114 F.R.D. 419, 427 (1987).

107 *See* FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 137 (1990) (reporting that a post-Guidelines survey found that more than 50% of federal judges responding estimated a 25% increase in time devoted to sentencing, while one-third estimated and increase of 50%). Repeated sentencing hearings also have an adverse impact on the probation officer who must prepare the presentence investigation report for each hearing.

108 In 1992, approximately 4180 AUSAs, *see* Luban, *supra* note 42, at 1766 n.11, prosecuted 59,198 defendants. SOURCEBOOK 1992, SUPRA note 104, at 476.

109 Federal public defenders are overburdened to an extreme degree. *See* United States v. Rogers, 602 F. Supp. 1332, 1350 (D. Colo. 1985) (public defenders cannot match the time and resources that prosecution in RICO and CCE cases expend); *Legal Ethics 1990: What Every Lawyer Needs to Know*, 403 P.L.I. LITIGATION AND ADM. PRACTICE COURSE HANDBOOK SERIES 411 (public defenders see an endless waiting line for services). While federal defenders are often very skilled and more knowledgeable about criminal law than most private attorneys, "case overload (which can only get worse . . .) may nullify much of federal defenders' specialist advantage over private attorneys. . . . Beyond case overload, the lack of funds available to public defenders may prevent the employment of expert witnesses, investigators, and others who might build a credible defense." Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1441 (1993); Mark L. Walters, Note, *American Dreammasters v. The Cocaine Cowboys: Caplin, Monsanto, and the New Cold War*, 69 TEX. L. REV. 159, 193-94 (1990) (in most complex cases, an overburdened public defender will not be as effective an advocate as a privately retained lawyer who can afford to devote as much time as necessary to fully prepare the defense).

fenders than Assistant U.S. Attorneys.[110] And defender caseloads continue to grow,[111] while their budgets continue to shrink.[112] Unlike the prosecutors, defenders do not control their caseloads; they are at the mercy of the government. Each joinable offense that the government prosecutes separately diverts defender resources from equally deserving defendants and dilutes taxpayer dollars designed to provide federal defendants with competent counsel.

Redundant prosecution also undermines the integrity of the justice system. The damage to the criminal jury system caused by reprosecution after acquittal or conviction on a discounted charge is considerably more dangerous than relitigation in the civil system. Allowing the government to ignore hostile verdicts strikes at the heart of the criminal jury's nullification power. Consider, as Professor Westen points out, that courts cannot constitutionally confine the criminal jury to fact-finding. Numerous jury control devises, ranging from the directed verdict to ordering a new trial, are "constitutionally employed in civil cases because they do not intrude upon any function that the civil jury is constitutionally entitled to perform."[113] In the civil system, the reconsideration of a previous jury verdict offends only the factual decisions of the prior jurors.

In the criminal system, reconsideration of the original "not guilty" verdict or even a "guilty" verdict involving a lesser crime, in-

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110 This is actually a gross understatement. In October 1990, more than 42 individuals worked in federal prosecution and legal services for each individual working in the federal public defenders office. SOURCEBOOK 1992, *supra* note 104, at 23. In 1992, federal public defenders and assistants numbered 589. *Id.*

111 The increasing use of forfeiture actions under 21 U.S.C. § 853 against private attorneys only exacerbates this problem. *See* United States v. Ianniello, 644 F. Supp. 452, 456 (S.D.N.Y. 1985) (forfeiture possibility would make private attorney reluctant to handle RICO cases); United States v. Badalamenti, 614 F. Supp. 194, 196-97 (S.D.N.Y. 1985) (forfeiture sends attorneys message not to represent criminal defendant because fee may be lost); Anthony G. Vella, Note, Caplin & Drysdale, Chartered v. United States: *Seizing Attorney Fees—Frozen Assets or Frozen Justice? The Sixth Amendment Right to Counsel of Choice is Given the Cold Shoulder*, 11 N. ILL. U. L. REV. 155, 182-83 (1990) (recognizing reluctance of private attorneys, subject to forfeiture of fees, to accept a defendant who is under a cloud of forfeiture); Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 781 (1989) (exodus of talented lawyers from defense bar due to forfeiture may be devastating); *see* Fricker, *Dirty Money*, 75 A.B.A. J. 60, 64 (Nov. 1989) (pointing out that "Miami lawyer Joel Hirschhorn announced he would no longer defend drug traffickers because three of his fees had been seized."). "Perhaps most troubling is the fact that forfeiture statutes place the Government in the position to exercise an intolerable degree of power over any private attorney who takes on the task of representing a defendant in a forfeiture case." Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 650 (1989) (Blackmun, J., dissenting).

112 The October 1990 federal defender payroll amounted to $2,014,000, a fraction of the prosecution payroll of $82,159,000. SOURCEBOOK 1992, *supra* note 104, at 23.

113 Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1015 (1980).

vades the first jury's right to show mercy. Regardless of whether one categorizes nullification as a "right" or merely a "power,"[114] courts cannot constitutionally confine the criminal jury to the role of fact finding.[115] The jury possesses a "species of legislative power"[116]—the power to dispense leniency where the law prescribes none. In a successive prosecution case involving the reintroduction of the bulk of the original evidence, the initial jury has arguably made a decision regarding the defendant's culpability for the "act" at issue. Such a decision cannot logically be confined to the specific offense definition; it represents a rough approximation by the jury of the appropriate punishment for the defendant's behavior. Allowing the prosecution to redefine the crime and relitigate the facts presented in the initial trial neatly divests the first jury of its nullification prerogative.

Even in instances of clear error on the part of the jury,[117] successive prosecution is seldom worth the price. Successive prosecution, like duplicative litigation in the civil system, undermines public respect for, and confidence in, the courts. The societal consequences stemming from a loss of confidence in the criminal justice system are particularly grave. To feel secure, a society must believe that its criminal justice system works—that the system is effective in incarcerating the guilty and setting the innocent free. Every time the government attempts to avoid or modify a prior verdict through a subsequent prosecution based on the same facts, it suggests to the populace that the justice system is untrustworthy; it fuels public belief that the system routinely releases dangerous criminals on technicalities. Such an attitude breeds fear, contempt for law enforcement, and, ultimately, vigilantism among the privileged. And among the disenfranchised, the failure of government to respect jury verdicts can only fuel charges of inequity and bias. The United States has an entire subpopulation that believes that the government will incarcerate them at some point regardless of their guilt. Repeated attempts to convict on identical facts simply reinforce this view, which again, leads to disrespect for the

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114 Whether the nullification prerogative is a "right" or simply a tolerated usurpation of power continues to provoke intense debate. *See, e.g.*, Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976); Chaya Weinberg-Brodt, Note, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825 (1990); Westen, *supra* note 113, at 1018.

115 Westen, *supra* note 113, at 1017.

116 Westen, *supra* note 113, at 1012.

117 The acquittal of the Los Angeles police officers in the original "Rodney King" case immediately leaps to mind as the classic example of "clear error." This case is discussed in the context of society's interest in correcting errors in Part II.B., *infra*.

criminal law and ultimately to social upheaval.[118] Respect for the criminal justice system is crucial to a successful democracy; redundant prosecution, like any action that erodes public confidence in the integrity of criminal verdicts, should not be undertaken lightly.

III. REVISITING THE TRANSACTION RULE DEBATE

Although the costs of successive prosecution are potentially quite high, efforts to establish prosecutorial joinder requirements similar to those used in the civil system have been consistently resisted. Numerous scholars, jurists, and policy makers have advocated some version of a transaction rule for criminal prosecutions. Justice Brennan's attempts in the constitutional setting began with his concurrence in Ashe v. Swenson where he argued that "the prosecution, except in the most limited circumstances, [should be required] to join at one trial all charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."[119] Policy initiatives suggesting similar regimes have met with some success. In the 1960s and early 1970s, the American Law Institute,[120] the American Bar Association,[121] and the National Conference of Commissioners on Uniform

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118 *C.f.* Paul Robinson, *Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders,* 83 J. CRIM. L. & CRIMINOLOGY 693 (1993). Professor Robinson argues that

> [i]f the law closely matches people's shared intuitive notions of justice, it grows in its power to act as a model for their conduct. If the law is seen as being unjust, its power as a moral force is diminished. A society that imposes criminal liability on persons that the community regards as not sufficiently blameworthy risks destroying this motive to adhere to the laws.

Id. at 708.

119 Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring).

120 *See* MODEL PENAL CODE § 1.07 (Proposed Official Draft 1962). Subsection (2) provides:

> (2) *Limitation on Separate Trials for Multiple Offenses.* Except as provided in Subsection (3) of this Section, a defendant shall not be subject to 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.

When first proposed in 1956, subsection two was broader in scope and required the joinder of multiple charges when:

> (a) the offenses are based on the same conduct; or
> (b) the offenses are based on a series of acts or omissions motivated by a purpose to accomplish a single criminal objective, and necessary or incidental to accomplishment of that objective; or
> (c) the offenses are based on a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.

