LITTERING FOR $500:[1] HOW DOES JUDICIAL ESTOPPEL SOLVE THE PROBLEMS THAT FACTUALLY BASELESS PLEAS POSE TO THE DOUBLE JEOPARDY CLAUSE?

INTRODUCTION

The police arrest Leigh[2] in St. Louis city for possessing less than thirty-five grams of marijuana. The municipal prosecutor offers Leigh a plea deal: plead guilty to the misdemeanor violation of littering,[3] and the prosecutor will drop the marijuana possession charge.[4] Eager to end her legal battle and to be safe from the collateral consequences that can accompany a conviction for the possession of drugs,[5] Leigh accepts the prosecutor's plea deal and pleads guilty to the littering charge.

As Leigh's story demonstrates, it is impossible to understand the modern American criminal legal system without understanding plea bargaining.[6] As many as 94 percent of state felony convictions and 97 percent of federal felony convictions result from guilty pleas.[7] Therefore, any examination of

1. SAINT LOUIS, MO., CODE OF ORDINANCES § 11.18.240(B) (2018) ("Any person, corporation or other legal entity which violates any of the provisions of this chapter or participates in the violations of its provisions, either as a proprietor, owner, tenant, manager, superintendent or otherwise, provided that the violations are not enforced under Chapter 25.33, shall be guilty of a misdemeanor and upon the conviction thereof shall be punished by a fine of not less than twenty-five dollars ($5.00) [sic] and not more than five hundred dollars ($500.00) or by imprisonment for not more than ninety (90) days or both such fine and imprisonment . . . .").

2. "Leigh" is a fictional character, and this story is not based on any one person's experience.

3. SAINT LOUIS, MO., CODE OF ORDINANCES § 11.18.020 (2018) ("No person shall throw, deposit, accumulate or cause or allow to be thrown, deposited or accumulated litter in or upon any sidewalk, parkway, gutter, street, alley or other public place within the City except in public receptacles or in authorized receptacles for collection.").

4. *Id.* § 11.60.300 ("It shall be unlawful for any person to possess marijuana . . . .").

5. *See* Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (declining to decide whether deportation consequences are truly "collateral" but discussing their impact on criminal defendants' decision-making); Nora V. Demleitner, *"Collateral Damage": No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1034–41 (reviewing the collateral consequences that drug offenders face, including "denial of access to the social net," denial of education and employment opportunities, and denial of access to political processes); Alicia Werning Truman, *Unexpected Evictions: Why Drug Offenders Should Be Warned Others Could Lose Public Housing if They Plead Guilty*, 89 IOWA L. REV. 1753, 1755, 1757–61 (2004) (defining collateral consequences as the "civil penalties following a criminal conviction" and discussing loss of housing as a collateral consequence).

6. Missouri v. Frye, 566 U.S. 134, 144 (2012) ("[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system." (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992))).

7. SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES tbl.4.1 (2009); UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE: CRIMINAL

the criminal legal system must confront the reality that "justice" does not play out in front of a jury of twelve peers; rather, it occurs in back rooms and hallways, out of the public eye and away from sunshine's cleansing power.[8]

One consequence of the modern plea-bargaining system is the emergence of "factually baseless pleas."[9] A factually baseless plea "is a guilty plea . . . entered by a defendant for an offense that the defendant did not commit, and that all the parties in the case know the defendant did not commit."[10] While there have been no statistical studies that examine the frequency of these factually baseless pleas, judges and lawyers within the criminal legal system acknowledge that they occur frequently.[11] Many actors see these baseless pleas as a win-win-win situation—defendants get more lenient sentences, judges get reduced docket loads, and prosecutors get more time to spend on "serious" crimes.[12] However, critics of these pleas argue that they promote unequal treatment of defendants, inaccurate results, and general discontent with the criminal legal system.[13]

Additionally, factually baseless pleas may create other unexpected consequences for defendants. For example, when pleading guilty, Leigh assumes that it will be the last time that she will hear about the drug possession incident. However, one month later, a state prosecutor decides to charge Leigh with marijuana possession arising from the same incident. Leigh's attorney assumes that since she has already been prosecuted for this crime she will be protected from this subsequent prosecution by the Double Jeopardy Clause of the Fifth Amendment and *Waller v. Florida*.[14]

DEFENDANTS DISPOSED OF IN U.S. DISTRICT COURTS tbl.5.24.2010 (2010), https://www.albany.edu/sourcebook/pdf/t5242010.pdf [https://perma.cc/5NPE-YXTQ].

8. Michael P. Donnelly, *From the Bench: End Factually Baseless Plea Bargains*, LITIG., Spring 2016, at 6, 6 (arguing that factually baseless plea bargains should not be accepted in Ohio because they undermine the search for truth and justice in the courts); *see also Serial: You've Got Some Gauls*, CHICAGO PUBLIC RADIO 30:24 (Sept. 20, 2018), https://serialpodcast.org/season-three/2/youve-got-some-gauls [https://perma.cc/T9X7-PUBH] (mentioning Judge Michael Donnelly in Ohio, an anomaly in his courthouse, who does not discuss plea deals off the record).