Id. The Council, however, felt that the scope of the 1956 proposal was too broad. *Id.*

121 *See* STANDARDS RELATING TO JOINDER AND SEVERANCE § 1.3 (ABA Project on Minimum Standards for Criminal Justice, Tent. Draft 1967); MODEL PENAL CODE, *supra* note 120, § 1.0. Section 1.3, entitled *Failure to Join Related Offenses,* provides in pertinent part:

> (a) Two or more offense are related offenses, for purposes of this standard, if they are within the jurisdiction of the same court and are based on the same conduct or

State Laws[122] independently proposed versions of a transaction-based joinder rule. A number of states have embraced some form of compulsory joinder in criminal prosecutions,[123] but the majority of the states and the federal system operate with only nominal restrictions on the successive prosecution power.

Critics have raised two general objections to a more demanding joinder requirement in the criminal arena. First, they contend that a factually-driven approach will generate an unacceptable degree of uncertainty in criminal prosecutions. Second, they argue that the government needs to retain the ability to bring a second prosecution to correct unacceptable outcomes. Neither argument sufficiently justifies the broad successive prosecution power currently enjoyed by federal prosecutors.

A. UNCERTAINTY

The fatal defect traditionally ascribed to a transaction approach in the constitutional setting is uncertainty.[124] The literature is replete

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arise from the same criminal episode.

(b) When a defendant has been charged with two or more related offenses, his timely motion to join them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted . . . .

(c) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for joinder of these offense was previously denied or the right of joinder was waived. . . . The motion to dismiss must be made prior to the second trial, and should be granted unless the court determines that because the prosecuting attorney did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

(d) Entry of a plea of nolo contendere to one offense does not bar the subsequent prosecution of a related offense. . . .

Id.

122 UNIF. R. CRIM. P. 471 (1974) provides:

(a) Related offenses defined. Two or more offenses are related offenses, for the purposes of this Rule, if they are within the jurisdiction of the same court and are based on the same conduct or arise from the same criminal episode.

(b) Joinder of related offenses. Upon motion of the defendant . . . the court shall join for trial two or more charges of related offenses, unless it determines that because the prosecuting attorney does not presently have sufficient evidence to warrant trying one or more of the charges, or for some other reason, the joinder would defeat the ends of justice.

Id.

123 Twenty-three states currently operate under some type of transaction restriction. For an in-depth look at the various state provisions, see generally Vestal & Gilbert, *supra* note 90, at 1 (contrasting various states' practices under compulsory joinder rules).

124 Justice Scalia implied that the main reason the Grady rule was "unworkable" was because it had provoked great uncertainty in the lower federal courts. *See* United States v. Dixon, 113 S. Ct. 2849, 2852 (1993) ("Grady must be overruled because it contradicted an unbroken line of decisions, contained less than accurate historical analysis, and *has produced confusion.*") (emphasis added). *See also* Thomas, *supra* note 10, at 332-33 (noting that

with excellent examples illustrating the potential problems in defining the "transaction."[125] More restrained approaches often suffer from the same malleability problems.[126] Therefore, it seems important to ask whether certainty is of such importance in this area that a transaction or other factually based approach is simply untenable.

Definitional difficulties alone have not traditionally disqualified terms from application in the criminal context. After all, what is probable cause, a reasonable suspicion,[127] and, for that matter, a reasonable doubt? Interpretation of words is surely an unavoidable necessity in the law. And unfortunately (or perhaps fortunately from the professional lawyer's point of view) words alone are seldom self-defining.[128]

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the "same transaction test's greatest flaw is that it creates further definitional problems"); Note, *supra* note 10, at 968-69; Comment, *supra* note 10, at 276 ("The principal shortcoming of this approach is that any sequence of conduct can be defined as an 'act' or a 'transaction.'").

125 *See, e.g.*, Thomas, *supra* note 10, at 377-78 ("A defendant . . . conspires to rob a victim and then rapes and robs her . . . The conspiracy to commit robbery is probably not part of the same criminal transaction as the commission of the robbery, but it is more difficult to decide whether the rape and robbery are part of the same transaction. Does it matter how much time elapsed between the crimes? Does it matter if the defendant did not decide to rape the victim until after he had completed the robbery?"); Comment, *supra* note 10, at 276 ("A man is shaving. How many acts is he doing? Is shaving an act? Yes. Is changing the blade in one's razor an act? Yes. Is applying lather to one's face an act? . . . Yes, yes, yes.").

126 *See* Sara Barton, Note, Grady v. Corbin*: An Unsuccessful Effort to Define "Same Offense"*, 25 GA. L. REV. 143, 159 (1990) (finding that the *Grady* approach to defining "same offense" will not simplify application of the double jeopardy principle); Poulin, *supra* note 63, at 99 (criticizing the *Grady* approach for contributing to, rather than dispelling, the confusion over what constitutes a single course of criminal conduct for double jeopardy purposes); Thomas, *supra* note 10, at 333 n.54 (pointing out that both the "single intent" and the "gist of offenses" tests suffer from malleability problems).

Even the *Blockburger* approach so faithfully embraced in *Dixon* is problematic to apply. *See* United States v. Dixon, 113 S. Ct. 2849 (1993). Although Justice Scalia managed to convince a majority of the Court to overrule *Grady* because of its lack of "deep historical roots" in favor of the "familiar" *Blockburger* approach, the majority disintegrated when it came to applying *Blockburger*. *See Dixon*, 113 S. Ct. at 2860, 2865 (Rhenquist, C.J., concurring in part and dissenting in part). Justice Rhenquist, joined by Justices O'Connor and Thomas opined that the focus of the *Blockburger* analysis should be on the statutory elements of the offense charged, and not on the facts that must be proven under the particular court orders in question as contended by Justices Scalia and Kennedy. *Id.* at 2867. Therefore, instead of correcting the malleability problems of *Grady*, the fragmented Court in *Dixon* became mired in the application problems of the "familiar" test it was adopting.

127 *See* Terry v. Ohio, 392 U.S. 1 (1968). The uncertainty surrounding search and seizure is arguably of greater significance than any prosecutorial rule. Prosecutors have the luxury of time in drafting indictments and the ability to amend those indictments with little difficulty. Police, on the other hand, must make quick judgments in dynamic situations.

128 Witness the debate over methods of statutory construction. *See, e.g.*, William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (discussing the anxiety produced in scholars and judges by the need to deny

The civil system has encountered similar definitional difficulties. The precise meaning of "cause of action" or "claim" remains open to debate. As Professor Cleary pointed out in the early days of the federal rules, when attempting to determine what could have been litigated in the initial proceeding,

> we leave the workaday world and enter into a wondrous realm of words, where results are obtained not by grubbing out facts but by application of incantations which change pumpkins into coaches and one man's property into another's. The incantations are the various definitions of what constitutes a cause of action.[129]

In spite of initial difficulties, the civil system has not changed its course. The federal courts generally prefer the approach advocated in the Restatement of Judgments Second:[130]

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the existence of indeterminacy and values in statutory construction).

129 Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 343 (1948).

130 *See, e.g.*, Gonzalez v. Banco Cent. Corp., 27 F.3d 751, 755-56 (1st Cir. 1994) (applying the transactional approach of the Restatement (Second) of Judgments); Manego v. Orleans Bd. of Trade, 733 F.2d 1, 5 (1st Cir. 1985), *cert. denied*, 475 U.S. 1084 (1986) (explicitly adopting the transactional approach of the Restatement (Second) of Judgments); Prime Management Co., Inc. v. Steinegger, 904 F.2d 811, 816 (2d Cir. 1990) (applying the transactional approach to claim preclusion issues); Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963-64 (3d Cir. 1991) (adhering to "the present trend" of the transactional approach); Keith v. Aldridge, 900 F.2d 736, 740 (4th Cir. 1990) (adopting the transactional approach of the Restatement (Second) of Judgments as consistent with the modern trend); Agrilectric Power Partners, Ltd. v. General Elec. Co., 20 F.3d 663, 665 (5th Cir. 1994) (stating that the Fifth Circuit has adopted the transactional approach for determining whether two complaints involve the same cause of action); Sanders Confectionery Prod., Inc. v. Heller Fin., Inc., 973 F.2d 474, 484 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1046 (1993) (finding that "[i]dentity of causes of action [for res judicata purposes] means an 'identity of the facts creating the right of action and of the evidence necessary to sustain each action'" (quoting Westwood Chem. Co. v. Kulick, 656 F.2d 1224, 1227 (6th Cir. 1981)); Lim v. Central DuPage Hosp., 972 F.2d 758, 763 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993) (stating that the Seventh Circuit has utilized the transactional approach); Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 593 (7th Cir. 1985) (stating that the transactional test is decidedly fact-oriented); Armstrong v. Norwest Bank, Minneapolis, N.A., 964 F.2d 797, 802 (8th Cir. 1992) (applying the approach of the Restatement (Second) of Judgments); Constantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th Cir.), *cert. denied*, 459 U.S. 1087 (1982) (adopting the transactional approach); Clark v. Haas Group, Inc., 953 F.2d 1235, 1236-37 (10th Cir.), *cert. denied*, 113 S. Ct. 98 (1992) (stating that the Tenth Circuit has adopted the transactional approach advocated by the Restatement (Second) of Judgments); Wallis v. Justice Oaks II, Ltd., 898 F.2d 1544, 1551 (11th Cir. 1990) (applying the transactional approach of the Restatement (Second) of Judgments); U.S. Indus., Inc. v. Blake Constr. Co., Inc., 765 F.2d 195, 205 (D.C. Cir. 1985) (finding that the D.C. Circuit had adopted the approach of the Restatement (Second) of Judgments); Young Eng'rs, Inc. v. United States Int'l Trade Comm., 721 F.2d 1305, 1314 (Fed. Cir. 1983) (adhering to the approach of the Restatement (Second) of Judgments); Rowe v. United States, 4 Cl. Ct. 39, 43 (1983) (applying the Restatement (Second) of Judgments); *See also* John F. Wagner, Annotation, *Proper Test to Determine Identity of Claims for Purposes of Claim Preclusion by Res Judicata Under Federal Law*, 82 A.L.R. FED. 829, 837 (1987) (finding that the clear trend in most recent decisions of the federal courts has been toward the transactional approach of the Restatement (Second) of Judgments).

> What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.[131]

Practice under the Rules of Civil Procedure has established workable parameters.[132] Some worthy claims have been barred, but the efficiency gains have been thought to be worth the occasional harsh result.

Before embracing a similar approach in the criminal system, however, it is necessary to examine whether there is some reason to attach greater importance to certainty in the criminal context than in the civil context. The lack of a clear, bright line joinder rule in the criminal arena could produce three different problems:

> (1) the court might erroneously deny the defendant's motion to dismiss a redundant prosecution, thus wrongfully causing the defendant to face a second trial;
> (2) the prosecution might interpret the rule too narrowly and fail to join an offense which it should join;
> (3) the prosecution, fearing a broad interpretation, might join offenses which it could legitimately prosecute separately.

Regarding the first scenario, it is unlikely that critics resist compulsory joinder because a defendant's expectations of finality might be dashed by an unduly narrow interpretation of the transaction. Theoretically, defendants could rely to their detriment on the rule, expending all their resources at the first trial. But realistically, defendants probably do not husband resources in this manner. A criminal prosecution is a battle for survival, not a business transaction.[133] Thus, from the defendant's point of view, the situation can only improve; malleability is not a stumbling block.

The second scenario, that the prosecutor may underestimate the breadth of the rule, fail to charge a known offense,[134] and be barred

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131 RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982).

132 *C.f.* May v. Parker-Abbott Transfer and Storage, Inc., 899 F.2d 1007, 1009-10 (10th Cir. 1990) (recognizing that the transactional approach of the Restatement (Second) of Judgments will generally consider a contract to be one transaction, so that res judicata bars all claims of contractual breach not brought in the original action unless the breach occurred after the original action). Furthermore, although the exact scope of a transaction for res judicata purposes may be unclear, uncertainty is easy to avoid by asserting all claims which might be precluded if not asserted. Michael J. Waggoner, *Fifty Years of* Bernhard v. Bank of America *is Enough: Collateral Estoppel Should Require Mutuality but Res Judicata Should Not*, 12 REV. LITIG. 391, 393 (1993).

133 This may not be true in the organized crime context, where defending criminal charges may simply be a cost of doing business.

134 Transaction-based joinder requirements routinely exempt offenses for which the evi-

from prosecuting it later, is a more likely objection. Here, a legislative solution has an advantage over a judicially fashioned rule. A statute is announced in advance after input from the Department of Justice and federal prosecutors. The congressional enactment process should provide sufficient information to avoid serious miscalculation or expansive judicial readings.

The existence of the Federal Sentencing Guidelines should also ease the transition. Many federal offenses are subject to the Guidelines' grouping rules.[135] Consequently, in many subsequent prosecution scenarios, the additional punishment that the Guidelines prescribe is not substantial. In addition, related crimes are often swept into the punishment calculation under the relevant conduct provision.[136] As currently interpreted, the scope of the relevant conduct provision is slightly broader than the permissive joinder rule[137] that the federal courts employ.[138] Thus, unless the prosecution simply fails to recognize an additional offense as "relevant conduct" or the offense is one of the few exempted from the relevant conduct re-

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dence was not available when the prosecution commenced. *See, e.g.*, MODEL PENAL CODE, *supra* note 120, § 1.07(2) (referring to "known" offenses). Thus, this discussion focuses exclusively on the prosecutor's failure to join a known offense as a result of confusion regarding the scope of the rule.

135 To avoid unfair treatment that might result from count manipulation and aggregation, the Commission devised rules for grouping certain offense conduct into a single punishment. The grouping rules provide for an incremental punishment in multi-count situations. *See* U.S.S.G., *supra* note 5, § 3D1.2. This theoretically prevents prosecutors from charging a defendant with 10 counts of drug distribution and obtaining a sentence that is 10 times greater than a sentence following conviction for only one count of drug distribution. *See* U.S.S.G., *supra* note 5, § 1B1.3, Background Commentary ("The reference to Section 3D1.2(d), which provides for grouping of multiple counts . . . prevents double counting").

136 *See* U.S.S.G., *supra* note 5, § 1B1.3. For a discussion of the relevant conduct provision, see *supra* text accompanying note 76.

137 *See* FED. R. CRIM. P. 8(a).

138 FED. R. CRIM. P. 8(a) governs the joinder of offenses in the federal system. The rule is fairly broad, allowing joinder "if the offenses charged, . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together of constituting parts of a common scheme or plan." According to Judge Wilkins, the Chairman of the Sentencing Commission, the relevant conduct provision encompasses acts outside the scope of rule 8:

> The phrase "same course of conduct" as used in subsection [1B1.3](a)(2), does not have an exact counter point in Rule 8(a) . . . . The phrase, however, at least encompasses that portion of Rule 8(a) permitting joinder of offenses that "are of the same or similar character" or that involve "two or more acts or transactions connected together." The guideline term is broader than this analogous language, since it does not require a *connection* between the acts in the form of an overall criminal scheme. Rather, the guideline term contemplates that there be sufficient similarity in temporal proximity to reasonably suggest that repeated instances of criminal behavior constitutes a pattern of criminal conduct.

Wilkins & Steer, *supra* note 79, at 515-16 (footnotes omitted; emphasis in original).

gime,[139] the prosecution may introduce an omitted offense at sentencing. Thus, the viable prosecutions lost due to the initial uncertainty of a mandatory joinder rule should be minimal.

The third scenario, that the prosecution will overcompensate to avoid problem two above, is also a realistic possibility. There is undoubtedly a point at which the prosecution is prejudiced by presenting too many counts.[140] The presentation of a large number of legally unrelated charges that have some factual connection may confuse the jury or generate hostility leading to an unacceptable compromise verdict.

This is not a problem that is necessarily generated by uncertainty; it could just as easily occur under a completely concrete joinder rule. Uncertainty is a problem only if it induces the government to include confusing or inappropriate offenses which are joinable under Rule 8(a),[141] but which fall outside of the scope of the transaction embraced by the hypothetical joinder rule. Courts could handle "overjoinder" of this sort by authorizing a government severance motion to determine whether the offense in question falls within the joinder requirement. If the court finds that the prosecutor did not need to include the offense at issue in the original indictment, it should grant severance without a showing of prejudice by the government.[142]

From a policy point of view, uncertainty does not disqualify a factually driven compulsory joinder rule from use in the criminal system. The balance appears to be similar to that in the civil context. Some manipulation may occur to benefit the party towards whom the court feels most sympathetic; some worthy claims will be lost in the beginning; and some overjoinder problems may develop. None of these problems seem particularly overwhelming in a statutory environment.

B. SOCIETY'S INTEREST IN CORRECTING "ERRORS"

It is more likely that society resists an act-based approach because

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139 *See supra* text accompanying notes 84 to 89.

140 *See* Comment, *supra* note 10, at 293.