9. Mari Byrne, Note, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961, 2968 (2010).

10. *Id.* at 2966.

11. *Id.* at 2964; *see also* Donnelly, *supra* note 8, at 7; *St. Louis Criminal Defense FAQ*, BRINKMAN & ALTER LLC, https://www.brinkmanandalter.com/st-louis-criminal-defense-faq.html [https://perma.cc/6YVQ-HEN3] ("[Y]our attorney and the prosecutor come to an agreement to lower the marijuana possession charge to a lesser infraction, like 'littering' . . . .").

12. Byrne, *supra* note 9, at 2964.

13. Myeonki Kim, *Conviction Beyond a Reasonable Suspicion? The Need for Strengthening the Factual Basis Requirement in Guilty Pleas*, 3 CONCORDIA L. REV. 102, 110–13 (2018).

14. U.S. CONST. amend. V ("No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."); Waller v. Florida, 397 U.S. 387, 395 (1970) (holding that prosecution in a state court is barred by the Fifth Amendment if the person has been previously tried in a municipal court for the same offense).

If Leigh had been originally charged in state court, received a plea deal, and then been re-charged by another state prosecutor, she could potentially rely on the Supreme Court's decision in *Santobello v. New York* for protection.[15] In *Santobello*, the Court held that an agreement made with one prosecutor in an office operates to bind all of the prosecutors in the office because the "[t]he staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done."[16] However, an agreement by the municipal prosecutors in Leigh's case would not bind the state prosecutors because they are not on the "same hand" as the municipal prosecutors.[17] It was not the state prosecutors who promised to dismiss her case, it was the municipal prosecutors. Therefore, the Supreme Court's requirement that prosecutors follow through on their promises[18] does not provide Leigh any relief or protection.

Additionally, a closer examination of the Supreme Court's Double Jeopardy jurisprudence, based on the decision in *Blockburger v. United States*,[19] makes it unclear whether Leigh is protected from the subsequent prosecution by *Waller* and the Double Jeopardy Clause.[20] This Note examines whether the Double Jeopardy Clause protects Leigh and other criminal defendants in similar situations—ultimately concluding that it does not. It also uses the Double Jeopardy Clause as a lens to examine how actors within the criminal legal system fail to consider the implications of factually baseless pleas when entering into these agreements. Finally, it proposes using the doctrine of judicial estoppel to protect criminal defendants from subsequent prosecutions arising out of factually baseless pleas.

In Part I, this Note examines the American plea-bargaining system. An understanding of the current state of the American criminal legal system, specifically the explosion of plea bargains over the last century, is crucial to understanding the pervasiveness of factually baseless pleas within the system.

In Part II, this Note defines factually baseless pleas and explores what constitutes factually baseless pleas. It will then quickly discuss the arguments that have been presented in support of, and in opposition to, the use of factually baseless pleas, before concluding with an examination of

15. 404 U.S. 257, 262 (1971).
16. *Id.*
17. *Id.*
18. *Id.*
19. *See infra* Section III.B; *see also* Currier v. Virginia, 138 S. Ct. 2144, 2153 (2018) (referencing the *Blockburger* test as the Court's current interpretation of whether two charged crimes are the "same offense"); Blockburger v. United States, 284 U.S. 299, 304 (1932) (holding that the proper test to determine whether a subsequent prosecution is barred because it is for the "same offense" is whether each crime charged requires proof of an element that the other does not).
20. *See infra* Section IV.

the impact that these pleas have on defendants and the criminal legal system as a whole.

In Part III, this Note will analyze the Double Jeopardy Clause. While the jurisprudence is somewhat muddled, this Note attempts to unpack the current state of the Double Jeopardy Clause, specifically as it relates to subsequent prosecutions, which has often followed a formalistic set of rules.

In Part IV, this Note discusses the intersection of factually baseless pleas and the Court's double jeopardy jurisprudence. Specifically, it focuses on how and why factually baseless pleas fail to protect criminal defendants from subsequent prosecutions. The intersection of factually baseless pleas and the Double Jeopardy Clause highlights the significant jurisprudential issues that these baseless pleas create for the American criminal legal system.

In Part V, this Note discusses judicial estoppel, and the application of judicial estoppel by the courts. Courts have interpreted this equitable doctrine differently in many jurisdictions, but this Note focuses on the guidelines laid down by the Supreme Court and the State of Missouri, as well as the doctrine's application in criminal cases.