141 FED. R. CRIM. P. 8(a).

142 Although such a severance mechanism would likely avoid prejudice to the government, the prosecution may argue that disclosing other offenses potentially available at a subsequent prosecution would prejudice its position. Undoubtedly, the government will not want to disclose more of its case than absolutely necessary. On the other hand, if the government believes even tangentially related offenses exist, it is hard to argue that the prosecution should not tell the defendant as soon as possible. Remember, this is not a scenario where the defendant has an opportunity to affect the additional counts. The current indictment already contains charges based on conduct that arguably relates to the charges in question. Potential prejudice from unnecessary disclosure is not sufficiently problematic to warrant abandoning a compulsory joinder effort.

it fears that the prosecutor or fact finder will make a "mistake," allowing a guilty person to escape justice.[143] An unacceptable verdict may result from a variety of factors ranging from the incompetent prosecutor or lenient judge to a racially biased jury. Unacceptable verdicts will continue to occur under a mandatory joinder regime. The question is whether these situations are sufficiently numerous and dangerous to justify the serious individual and systemic costs attendant to an unconstrained approach to successive prosecution.

1. Prosecutorial Error

The risk of the federal system failing to punish a factually guilty person as a result of prosecutorial error[144] does not demand the retention of the successive prosecution power. As a general rule, the federal prosecutor is sufficiently well-organized to prosecute effectively. Assistant United States Attorneys typically boast excellent credentials and experience prior to government employment.[145] The federal grand jury provides the prosecution with a powerful investigative tool, complete with nationwide subpoena power, to thoroughly investigate the crime.[146] The offices get support from highly trained and well-funded investigative organizations, such as the Federal Bureau of Investigation and the Drug Enforcement Agency.[147] And the fact that a crime usually must be "serious" before provoking federal attention[148] likely avoids the dramatic "underprosecutions" that sometimes result from overlapping jurisdiction[149] between the traffic division, for example, and the felony unit in a single state office.[150]

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143 Comment, *supra* note 10, at 288 ("The chief justification offered for reprosecuting on reserved counts after an acquittal is that there was a 'mistake' prejudicial to the state at the first trial.").

144 This discussion focuses exclusively on the prosecutor's failure to adequately pursue *known* offenses. Newly discovered offenses are typically excluded from the scope of mandatory joinder requirements as are offenses which have not been completed at the time of prosecution. Thus, defendants cannot escape punishment by successfully hiding a crime, nor will they escape criminal liability, for instance, if their victim dies after the government has prosecuted them for assault.

145 *See* EISENSTEIN, *supra* note 38, at 109.

146 *See* LAFAVE & ISRAEL, *supra* note 53, at 382-84.

147 The annual federal drug control budget alone amounted to over $12.2 billion. This figure includes all drug related efforts, such as prevention, treatment, etc. UNITED STATES DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, at 19-21 (1993).

148 *See* Frase, *supra* note 40, at 262-65.

149 The United States Attorney's office in the District of Columbia is responsible for prosecuting general crimes in the District. Because this office may have special divisions much like a state prosecutorial unit, special rules may be necessary for the D.C. office to avoid serious underprosecutions resulting from misdemeanor/felony distinctions and the like.

150 Grady v. Corbin, 495 U.S. 508 (1990), provides a good example of the problem. The traffic or misdemeanor division first prosecuted the defendant for reckless driving. Subse-

In addition, the procedural climate in which the government pursues federal crimes is fairly forgiving of prosecutorial errors. Prosecutors may add related offenses to an indictment before trial with relative ease.[151] Additionally, if the court dismisses the entire indictment for defects in the description of offenses, the prosecutor may present the evidence to a second grand jury.[152] The Guidelines also provide a zone of comfort by allowing post-conviction adjustments, thus diminishing the impact of pleading and presentation decisions on sentence severity.[153]

The general competence of the federal prosecutor, the resources devoted to investigative assistance, the structure of the offices, and the procedural climate in which federal crimes are litigated should insulate the system from serious prosecutorial missteps. The risk that dangerous criminals will escape justice as the result of prosecutorial incompetence in the federal system seems remote. Contrasted with the potential costs associated with duplicative criminal proceedings, the occasional prosecutorial mistake is not serious enough to warrant a wide-open approach to successive prosecution.

2. *Fact Finder Error*

Condoning reprosecution in cases of fact finder "error" is even more troubling. Decisions by either the judge or the jury may gener-

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quently, a grand jury charged him with manslaughter. The Supreme Court barred the second prosecution on Double Jeopardy grounds. *Id.* at 510.

151 Although the Federal Rules of Criminal Procedure do not specifically authorize superseding indictments, federal prosecutors routinely file them. United States v. Frechette, 1990 WL 3184 at *3 (W.D. Pa. Jan. 9, 1990). As a general rule, a superseding indictment will not extend the government's time to bring the defendant to trial under the Speedy Trial Act. *See* 18 U.S.C. § 3161 (1988). "The government may seek a superseding indictment which adds new charges or corrects errors in the original indictment at any time up to the time of trial." *Frechette*, 1990 WL at *3; United States v. Fisher, 871 F.2d 444, 452 (3d Cir. 1989). However, if the grand jury returns a superseding indictment so close to trial as to prejudice the defendant, the District Court should grant an "ends of justice" continuance to allow defendant's counsel adequate preparation time. *See* United States v. Rojas-Contreras, 474 U.S. 231, 237 (1985). The defendant's burden to show "prejudice" will be difficult to overcome in most cases. *See, e.g.*, United States v. Grossman, 843 F.2d 78 (2d Cir. 1988) (holding that a superseding indictment, which the government filed two days before trial, and which added 10 counts to the previous indictment involving new transactions, did not prejudice the defendant).

152 *See* SARA S. BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 6:41 (1986) (noting that "double jeopardy poses no bar to resubmission because the grand jury has determined only that the evidence presented did not establish probable cause to indict the accused"); LAFAVE & ISRAEL, *supra* note 53, at 692 ("The longstanding federal rule is that resubmissions are permissible, without court approval, even when the prosecutor presents no additional evidence to the second grand jury.").

153 For a description of the Guidelines' mechanisms facilitating the correction of prosecutorial errors, see *supra* text accompanying notes 78 to 82.

ate an unacceptable verdict. Such verdicts are an unavoidable by-product of a system committed to an independent judiciary and a representative jury.[154] Thus, the question is whether such inevitable events warrant the retention of an unrestricted successive prosecution power. Generally, they do not.

The key difficulty in allowing reprosecution to remedy fact finder error is that there is no suitable method of identifying an "error." As the author of the seminal Double Jeopardy analysis *Twice in Jeopardy*[155] noted, the current approach "allows the prosecutor to decide whether he was defeated fairly."[156] Prosecutors are, of course, the least objective government officials available to make this decision. Regardless of their ethical duty to "do justice,"[157] they are adversaries and undoubtedly believe completely in the righteousness of their cause.

a. Judicial Error

In many instances in which the prosecutor identifies the judiciary as the source of the "error," an objective judicial assessment of the accuracy of the decision in question is already available. The government may appeal critical pretrial suppression and exclusion orders.[158] Thus, in situations in which the government believes that the verdict is inaccurate because the court limited the scope of the jury's inquiry by granting a suppression order, the prosecution has the opportunity to litigate the accuracy of the offending decision before trial. If the order is upheld on appeal, the unacceptable verdict stems not from "error" but from the fact that the defendant is not legally guilty of the offense at issue. Thus, the prosecutor's complaint is not with the fact finder, but with the Constitution. There is simply no basis for allowing the executive to second guess this decision through reprosecution.

Evidentiary decisions made during the trial remain unreviewable

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154 Professor Thomas eloquently argues this point in the Double Jeopardy context:

> Because the question for the criminal justice system is necessarily legal guilt, rather than whether X did Y, the system must prefer the judgement of the fact finder to that of the prosecutor. Because this is so, it is nonsensical to speak of the prosecutor correcting "errors" made by the fact finder. The fact finder's judgment is the defendant's culpability. Thus, the double jeopardy clause is simply an inevitable part of the system that gives the ultimate decision-making responsibility to the fact finder.

Thomas, *supra* note 18, at 835.

155 See Comment, *supra* note 10, which remains to this day one of most compelling critiques of the Double Jeopardy protection ever written.

156 *Id.* at 290.

157 A.B.A. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-1.2(c) (3d ed. 1993).

158 18 U.S.C. § 3731 (1988) allows the United States to appeal, *inter alia*, judicial decisions dismissing indictments, ordering new trials after verdict, and suppressing or excluding evidence before trial.

in the event of an acquittal. Such decisions may conceivably account for a "technically inaccurate" verdict. It is doubtful, however, that such situations occur frequently enough to justify a reprosecution remedy. In cases involving close, critical evidentiary decisions, the court has every incentive to rule in the government's favor. The federal bench has no more desire than the general public to see a factually guilty defendant escape justice. Resolving such disputes in favor of the government allows the case to proceed to conviction while still allowing the defendant to appeal the ruling. If the decision was in error, the appellate court may remand the case for retrial without the evidence in question.

Although not technically attributable to "fact finder" error, sentences which the prosecution perceives to be too lenient may also fuel the government's desire to reprosecute. This perception may also be tested objectively in the courts of appeal. One of the best characteristics of the Federal Sentencing Guidelines is the right to contest the accuracy of the sentence.[159] For example, an incorrect interpretation of the scope of the relevant conduct provision, or a failure to account for obstruction of justice may be remedied on appeal. Similarly, both the propriety and extent of a decision to depart downward are subject to review.[160] Thus, in situations in which the judge correctly applied the Guidelines, prosecutorial claims of an inadequate sentence may simply mask a disagreement with Congress regarding appropriate prison terms.

b. Jury Error

The jury may acquit or compromise in the face of what the prosecutor believes to be overwhelming evidence of guilt. But allowing the government to reprosecute in the face of a hostile jury verdict is antithetical to the entire theory of community control over the content and use of the criminal sanction. The jury lies at the heart of the constitutional system of justice;[161] it stands as a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[162] Allowing the government unrestricted access to the successive prosecution power renders hollow the promise of

159 *See* 18 U.S.C. § 3742 (1988 & Supp. V. 1994); HUTCHINSON & YELLEN, *supra* note 82, § 9.1.

160 Courts review the propriety of departure *de novo*, while they review the extent of departure for "reasonableness." 18 U.S.C. 3742(f)(1)-(2) (1988); *See also* HUTCHINSON & YELLEN, *supra* note 82, §§ 9.2, 9.4.

161 *See* Amar, *supra* note 99, at 1183 ("The dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury."); Lear, *supra* note 78, at 1223-28.

162 Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

protection from the "corrupt or overzealous" prosecutor.

c. The Egregious Outcome

It is impossible to talk about fact finder "error" without addressing the acquittal and subsequent retrial in the Rodney King case.[163] Although that case presented a dual sovereignty problem beyond the scope of this Article,[164] such a situation could occur as the result of a failed federal prosecution. The question is whether the government must retain the successive prosecution power specifically to remedy civil unrest caused by the perception that justice has not been done.

The argument is similar to that advanced in favor of the pardon power.[165] Enlightenment philosophers condemned the pardon power as an illegitimate exercise of power inconsistent with democracy.[166] Yet, the Framers of the Constitution found it essential to sta-

163 On 29 April 1992, a California state jury acquitted three of four Los Angeles Police Officers accused of brutally beating Rodney King. Richard A. Serrano & Tracy Wilkinson, *All Four in King Beating Acquitted*, L.A. TIMES, Apr. 3, 1992, at A1. The jury could not reach a verdict on the charge of assault under color of authority against Officer Laurence M. Powell. *Id.* The venue for the King case moved from a location in Los Angeles County to predominately white Los Angeles suburb of Simi Valley. Martin Berg, *D.A.'s Actions on King Venue are Questioned*, L.A. DAILY J., May 7, 1992, at 1. The Simi Valley jury was composed of 10 whites, a Latin-American, and an Asian-American. Richard A. Serrano & Carlos V. Lozano, *Jury Picked for King Trial; No Blacks Chosen*, L.A. TIMES, Mar. 3, 1992, at A1. The jury's verdict was widely denounced as a failure of the criminal justice system. *See* Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 528 n.101 (1994). Approximately three months after the Simi Valley verdict, a federal grand jury returned an indictment against all four officers for alleged civil rights violations. *Id.* at 528.

164 According to the Dual Sovereignty Doctrine, the Double Jeopardy Clause does not prohibit a second prosecution for an identical offense if pursued by a separate sovereign. Thus, double jeopardy theoretically has no application in a reprosecution by state authorities after a federal acquittal, and vice versa. *See* Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). The vast majority of double jeopardy scholars have condemned this position. *See* Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. REV. 609, 618 (1994); Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. REV. 649, 651 & n.11 (1994). The retrial in the Rodney King case was particularly troublesome to groups such as the ACLU, which have traditionally deplored the Dual Sovereignty Doctrine as unconstitutional. The national ACLU condemned the second trial of the L.A. police officers, while the Southern California chapter of the ACLU argued that retrial was defensible in the civil rights context. *See id.* at 659-78.

165 U.S. CONST. art. I, § 2 provides in pertinent part: "The President shall . . . have Power to grand Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." *Id.*

166 For example, Montesquieu argued that the pardon power was an unjustifiable interference with the people's right to punish and could therefore not exist in a republic. *See* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 24 (1989). Immanuel Kant is perhaps most famous for his condemnation of the pardon power. *See id.* at 28 (1989). Kant argued that the pardon power was not only a usurpation of the rights of the community, but was a breach of moral law because the community had failed in its

bility.[167] A government, to survive, must have the ability to forgive rebellion and bring dissidents back into the fold.[168]

The same argument might apply to the successive prosecution power. The government must have a way to respond to widespread dissatisfaction with a jury verdict. Otherwise, it risks a breakdown of the law and the resulting vigilantism and political disaffection characterizing Los Angeles after the Simi Valley acquittals.[169] The United States is no stranger to jury nullification in racially charged cases.[170] Perhaps this history requires the retention of a broad successive prosecution power.

The problem with this position is that the power retained is unnecessarily broad and unusually dangerous. In the case of the pardon power, the temptation to use it is low, while the political price for

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duty to punish an offender. *Id.*

Blackstone shared the view that the pardon power and democracy were inconsistent. 4 WILLIAM BLACKSTONE, COMMENTARIES *483 ("In a pure democracy, this power of pardoning cannot subsist; for there nothing higher is acknowledged than the magistrate who administers the laws.").

167 Professor Moore suggests that the Framers "were more inclined to see the pardon as an instrument of law enforcement than an act of grace. Thus, they were more concerned with making the pardon power work than with making it conform to philosophical presuppositions about democracy." MOORE, *supra* note 166, at 25. Note that the French experiment without a pardon power in the wake of the French Revolution was entirely unsuccessful. "France found that it could not get along without some machinery for clemency . . . ." *Id.* Professor Moore concludes by pointing out that "no other regime in the world has been without a clemency power of some sort." *Id.*

168 As Hamilton explained in THE FEDERALIST,

> in seasons of insurrection and rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which if suffered to pass unimproved, it may never be possible afterwards to recall.

MOORE, *supra* note 166, at 26 (quoting ALEXANDER HAMILTON, THE FEDERALIST No. 74). This theory was tested in 1794, when President Washington summoned the army to quell the Whiskey Rebellion in Pennsylvania. After routing the rebels (they ran into the hills in the face of the oncoming army), President Washington pardoned them all, saying

> For though I shall always think it a sacred duty to exercise with firmness and energy the constitutional powers with which I am vested, yet it appears to me no less consistent with the public good than it is with my own feelings to mingle the operations of Government every degree of moderation and tenderness which the national justice and safety permit.

MOORE, *supra* note 166, at 27 (quoting UNITED STATES PRESIDENTIAL CLEMENCY BOARD, 1975, at 356).

169 Immediately following the Simi Valley acquittals of the four Los Angeles Police Officers accused of brutalizing Rodney King, Los Angeles erupted into four days of intense rioting. Greg Braxton & Jim Newton, *Looting and Fires Ravage L.A.*, L.A. TIMES May 1, 1992, at A1.

170 Many of the causes of action authorized by the Civil Rights Acts of 1871 were in response to the inability of African-American citizens to obtain justice in the southern state courts following the Civil War. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.2 (2d ed. 1994).

overuse is high.[171] The opposite is true for successive prosecution. The temptation to harass those believed to be guilty is high. Prosecutors can easily believe that reprosecution is the "right" thing, that they are seeking "justice." The political price for such actions is low, and in high profile cases, the majority of the public, convinced that criminals are getting off scot free, will applaud.[172]

Moreover, the Dual Sovereignty Doctrine[173] may already provide an adequate method for redressing an egregious outcome. It seems unlikely that a disappointing verdict in a huge federal antitrust prosecution or far-flung racketeering case will engender popular responses necessitating retention of the successive prosecution power in the federal system. The cases most likely to provoke extreme reactions are those that strike closer to home—police brutality, mass murder, child molestation, or flag burning. The federal criminal code will address only a few situations of this type, and a state criminal prosecution will usually be available should the federal prosecution fail. Given the availability in many cases of a subsequent state prosecution, resisting compulsory joinder on the ground that social upheaval stemming from an unpopular verdict cannot be addressed seems entirely misguided.