Finally, in Part VI, this Note advocates for the use of judicial estoppel to protect criminal defendants from subsequent prosecutions after they accept a factually baseless plea. While the elimination of factually baseless pleas would be preferable to the "band-aid" solution that judicial estoppel presents, the lack of actors calling for the elimination of factually baseless pleas makes their abolition in the near future unlikely. In the meantime, judicial estoppel would prevent prosecutors from abusing factually baseless pleas, ensure that the courts do not expose defendants to multiple punishments for the same offense, and safeguard the integrity of the court system.

I. PLEA BARGAINING: THIS IS AMERICA[21]

Plea bargaining first became a systemic feature of the American criminal legal system in the early to mid-nineteenth century.[22] While prosecutors had previously used plea bargains episodically,[23] pleas grew in popularity over the nineteenth century, and by the early twentieth century they became the

21. CHILDISH GAMBINO, THIS IS AMERICA (RCA Records 2018).

22. MARY E. VOGEL, COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS, AND THE MAKING OF POLITICAL AUTHORITY 93 (2007).

23. *Id.* (describing the infrequency of plea bargaining and pinning the number as low as 10 to 15 percent prior to the 1830s).

defining feature of American justice.[24] While it is commonly thought that the increase in plea bargains responded directly to rising caseload pressure, recent scholarship by Mary Vogel has challenged that assumption.[25] Based on her research in Boston, Vogel contends that plea bargaining actually "preceded rather than followed the marked increase in caseload seen after 1840."[26] Thus, she argues that plea bargaining was a form of social control used by the political elites to maintain their status.[27] The plea bargaining process gave these political elites discretion over the criminal legal system while consolidating conflicts into one controllable system.[28]

George Fisher's research deepens the understanding of plea bargaining by focusing on the role of courtroom actors in developing and perpetuating plea bargains.[29] Fisher focuses on how prosecutors, trial judges, and appellate judges expanded the use of plea bargains during the early twentieth century.[30] These plea bargains seemingly protect the legitimacy of the legal system because they create a presumption that the accused committed the crime and protect juries from making incorrect decisions.[31] When a defendant accepts a plea bargain, there is no cross-examination to test the facts of the case,[32] and the guilty plea is almost always accepted as conclusive and presumptively correct.[33] Therefore, in theory and in the eyes of many judges, prosecutors, and the public, plea bargains promote the values of efficiency, efficacy, and predictability.[34]

In part because of their perceived value to the judicial system, and possibly because of the prevalence of plea bargains by the mid-twentieth century, the Supreme Court has repeatedly affirmed the use of plea bargains.[35] In fact, it would be almost impossible to remove plea bargains

24. *Id.* at 95 ("According to complete counts of *all* cases in the Police Court docket made for this study, guilty pleas surged from less than 15 percent of all pleas entered in the docket in 1830 . . . . to a high of 88 percent in 1880.").

25. *Id.* at 123.

26. *Id.*

27. *Id.* at 131.

28. *Id.*

29. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 177 (2003) (noting that plea bargains serve the interests of those in high places).

30. *Id.* (describing how "expanding procedural protections" and the growth of appeals made plea bargains more useful for these actors).

31. *Id.* at 178.

32. *Cf.* Crawford v. Washington, 541 U.S. 36, 61–62 (2004) (finding that cross-examination helps ensure that evidence is reliable).

33. FISHER, *supra* note 29, at 178.

34. *Id.*

35. *Id.*; *see also* Santobello v. New York, 404 U.S. 257, 260 (1971) ("The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged."); Brady v. United States, 397 U.S. 742, 752 (1970) (discussing the benefits of plea bargaining to the state and to the defendant).

as a part of the American criminal legal system because they now define American criminal law.[36] Their essential role in the modern American legal system is demonstrated by the fact that there have never been any procedural changes that have threatened to remove plea bargains from prominence.[37] However, despite their continued vitality, there are certainly many criminal defense attorneys who would argue against plea bargaining because it systemically favors prosecutors.[38]

This systemic imbalance gives prosecutors enormous power to make arbitrary decisions whether to offer plea deals, when to offer plea deals, and the substance of those deals.[39] "Even for misdemeanors, a prosecutor frequently has a variety of options at the charging stage of the process."[40] Prosecutors often use these options to engage in "charge-bargaining," which is a tactic used to control defendants and coerce them into pleading guilty in exchange for a lesser sentence or charge.[41] A "charge-bargain" occurs when a prosecutor agrees to replace "a higher charge with a lower one in exchange for the defendant's promise to plead guilty."[42] As part of the charge-bargaining process, prosecutors often engage in "charge-piling" and "charge-sliding," which, respectively, allow prosecutors to pile on multiple charges in order to drastically increase the defendant's potential sentence[43] and then replace one set of charges with another during negotiations to enhance their bargaining position.[44]

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36. Missouri v. Frye, 566 U.S. 134, 144 (2012) ("[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system." (quoting Scott & Stuntz, *supra* note 6, at 1912)).