Even assuming that the government must retain the ability to reprosecute in the egregious case, the power should be carefully controlled to protect defendants and the system from abuse. Here again, a statutory approach to a mandatory joinder rule has its advantages. The law could forbid reprosecution, without a specific triggering event, such as the express approval of the Attorney General, or limit it to a group of cases in which an egregious verdict is most likely to produce civil discord. Although it is not clear that reprosecution after an unacceptable verdict is the best response to system failures of this sort, crafting a narrow statutory exception for such instances is preferable to vesting the government with an unfettered successive prosecution

171 Professor Moore contends that "President Ford's pardon of Richard Nixon may have cost him reelection [and that] several Governors have been impeached or driven from office for abusing their power to pardon." MOORE, *supra* note 166, at 7. Interestingly, Moore points out that "[t]he papal abuse of indulgences—the high price sinners were required to pay to the church for divine forgiveness—was one of the factors that led to the Protestant Reformation and the subsequent political upheaval in Europe." *Id.*

172 This attitude may account for the acquittals in the King beating trial. Many of the Simi Valley jurors revealed a possible pro-police bias during voir dire. Levenson, *supra* note 163, at 525 n.85. The comments from the jurors about police officers included: "They try to do a good job in difficult times," "it takes a special kind of person to make a good officer," and "they have to make a lot of life-threatening judgments and they do a lot with the community. But you don't hear about that." Serrano & Lozano, *supra* note 163, at A19.

173 *See supra* note 164 and accompanying text.

power.

IV. IMAGINING COMPULSORY JOINDER IN THE FEDERAL SYSTEM

Although scholars have long debated the constitutional necessity of a compulsory joinder requirement, little has been written regarding the practical aspects of implementing such a rule. The following observations are offered in the hope of expanding the transaction rule debate to include discussion of the pragmatic difficulties inherent in the adoption of a factually driven joinder rule in the federal system. The purpose of these remarks is not to develop a specific proposal. Commentators have advanced a vast number of thoughtful formulations describing the criminal transaction in expanding degrees of detail.[174] At least twenty-three states are currently operating under some version of a transaction-based compulsory joinder regime.[175] Thus,

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174 *See, e.g.*, STANDARDS RELATING TO JOINDER AND SEVERANCE, *supra* note 121, § 1.3; MODEL PENAL CODE, *supra* note 13, § 1.07; Thomas, *supra* note 10, at 398-99 (advocating the conduct based test ultimately adopted in Grady v. Corbin); Reintroducing evidence (suggesting a standard based on actual evidence used at the first trial); Comment, *supra* note 10, at 262 (contending that double jeopardy requires the joinder of all joinable offenses).

175 The 23 states are: Alaska: State v. Williams, 730 P.2d 806, 807 (Alaska 1987) (dismissing tampering with evidence indictment where the prosecution used essentially the same evidence used in an attempt to convict the defendant of murder); Arkansas: ARK. R. CRIM. P. 21.3 (when charged with two or more related offenses, defendant may move to join them for trial and the court shall grant the motion unless it determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at the same time, or for some other reason an injustice would occur if it granted the motion); California: CAL. PENAL CODE § 654 (West 1988) (in no case is an act or omission which is made punishable in different ways by different provisions to be punished more than once; an acquittal or conviction and sentence under a provision of the code bars a prosecution for the same act or omission under any other); Colorado: COLO. REV. STAT. ANN. § 18-1-408(2) (West 1986) ("If several offenses are known to the district attorney at the time of commencing the prosecution and were committed within his judicial district, all such offenses upon which the district attorney elects to proceed must be prosecuted by separate counts in a single prosecution if they are based on the same act or series of acts arising from the same criminal episode."); Florida: FLA. R. CRIM. P. 3.151(b) ("Two or more indictments or informations charging related offenses shall be consolidated for trial on a timely motion by a defendant or by the state."); Georgia: GA. CODE ANN. § 16-1-7 (1990) ("If the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution except . . ." that in the interest of justice the court may order that one or more of such charges be tried separately); Hawaii: HAW. REV. STAT. § 701-109(2) (1985) ("a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same 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"); Illinois: 720 ILCS 5/3-3 (Michie 1993) ("if the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution" if they are based on the same act, "unless the court in the interest of justice orders that one or more of such

charges shall be tried separately"); Maine: ME. REV. STAT. ANN. tit. 17-A, § 14 (West 1993) ("A defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offense were known to the appropriate prosecuting officer at the time of the commencement of the first trial and were within the jurisdiction of the same court and within the same venue, unless the court, on application of the prosecuting attorney or of the defendant or on its own motion, orders any such charge to be tried separately if it is satisfied that justice so requires."); Massachusetts: MASS. R. CRIM. P. 9 ("If a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges for trial unless he determines that joinder is not in the best interests of justice."); Michigan: People v. White, 212 N.W.2d 222, 227 (Mich. 1973) (adopting same transaction test as outlined in the concurring opinion of Justice Brennan in Ashe v. Swenson, 397 U.S. 436, 488 (1970)); Minnesota: MINN. STAT. § 609.035 (1983) ("if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. All offenses, if prosecuted, shall be included in one prosecution which shall be stated in separate counts."); Montana: MONT. CODE ANN. § 46-11-503(1) (1991) ("When two or more offenses are known to the prosecutor, are supported by probable cause, and are consummated prior to the original charge and jurisdiction and venue of the offenses lie in a single court, a prosecution is barred if: (a) the former prosecution resulted in an acquittal. . . . (b) the former prosecution resulted in a conviction that has not been set aside, reversed, or vacated"); New Jersey: N.J. R. CRIM. P. 3:15-3 (court shall join any pending non-indictable complaint for trial with a criminal offense based on the same conduct or arising from the same episode; however, if it appears that the joinder prejudices a defendant or the State, the court may decline to join or may grant other appropriate relief); New York: N.Y. CRIM. PROC. LAW. § 40.40 (McKinney 1992) ("Where two or more offenses are joinable in a single accusatory instrument against a person by reason of being based upon the same criminal transaction . . . such person may not . . . be separately prosecuted for such offenses even though such separate prosecutions are not otherwise barred by any other section of this article."); North Carolina: N.C. GEN. STAT. § 15A-926 (1994) ("When a defendant has been charged with two or more offenses [based on the same act or transaction or a series of acts or transactions connected together or constituting parts of a single scheme or plan] his timely motion to join them for trial must be granted unless the court determines that because the prosecutor does not have sufficient evidence to warrant trying some of the offenses at that time or if, for some other reason, the ends of justice would be defeated if the motion were granted."); Oregon: OR. REV. STAT. § 131.515 (1993) ("No person shall be separately prosecuted for two or more offenses based upon the same criminal episode, if the several offenses are reasonably known to the appropriate prosecutor at the time of commencement of the first prosecution and establish proper venue in a single court."); Pennsylvania: 18 PA. CONS. STAT. § 110 (1983) ("Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution . . . [when the subsequent offense is] based on the same conduct or arising from the same criminal episode, if such offense was known to the appropriate prosecuting officer at the time of commencement of the first trial and was within the jurisdiction of a single court unless the court ordered separate trial of the charge of such offense"); Tennessee: State v. Covington, 222 S.W. 1, 2 (Tenn. 1920) (same transaction test applied); Texas: Quitzow v. State, 1 Tex. Crim. 47, 53-4 (Tex. 1876) ("The prosecutor had a right to carve as large an offense out of this transaction as he could, yet must cut only once"); Utah: UTAH CODE ANN. § 76-1-403 (1990) ("If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred if: (a) The subsequent prosecution is for an offense that was or should have been tried under Subsection 76-1-402(2)"); Washington: WASH. SUPER. CT. CRIM. R. 4.3 ("When a defendant has been charged with two or more related offenses, the timely motion to join them for trial should

the varying options for scope and wording are already available. What follows are a few ideas dealing with the unique problems in the federal system—problems that any statutory effort must address, regardless of the scope of the joinder rule adopted.

A. VENUE

Any compulsory joinder effort in the federal system must deal with the multi-district character of federal crimes. Because venue is a major impediment to a consolidated prosecution, a federal compulsory joinder statute should contain either a venue waiver or stipulation provision.[176] A number of procedural rules implicating constitutional rights treat the failure to object within a certain time frame as a waiver of that right.[177] A stipulation scheme might be preferable to a waiver procedure, simply because it would avoid inadvertent waivers. A stipulation arrangement could require prosecutors to submit a venue statement with each count, allowing the defense to stipulate to a trial of the offense in that district, or to object and defend the charges separately.

Either scenario will require certain safeguards to avoid prosecutorial advantage-taking. One obvious danger in a multi-venue offense situation is that the prosecution may file the case in an inconvenient location.[178] Courts rarely grant motions to change venue,[179]

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be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted."); West Virginia: State v. Robinson, 257 S.E.2d 167, 170 (W. Va. 1979) (adopting both "same evidence" test and "same transaction" test).

Although Alabama has a statute purporting to adopt a transaction rule, *see* ALA. CODE § 15-3-8 (1982) ("Any act or omission declared criminal and punishable in different ways by different provisions of law shall be punished only under one of such provisions, and a conviction or acquittal under any one shall bar a prosecution for the same act or omission under any other provision."), courts apply it in the same manner as the Blockburger test.