37. FISHER, *supra* note 29, at 202 ("[T]he most convincing proof [that plea bargaining has held evolutionary sway over its sibling criminal-justice institutions] may be our inability to name a single important procedural innovation of the last 150 years that threatened to choke off plea bargaining and yet flourished.").

38. *Id.* at 221. *But see generally* Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599 (2005) (defending plea bargaining and discussing the benefits created by plea bargaining, including efficiency and autonomy).

39. ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 46 (2007).

40. *Id.* at 24 (describing the discretionary power that the prosecutor has in misdemeanor cases, including decisions about whether to bring charges and what sentence to seek).

41. Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1309, 1311 (2018) (describing how prosecutors have free rein to inflate charges and obtain more convictions through coercive plea bargaining—a process that has been "analogized to torture").

42. *Id.* at 1311. "The ability to control a defendant's sentencing exposure by manipulating the charges against him—that is to say, the ability to charge bargain—is widely recognized by scholars as 'the core of prosecutorial power in the United States.'" *Id.* at 1310 (quoting David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 487 (2016)).

43. *Id.* at 1313.

44. *Id.* at 1314.

Theoretically, prosecutors' ability to charge-bargain is limited by ethical standards,[45] rules of criminal procedure,[46] and the trial judge's willingness to accept a plea of guilty.[47] However, these structures often do little to actually limit prosecutors, especially given most defendants' personal interests in efficiency and minimizing inherent risks involved with going to trial.[48] This system, full of prosecutorial discretion, overcrowded dockets, and individually-focused defendants, creates a criminal legal system that is ripe for abuse.[49] Enter, stage right, factually baseless pleas.

II. FACTUALLY BASELESS PLEAS

Factually baseless pleas are "'admission[s] of guilt for the purposes of the case,' entered by a defendant for an offense that the defendant did not commit, and that all parties in the case know the defendant did not commit."[50] These are not the same as *Alford* pleas, fictional pleas, or pleas to lesser-included crimes.[51] And, compared with these other types of pleas, factually baseless pleas have remained relatively unstudied. However, anecdotal evidence from judges shows that these pleas may be quite common in the criminal legal system.[52]

Examinations of factually baseless pleas most often occur at the traffic court level,[53] but these pleas also occur in municipal courts and state courts.[54] While factually baseless pleas are certainly no secret,[55] many actors do not like discussing these pleas because they undermine both the

45. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY § 14-3.1 (AM. BAR ASS'N 3d ed. 1999); MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2016).

46. *See, e.g.*, FED. R. CRIM. P. 11(b)(3); MO. SUP. CT. R. 24.02(e); *see also* Crespo, *supra* note 41, at 1306 ("[I]t is this subconstitutional state law of criminal procedure—the hidden law of plea bargaining—that time and again establishes the mechanisms and legal frameworks through which prosecutorial plea bargaining power is generated and deployed.").

47. *See e.g.*, Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 368 (Iowa 2005) (limiting the ability of prosecutors to comply with ethical standards while engaging in factually baseless plea bargaining).

48. Crespo, *supra* note 41, at 1303.

49. *Id.*

50. Byrne, *supra* note 9, at 2966 (footnote omitted) (quoting Hudson v. United States, 272 U.S. 451, 455 (1926)).

51. *Id.* at 2967. *Alford* pleas are pleas "coupled with claims of innocence." *Id.*; *see* North Carolina v. Alford, 400 U.S. 25, 38–39 (1970). Fictional pleas occur when a defendant pleads guilty to a crime that does not actually exist. Byrne, *supra* note 9, at 2967. Pleas to lesser-included crimes include pleas to offenses "necessarily included in the offense charged." *Id.* (quoting Berra v. United States, 351 U.S. 131, 134 n.4 (1956)). These types of pleas all raise their own issues for criminal defendants and the criminal legal system, but their regulation and use are beyond the scope of this Note.

52. Donnelly, *supra* note 8, at 7 (citing an informal study that the author conducted which revealed "hundreds of rape cases that were resolved" by factually baseless pleas).

53. *See* Byrne, *supra* note 9, at 2968 n.40.

54. Donnelly, *supra* note 8, at 7; *see also* Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 367 (Iowa 2005) (condemning factually baseless pleas in Iowa).