176 No constitutional obstacle to such a scheme is apparent. Even though waiver of a constitutional right must theoretically be "knowing and intelligent," courts routinely hold that defendants have forfeited their constitutional rights when they fail to make evidentiary objections or miss filing deadlines. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977) (refusing to review habeas corpus petitioner's *Miranda* claim on the ground that defendant had failed to raise the issue at trial); Engle v. Issac, 456 U.S. 107 (1982) (refusing to review habeas corpus petitioner's *Winship* claim on the ground that the defendant had failed to raise the issue at trial).

177 *See, e.g.*, FED. R. CIV. P. 38(b) (requiring party to demand a jury trial within 10 days of the last pleading establishing the jury right); FED. R. CRIM. P. 12(f) (failure of a party to raise defenses or objections or to make requests which it must make prior to trial will constitute waiver if the party does not make them within the time the court prescribes).

178 "[T]he crime-committed formula will not always produce the most convenient forum from the defendant's perspective, especially when the offense is committed in more than one place and the prosecution has a choice of districts." LAFAVE & ISRAEL, *supra* note 53, at 747.

leaving the defense with the option of litigating in the inconvenient district or declining to waive venue and defending in several districts. Requiring the prosecution to file the indictment in the district encompassing the most serious crime as defined by potential sentencing exposure might avoid this problem.[180] Alternatively, the current standards for change of venue could be modified to include a less stringent inquiry in the multi-venue scenario.

B. CENTRAL COORDINATION AND OVERSIGHT

Establishing a central clearing mechanism to assist the districts in determining whether other investigations of subjects and targets are ongoing should be not be difficult in the computer era. Once the Department of Justice determines that related investigations are proceeding, it may assign the prosecution to a particular office. An inevitable casualty of centralization will be the ability of the U.S. Attorneys to respond consistently to local concerns, and the Department will need to be sensitive to such concerns when selecting districts for consolidation.

C. SUCCESSIVE PROSECUTION BASED ON NEW EVIDENCE

Drafting an exception for prosecutions based on evidence discovered after the initiation of the initial prosecution will be particularly challenging in the federal environment. Embracing too forgiving of a standard will undermine the entire enterprise, yet too strict an approach will unduly hamper legitimate prosecution. Thus, where one draws the line is extremely important.

The Model Penal Code's formula, which a number of states have

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179 FED. R. CRIM. P. 21(b) provides in pertinent part: "[f]or the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district." Trial courts have broad discretion to transfer a case and may consider a wide range of factors in the determination. *See* Platt v. Minnesota Mining & Mfg., 376 U.S. 240, 243-44 (1964). The *Platt* Court recognized nine factors trial courts frequently rely upon: "(1) location of . . . defendant; (2) location of possible witnesses; (3) location of events likely to be at issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; and (9) docket condition of each district or division involved." *Id.* Appellate courts review the denial of motion to transfer venue under Rule 21(b) under the abuse of discretion standard. *E.g.*, United States v. Parker, 877 F.2d 327, 331 (5th Cir. 1989); United States v. Hueftle, 687 F.2d 1305, 1309-10 (10th Cir. 1982). Defendants rarely succeed on appeal. *See, e.g., id.*

180 If sentencing exposure is the determinative factor, it should be judged by reference to the Guidelines as opposed to the statute at issue. Many federal offenses contain extremely high maxima, which in no way correspond to the likely sentence under the Guidelines.

adopted,[181] provides a good point from which to launch the debate. Under this approach, the government needs to join only those offenses "known to the appropriate prosecuting officer at the time of the commencement of the first trial . . . ."[182] This formula raises three critical questions for the federal system: how the system should determine if the appropriate federal prosecutor knows about an offense; the standard courts should use to evaluate claims of prosecutorial ignorance; and whether the "commencement of trial" provides an appropriate triggering point for the federal system.

At the very least, knowledge should be attributed to the federal prosecutorial unit only after an actual AUSA has received the information. Thus, like most of the states, the federal system should not equate knowledge on the part of law enforcement or other investigative agencies with prosecutorial knowledge. Beyond this point, the question becomes more difficult. If a compulsory joinder rule is to have any real impact on system-wide redundancy, it must equate the possession of new evidence by any AUSA in the system with possession by the prosecuting district. Absent this broad attribution standard, a statutory joinder requirement will do little more than supplement the Petite Policy, preventing primarily intra-district reprosecution. The government will have to develop an effective means of distributing relevant information to the investigating districts. Therefore, the commitment of the Department of Justice to the scheme is critical.

Determining the standard by which courts should evaluate prosecutorial claims of new evidence is similarly problematic. The prosecution must have the burden of demonstrating that a lack of evidence supporting the proposed charge prevented its inclusion in the original indictment. The defendant has no way of establishing the extent of the prosecutor's knowledge. The difficulty emerges in assessing whether sufficient evidence of the offense in question was available to the prosecution in the initial case. Any judicial determination may collide with the traditional charging discretion lodged with the prosecutor. Judges have long excused themselves from judgments of this sort on the ground that such decisions are beyond the competence of the bench: "Few subjects are less adapted to judicial review than the exercise of the Executive of his discretion in deciding when and whether to institute criminal proceedings . . . ."[183] But allowing the prosecutor to be the sole judge of the question leaves the system

181 *See, e.g.*, GA. CODE ANN. § 16-1-7 (1990); 720 ILCS 5/3-3 (Michie 1993); ME. REV. STAT. ANN. tit. 17-A, § 14 (West 1993).

182 MODEL PENAL CODE, *supra* note 120, § 1.07(2).

183 Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967); *see also* Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 389 (1976).

open to manipulation.

Clearly, courts should bar new charges supported by facts set forth in the original indictment. The judge seems similarly competent to review the date that the "new" evidence became available, and whether reasonable diligence could have turned up such evidence in the first proceeding. Courts, however, will have to honor prosecutorial judgment regarding the level of evidence necessary to proceed, if only to avoid increasing judicial oversight to a point that efficiency gains from a joinder rule are lost.

Lastly, note that the Model Penal Code formula requires the joinder of offenses known before the "commencement of trial." The better approach is probably to consider the matter closed once the government files an indictment. Both the prosecution and the defense need preparation time in the event the government files a superseding indictment. The Speedy Trial Act allows only seventy days between indictment and trial,[184] thus compressing the time to resubmit an indictment without prejudicing the defendant. Admittedly, keying the joinder requirement to the indictment date leaves open the real possibility of prosecutorial manipulation. But equating knowledge of an offense with the ability to prosecute it at an upcoming trial seems unrealistic in the extreme.

D. SEVERANCE

A mandatory joinder rule will increase the instances in which a severance remedy may be necessary. As noted, the inherent uncertainty of any joinder requirement may cause the prosecutor to join related offenses that could legitimately be pursued in a separate prosecution. The government should therefore have access to a prophylactic motion to assess the necessity of joining the counts in question. Once a court finds that the offenses at issue are outside the scope of the joinder requirement, it should grant severance as a matter of right.

A government severance motion should also be available to remedy situations in which the number and nature of the charges, rather than uncertainty regarding the scope of the joinder rule, are the source of potential prejudice to the prosecution.[185] But obtaining severance in such a scenario should require proof of actual prejudice, as opposed to mere preference, on the part of the government. Failure

184 18 U.S.C. § 3161(c)(1) (1988).

185 The practical significance of this problem may be minimal, because the Guidelines limit the impact of charging decisions by accounting for related offenses at sentencing. *See supra* text accompanying notes 78 to 82.

to insist upon a high burden will allow prosecutors to undermine any efficiency gains envisioned by a joinder requirement.

The very fact of a mandatory joinder rule, regardless of its definitional difficulties, may adversely affect the defendant. The problem from a defense perspective derives from the cumulative impact on the jury of an extensive indictment containing an enormous number of related or overlapping accusations. A factually driven compulsory joinder rule will undoubtedly increase defendants' exposure to this problem. Severance is theoretically available under Rule 14[186] upon proof of substantial prejudice. Substantial prejudice, however, is extremely difficult to demonstrate prior to trial, and defendants have not fared well under this rule.[187] Some loosening of the standard will be necessary to counter an increase in the number of charges routinely included in a single indictment, regardless of whether this increase is the result of prosecutorial uncertainty or simply compliance with a single-indictment requirement.[188]

E. RELATIONSHIP TO SENTENCING GUIDELINES

The Guidelines are generally compatible with a compulsory joinder requirement. The Guidelines soften the impact of deficits in prosecutorial judgment and fact finder "mistakes" by providing a mechanism to punish defendants for unindicted or unconvicted of-

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186 FED. R. CRIM. P. 14.

187 Parties must show substantial prejudice to warrant severing trials under Rule 14. United States v. Werner, 620 F.2d 922, 928 (2d Cir. 1980); *see also* United States v. Barrett, 505 F.2d 1091, 1106 (7th Cir. 1974) ("Obviously any adding of offenses to others is prejudicial to some extent."), *cert. denied*, 421 U.S. 964 (1975). Professors LaFave & Israel, *supra* note 53, at 764, have noted that "[d]efendants generally have not fared very well under rules and statutes which permit them to obtain a severance of offenses only upon proof of prejudice." The prejudice issue involves speculation about things that may or may not occur; it is difficult for the trial judge to make a finding on prejudice before trial. Further, judges are "reluctant to make a finding of prejudice during trial, after the prosecution has put in most or all of its proof." *Id.*

And it is "virtually impossible for the defendant to prevail on appeal," *id.*, under the abuse of discretion test. United States v. Armstrong, 621 F.2d 951, 954 (9th Cir. 1980) (recognizing "joinder is the rule rather than the exception and . . . the burden is on the defendant in his appeal following denial of the motion to sever to show that joinder was so manifestly prejudicial that it outweighed the dominant concern with judicial economy and compel exercise of the court's discretion to sever.") (citing United States v. Brashier, 548 F.2d 1315, 1323 (9th Cir. 1976)). For a more in-depth discussion of joinder and severance under Rules 8 and 14, see Note, *Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 YALE L.J. 553 (1965).

188 Where the defendant argues that the joinder of multiple offenses exceeds the *scope of Rule 8 itself*, severance is much easier to obtain. Misjoinder is a question of law, and is not a matter of discretion. *See* United States v. Lane, 474 U.S. 438, 449 n.12 ("review on appeal is for an error of law"); *Werner*, 620 F.2d at 926 & n.5; *Granello*, 365 F.2d 990, 995 (2d Cir. 1966); *Turoff*, 853 F.2d 1037, 1042 (2d Cir. 1988).

fenses. In addition, the Guidelines' grouping rules[189] and requirements for concurrent sentencing[190] reduce incentives to fragment prosecutions. Thus, minimal tinkering with the relevant conduct provision[191] should harmonize the Guidelines regime with a mandatory joinder requirement.

As currently interpreted, the relevant conduct provision allows consideration of acts which could not be joined under Rule 8.[192] This opens up the possibility that under a joinder requirement coextensive with or narrower than Rule 8, facts underlying an offense subsequently prosecuted will be litigated twice. Most circuits allow enhancements for relevant conduct evidence and a subsequent sentence for a later conviction based upon that conduct.[193] The chief difficulty from the successive prosecution perspective is that the government acquires the proverbial dress rehearsal at sentencing. If a defendant presents evidence at the sentencing hearing, the prosecution obtains crucial discovery for the subsequent trial. This practice creates the possibility that an innocent person will be convicted by a well-choreographed presentation at the subsequent trial. Revising the relevant conduct provision to mirror the scope of any transaction rule would avoid this problem.

In cases in which the defendant has declined to waive venue, two problems involving the application of the relevant conduct provision could occur. First, allowing enhancement at sentencing in the initial proceeding for an offense without venue would give rise to all of the successive prosecution problems discussed in the preceding paragraph. The easiest way to handle this issue is to prohibit relevant conduct enhancements for acts forming the underlying basis of a pending charge.

The second problem is more complex. The government may simply dismiss charges in response to a defendant's decision not to waive venue and seek enhancement at sentencing, rather than refile the indictment in the appropriate district. From a successive prosecution standpoint, this would be a positive development. But in such a case, the defendant loses forever the right to have a jury review the accusation. The Guidelines already obstruct public review of punish-

189 *See* U.S.S.G., *supra* note 5, § 3D1.2. *See also supra* note 135 and accompanying text.

190 *See* U.S.S.G., *supra* note 5, § 5G1.3. *See also supra* notes 83 to 84 and accompanying text.

191 U.S.S.G., *supra* note 5, § 1B1.3. *See also supra* notes 78 to 81 and accompanying text.

192 *See* Wilkins & Steer, *supra* note 79, at 515-16; *see supra* text accompanying note 79.

193 *See supra* text accompanying note 82. Both the Second and Tenth Circuits, however, have barred the subsequent prosecution of offenses offered as relevant conduct in the first proceeding on Double Jeopardy grounds. *See* United States v. McCormick, 992 F.2d 437 (2d Cir. 1993); United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991).

ment decisions by encouraging prosecutors to forego formal convictions in favor of sentence enhancements.[194] A compulsory joinder rule should avoid contributing to this trend. Prohibiting relevant conduct enhancements for dismissed charges in the venue waiver context provides a simple solution to the dilemma.

F. COMPLEX/COMPOUND OFFENSES

The ever expanding use of complex/compound offenses to attack remote or continuing behavior further complicates any compulsory joinder effort in the federal system. Prosecutions for conspiracy, RICO, and violations of other complex/compound offenses, such as Continuing Criminal Enterprise (CCE),[195] will require special joinder rules tailored to the specific offense at issue. Although any in depth consideration is beyond the scope of this Article, some general observations are appropriate.

If a true "transaction" rule is embraced, some of the rules developed for conspiracy in the double jeopardy context provide a logical starting point. In determining whether separate prosecutions of related conspiracies involve the same offense, courts have used the "totality of circumstances" approach. This test focuses on factors such as "the overlap in time, personnel, and geographic location; the similarity of the overt acts; and the defendant's role in the two conspiracies," and might also include the "statutory offenses involved, . . . common objectives and the degree of interdependence between the two conspiracies."[196] Although this technique undoubtedly allows prosecutors to dissect larger conspiracies into several smaller units, such problems seem almost unavoidable due to the multi-defendant nature of the crime.

Other double jeopardy innovations are less justifiable. Conspiracy prosecutions require proof of overt acts which are often themselves criminal offenses. The courts have routinely held that conspiracy and the substantive offenses committed in the furtherance of the conspiracy do not need to be tried together.[197] An across the

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194 *See* Freed, *supra* note 79, at 1714 ("[Relevant conduct] allows the prosecutor to increase an offender's sentence more easily by *dropping* charges than by bringing them"); Lear, *supra* note 78, at 1206 (1993) ("Even when the Guidelines authorize a less severe punishment for an offense in the absence of a conviction, a prosecutor still has a substantial incentive to withhold proof until sentencing.").

195 21 U.S.C. § 848 (1988).

196 Poulin, *supra* note 63, at 119 (footnotes omitted).

197 *See* United States v. Felix, 112 S. Ct. 1377, 1384 (choosing to apply the established rule "long antedating any of [the recent] cases, and not questioned in any of them . . . that a substantive crime, and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes").

board rule allowing the substantive offenses to be tried separately from the conspiracy is surely the height of inefficiency. In many cases, co-conspirators can be tried in one proceeding for the substantive crimes and the conspiracy itself, without generating too much confusion. Prosecutors should be required to include substantive offenses in the conspiracy indictment, and deal with potential confusion through severance.

RICO prosecutions require a more intricate analysis, and many commentators have offered thoughtful solutions to the successive prosecution dilemma in the RICO context.[198] It may be that no single solution will sufficiently address the myriad of ways in which a related prosecution may be generated in the RICO environment. Rules must be developed to cover, at the very least, successive RICO prosecutions, the prosecution of the predicate acts followed by a RICO indictment, a RICO prosecution followed by separate indictments for the predicate acts alleged, and the successive prosecution of RICO and other complex offenses such as CCE. Professor Poulin analyzes these problems in the constitutional context and concludes that a combination of the totality of circumstances test used in conspiracy cases and the *Grady* test would "give prosecutors adequate latitude while protecting defendants' interests."[199] Such a formula provides a reasonable point at which to begin debate regarding a statutory joinder requirement in the complex/compound offense category.

V. Conclusion

Successive prosecution in the federal system presents a particularly difficult puzzle. Decentralized structure, constitutional venue limitations, political agendas, and the innate complexity of federal offenses make a solution that much more perplexing. Yet, regardless of its origins, federal reprosecution is a dangerous phenomenon, proceeding virtually unchecked with the power to ruin defendants and undermine the integrity of the criminal justice system.

Neither the inherent uncertainty of a factually-driven joinder requirement nor the need to remedy unpopular verdicts sufficiently justifies the retention of an unchecked reprosecution power in the federal system. However, reaching a political consensus on this point and agreeing on a workable transaction definition are but the tip of the iceberg. Implementing a compulsory joinder regime will require intricate policy choices about the way federal prosecutors do business, the role of the courts in evaluating prosecutorial judgments, sentenc-

198 *See, e.g.*, Poulin, *supra* note 63; Thomas, *supra* note 67, at 1359.
199 Poulin, *supra* note 63, at 136.

ing policy, and a myriad of other questions. Expanding the traditional transaction rule debate to include such policy considerations may yield a rule that avoids hamstringing the prosecution, while adequately protecting defendants from government abuse.