55. *See St. Louis Criminal Defense FAQ*, *supra* note 11.

legitimacy of the judicial system and the assumption that our criminal legal system finds truth.[56]

Some jurisdictions prohibit factually baseless pleas.[57] For example, the Iowa Supreme Court has held that a prosecutor who accepts factually unsupported guilty pleas violates the Iowa ethics code.[58] The court specifically notes that any prosecutor who accepts guilty pleas to factually baseless crimes is not fulfilling their duty to only bring charges for which they have probable cause.[59] This decision condemns the acceptance of factually baseless pleas and exposes Iowa prosecutors to potential sanctions if they choose to accept these pleas.[60] However, Iowa's decision to harshly condemn factually baseless pleas, and to sanction the prosecutors who engage in charge-bargaining using factually baseless pleas, while commendable, is not the norm in every jurisdiction.[61]

In jurisdictions that do allow factually baseless pleas, they may have gained prominence because, especially in municipal courts, many prosecutors face excessive caseloads, often consisting of up to hundreds of felonies and misdemeanors per year.[62] Because of these prosecutors' high caseloads, it may not always be worth the expenditure of resources to bring all cases to trial.[63] Therefore, prosecutors use plea bargains to ensure that they can still obtain convictions without neglecting the rest of their caseload.[64] In many cases, the prosecutor can negotiate using lesser-included offenses that are still based in fact; however, in many misdemeanor and infraction cases, there are no lesser-included crimes.[65] Thus, prosecutors who wish to engage in charge bargaining may feel that they have no choice but to present a defendant with factually baseless plea offers.[66] In the short term these deals can benefit defendants because they may receive a lenient sentence, have a lesser crime on their record, or return

56. Byrne, *supra* note 9, at 2997.
57. *See, e.g.*, *Howe*, 706 N.W.2d at 367.
58. *Id.* at 368.
59. *Id.* at 369.
60. *Id.* at 378.
61. *See, e.g.*, Byrne, *supra* note 9, at 2968 (discussing the use of factually baseless pleas in Missouri municipal courts).
62. Adam M. Gershowitz & Laura R. Killinger, Essay, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 268–70 (2011).
63. *See, e.g.*, DAVIS, *supra* note 39, at 22 ("The ever-present desire to dispose of the constantly growing number of criminal cases as expeditiously as possible undoubtedly played a part [in the decision to dismiss a murder charge].").
64. VOGEL, *supra* note 22, at 9.
65. *See, e.g.*, SAINT LOUIS, MO., CODE OF ORDINANCES § 11.61.020 (2018) (drug paraphernalia possession); SAINT LOUIS, MO., CODE OF ORDINANCES § 11.60.300 (2018) (marijuana possession).
66. Byrne, *supra* note 9, at 2972 ("Especially where prosecutors have overwhelming numbers of similarly situated, seemingly minor cases, baseless pleas provide a quick and efficient resolution, allowing prosecutors to focus their litigation efforts on more critical cases." (footnote omitted)).

to their families.[67] Additionally, while at least some of these defendants are innocent, they still agree to the bargain because it minimizes their long-term risk.[68] Prosecutors engaged in factually baseless plea bargaining may even feel that they are helping criminal defendants by giving them second chances.[69]

However, while factually baseless pleas may seem like a compromise between prosecutors and defendants that balances prosecutors' interest in efficiency with defendants' interest in leniency, factually baseless pleas present significant dangers to the criminal legal system. First, they undermine the legitimacy of the criminal legal system because they necessarily involve disregarding the truth; by definition they can only occur when a defendant pleads guilty to something they did not do.[70] Second, they potentially raise separation of powers issues because the courts implicitly define crimes to include conduct that the legislature did not intend them to include.[71] Third, these pleas also potentially result in more guilty pleas for innocent defendants, which becomes especially apparent in "standard-deal" cases[72] because there is very little investigation.[73] Finally, these pleas can undermine the criminal legal system because many legal doctrines, including the Double Jeopardy Clause, do not conceive of pleas which are not based in fact, and the jurisprudence is not, therefore, prepared to handle factually baseless pleas.

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67. DAVIS, *supra* note 39, at 50–52 (describing the story of Emma Faye Stewart who was arrested, could not afford bond, and pleaded guilty to a crime that she did not commit so that she could return to her family).

68. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1239 (2008) ("Innocent defendants plead guilty, as do guilty defendants, because the alternative—contesting guilt at trial—is too risky.").

69. Byrne, *supra* note 9, at 2990–91 (referencing a New Jersey prosecutor who, when asked about factually baseless pleas said, "[Y]ou're not there just to hammer someone, you're there to do justice, and sometimes justice means people should get a break" (alteration in original) (quoting Jennifer V. Hughes & Dan Kraut, *A Bargain That Can't Be Driven Anymore: Judges Apply Brakes to No-Point Tickets*, RECORD (Bergen County, N.J.), Apr. 30, 2000, at A1)).

70. *Id.* at 2966.

71. *Id.* at 2995 n.296; *cf.* People v. Stephenson, 30 P.3d 715 (Colo. App. 2000) (finding that courts could not accept pleas to non-existent crimes because "the power to define crimes and prescribe punishments is vested exclusively in the General Assembly").

72. *Id.* at 2968 n.40. ("[P]rosecutors' offices typically have 'standard deals' that 'may be contained in written guidelines formulated by those in charge of the prosecutor's office or based on unwritten practices developed over time and passed on to newer members of the office.'" (quoting Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 105 n.119 (1995))); *see, e.g.*, *St. Louis Criminal Defense FAQ*, *supra* note 11.

73. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 17 (2018) ("Numerous scholars have examined the innocence problem of plea bargaining and have estimated that anywhere from 1.6% to 27% of defendants who plead guilty may be factually innocent."); *see also* Covey, *supra* note 68, at 1239 ("Nobody knows how many innocent defendants enter guilty pleas, but the number almost certainly is larger than has previously been acknowledged.").

III. DOUBLE JEOPARDY

The Fifth Amendment states that no person shall "for the same offense . . . be twice put in jeopardy of life or limb."[74] The Supreme Court has interpreted this phrase in many ways over the years and the contours of double jeopardy protection are still not entirely clear.[75] Part III.A will discuss the theoretical underpinnings of the Double Jeopardy Clause. Part III.B will explore the Supreme Court's current double jeopardy jurisprudence and how the Court has recently embraced a formalistic approach to the Double Jeopardy Clause. Part III.C will then examine the Supreme Court's decision to treat municipalities and states as the same sovereigns for the purpose of double jeopardy.

A. The Theory of the Double Jeopardy Clause

Perhaps the most oft-quoted rationale for the Double Jeopardy Clause was stated by Justice Black in *Green v. United States*.[76] Justice Black explained:

> [T]he 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.[77]

Justice Black focused on avoiding harassment and undue embarrassment for defendants as the underlying rationales for the Double Jeopardy Clause.[78]

Other commentators have advanced somewhat different rationales for the Double Jeopardy Clause. Some commentators believe that the Double Jeopardy Clause is not designed to protect against harassment, but rather multiple consequences for the same offense.[79] One commentator has gone so far as to say that it is merely "an outgrowth of substantive criminal law and the procedural allocation of responsibility between legislatures and judges."[80] Under this rationale, the Double Jeopardy Clause preserves the

74. U.S. CONST. amend. V.
75. GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 1 (1998).
76. 355 U.S. 184 (1957).
77. *Id.* at 187–88.
78. *Id.*; *see* THOMAS, *supra* note 75, at 50 ("The standard interpretation focuses on the harm of forcing a defendant to endure a second trial, a harm the Court refers to as 'harassment.'").
79. THOMAS, *supra* note 75, at 56 (discussing Eli Richardson's theory that the Double Jeopardy Clause does not protect against harassment, but rather, multiple punishments for the same offense).
80. *Id.* at 62.

legislature's right to define crimes.[81] But at their core, regardless of how they frame the exact rationale, all of these theories focus on ensuring that criminal defendants are not punished twice for the same crime.[82] However, finding a framework that effectuates that protection has proven challenging for the Court.[83]

B. The Supreme Court's Current Double Jeopardy Jurisprudence: The Formalistic Approach

Today, the Supreme Court applies the *Blockburger* test to determine whether a subsequent prosecution for the same or a similar offense is barred by the Double Jeopardy Clause.[84] Clearly, the Double Jeopardy Clause protects against a subsequent prosecution of a defendant after a prior finding of guilt or innocence for the same charge.[85] Additionally, the Court has extended protections to subsequent prosecutions after a conviction or acquittal for a lesser- or greater-included offense.[86] The Supreme Court has also made it clear that defendants are protected from subsequent prosecutions when they have taken a guilty plea and the punishment has been enforced.[87] However, the Court has never considered whether an individual is protected if they accept a factually baseless plea, or even how the Court would approach a case that involves a factually baseless plea.

The Court's current understanding of the Double Jeopardy Clause did not arise out of a vacuum; rather, the Court grappled with the Double Jeopardy Clause for years before settling on *Blockburger* as the test to determine whether a subsequent prosecution for a similar or the same offense is prohibited.[88] The Court has consistently struggled to define "same

81. *Id.* at 68.

82. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .").

83. THOMAS, *supra* note 75, at 1 ("The United States Supreme Court has failed to achieve a stable interpretation of the Double Jeopardy Clause.").

84. Currier v. Virginia, 138 S. Ct. 2144, 2153 (2018); *see* Blockburger v. United States, 284 U.S. 299, 304 (1932).

85. *Blockburger*, 284 U.S. at 304.

86. *Guide for Users: II. Preliminary Proceedings*, 46 GEO. L.J. ANN. REV. CRIM. PROC. 269, 542 (2017); *see* Brown v. Ohio, 432 U.S. 161, 169 (1977) (finding a subsequent prosecution barred).

87. *Brown*, 432 U.S. at 165. *But see* Ohio v. Johnson, 467 U.S. 493, 502 (1984) (prohibiting offensive use of guilty plea to invoke double jeopardy, such as taking a guilty plea to a lesser-included crime while charges on the greater offense are pending in order to avoid criminal liability).

88. *See* United States v. Dixon, 509 U.S. 688, 704 (1993) (settling on the *Blockburger* test as the standard evaluation of whether two offenses are the "same offence" for the purpose of the Double Jeopardy Clause).

offence" and *Blockburger*[89] is the Court's attempt to provide a consistent, usable standard.[90]

The Court in *Blockburger* held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[91] When courts conduct a *Blockburger* analysis, they are supposed to look at the statutory elements of the crime and determine whether one of the charged offenses contains an element that is not present in the other charged offense.[92]

In *Blockburger*, the petitioner was charged with five counts of violating the Harrison Narcotic Act.[93] Petitioner was found guilty on three of the counts, including a violation of Section One of the Act and Section Two of the Act.[94] Section One of the Harrison Act made it illegal to sell opium or other narcotics if they were not in an appropriately stamped package.[95] Section Two of the Act made it illegal to sell the drug without a written order from the buyer.[96] The petitioner claimed that a prosecution under both Section One and Section Two of the Act put him in jeopardy twice for the same offense.[97] The Supreme Court held that even though only one act had occurred, the petitioner had violated two statutes that contained different elements; therefore, the prosecution of both offenses did not violate the Double Jeopardy Clause.[98]

In *Grady v. Corbin*, the Supreme Court determined that *Blockburger* was not the only test that should be used to determine whether something was the "same offense" for the purposes of double jeopardy.[99] In *Grady*, the

89. *Blockburger*, 284 U.S. at 299.

90. *Dixon*, 509 U.S. at 704 (discussing the *Blockburger* test and referencing its "deep historical roots").

91. *Blockburger*, 284 U.S. at 304 (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)).

92. Currier v. Virginia, 138 S. Ct. 2144, 2153 (2018) **(**applying the *Blockburger* test to decide a Double Jeopardy Clause issue).

93. *Blockburger*, 284 U.S. at 300; *see* Harrison Narcotic Act, ch. 1, § 1, 38 Stat. 785 (1914), *amended by* Act of Feb. 24, 1919, ch. 18, § 1006, 40 Stat. 1057, 1131 (1919) ("It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs [opium and other narcotics] except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found . . . ."); Harrison Narcotic Act, ch. 1, § 2, 38 Stat. 785, 786 (1914) ("It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs specified in section 691 of this title, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.").

94. *Blockburger*, 284 U.S. at 301.

95. *Id.* at 300 & n.1; *see* Harrison Narcotic Act § 1.

96. *Blockburger*, 284 U.S. at 300 & n.2; *see* Harrison Narcotic Act § 2.

97. *Blockburger*, 284 U.S. at 301.

98. *Id.* at 304.

99. 495 U.S. 508, 521 (1990), *overruled by* Dixon v. United States, 509 U.S. 688 (1993).

Court held that even subsequent prosecutions that were allowed under *Blockburger* could be barred if the prosecution would have to prove "conduct that constitutes an offense for which the defendant has already been prosecuted."[100] However, just three years later in *United States v. Dixon*, the Court explicitly overruled its decision in *Grady* and held that *Blockburger* was the proper test to determine whether multiple prosecutions were for the same "offense."[101] In *Dixon*, the Court held that "[t]he 'same-conduct' rule [*Grady*] announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy."[102] While the subsequent prosecutions in *Dixon* would clearly have been barred by *Grady*,[103] the Court held that the *Grady* standard was unworkable and ruled that under *Blockburger*, the subsequent prosecution was not barred.[104]

At the moment, the current Court seems content to continue to apply *Blockburger*.[105] While *Grady* "probably achieves a fairer result in some cases," the Court rejected the *Grady* approach in favor of the more clear-cut *Blockburger* analysis.[106]

C. Municipalities and the State Are the "Same Sovereign"

In *Waller v. Florida*, the Supreme Court held that both a municipal court and a state court are arms of the same sovereign, and, therefore, a guilty plea in a municipal court bars further prosecution by the state for the "same offense."[107] The Court analogized the situation of state and municipal governments to that of the United States and its territories.[108] Because municipalities and state governments derive their power from the same source, they must be treated as one entity for the purposes of double jeopardy.[109] Therefore, when someone like Leigh pleads guilty to a crime in municipal court, he or she is protected from a subsequent prosecution for that "same offense,"[110] even though the subsequent prosecution occurs in state court and not municipal court.[111] However, even though Leigh would

100. *Id.*
101. 509 U.S. 688, 704 (1993).
102. *Id.*
103. *Id.* at 703.
104. *Id.*
105. Currier v. Virginia, 138 S. Ct. 2144, 2153 (2018).
106. THOMAS, *supra* note 75, at 144.
107. 397 U.S. 387, 393 (1970).
108. *Id.*; *see* Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1872 (2016) (reasoning that, in the same way that a territory derives its power from the federal government, a municipality originally derives its authority and power from the state, so it must be treated as one sovereign with the state).
109. *Waller*, 397 U.S. at 394.
110. Blockburger v. United States, 284 U.S. 299, 304 (1932).
111. *Waller*, 397 U.S. at 394.

normally be entitled to the protection of the Double Jeopardy Clause, the discussion in Part IV demonstrates that the fact that she accepted a factually baseless plea deprives her of that protection.[112]

IV. THE DOUBLE JEOPARDY CLAUSE AND FACTUALLY BASELESS PLEAS

The fundamental fairness considerations underlying the Double Jeopardy Clause seem to suggest that Leigh should not be subject to prosecution for the same acts that led to the littering plea.[113] If the state is allowed to continue prosecuting Leigh for her actions, even after the municipal court has meted out punishment, Leigh, and others in the same situation, will be forced to live "in a continuing state of anxiety and insecurity."[114] There is also a very real danger that Leigh will be punished twice for one act.[115] Additionally, this second prosecution overrides the legislative intent for criminal defendants to only be punished once for their crimes.[116] Clearly, no matter what rationale is used to justify the Double Jeopardy Clause, Leigh should be protected by the doctrine.

However, after an examination of the mechanics of factually baseless pleas and the Double Jeopardy Clause, it seems apparent that the Double Jeopardy Clause would not protect Leigh from a subsequent prosecution in state court stemming from her marijuana possession charge. In St. Louis, littering requires proof that a person "throw, deposit, accumulate or cause or allow to be thrown, deposited or accumulated litter in or upon any sidewalk, parkway, gutter, street, alley or other public place within the City except in public receptacles or in authorized receptacles for collection."[117] Marijuana possession requires proof that "a person, with the knowledge of the presence and nature of [the marijuana], has actual or constructive possession of the [marijuana]."[118] Under the Court's *Blockburger* analysis, these offenses clearly require proof that the other does not.[119] Therefore, even though Leigh expected her case to be finalized when she accepted the municipal prosecutor's plea deal, and even though fairness would seem to

112. *See infra* Section IV.
113. *See supra* Section III.A.
114. Green v. United States, 355 U.S. 184, 187 (1957).
115. *See* THOMAS, *supra* note 75, at 112.
116. *Id.*
117. SAINT LOUIS, MO., CODE OF ORDINANCES § 11.18.020 (2018).
118. MO. REV. STAT. § 195.010(38) (2018) (defining "possessed" or "possessing a controlled substance"); *see also* SAINT LOUIS, MO., CODE OF ORDINANCES § 11.60.300 (2018) ("It shall be unlawful for any person to possess marijuana as defined in Chapter 195.010 et seq. of the Revised Statutes of Missouri as amended."); MO. REV. STAT. § 195.010(28) (defining marijuana).
119. None of the elements of either crime overlap, so any analysis that a court would undertake under *Blockburger* would quickly and easily conclude that these offenses are not the "same." *See* Blockburger v. United States, 284 U.S. 299, 304 (1932).

dictate that she not face a subsequent prosecution for the same act, the Court's current double jeopardy analysis would not protect Leigh.

Even under a *Grady* analysis, Leigh would be unlikely to receive protection. Under *Grady*, the court would look to see whether the prosecution would have to prove facts alleged in the first offense to obtain the second prosecution.[120] In this case, the prosecutor in the second proceeding would not have to prove any facts relating to littering in order to convict Leigh of drug possession.[121] Leigh could attempt to argue that the underlying facts of the littering offense, that she allegedly possessed marijuana, would have to be re-proven in the subsequent case, and, therefore, she should be protected from subsequent prosecution. However, this overlooks the Court's ruling that "[t]he critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct."[122] Therefore, because the elements of littering do not overlap with the elements of marijuana possession, the Double Jeopardy Clause does not seem to protect Leigh.[123]

Unfortunately, despite the fundamental unfairness of prosecuting Leigh twice for the same crime, none of the Court's double jeopardy decisions protect Leigh from subsequent prosecutions after she accepts the factually baseless plea in municipal court. This lack of protection illustrates the shortcomings of the current interpretation of the Double Jeopardy Clause, and, perhaps even more so, the danger that factually baseless pleas pose to defendants and to the legitimacy of the criminal legal system. These pleas complicate current legal doctrine, often at the expense of the rights of criminal defendants. Therefore, unless or until jurisdictions eliminate the use of factually baseless pleas, the courts need to consider alternative avenues to protect criminal defendants who accept these pleas from subsequent prosecutions. The equitable doctrine of judicial estoppel provides just such an avenue.

V. JUDICIAL ESTOPPEL

In *New Hampshire v. Maine*, the Supreme Court of the United States recognized the doctrine of judicial estoppel.[124] Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."[125]

120. Grady v. Corbin, 495 U.S. 508, 510 (1990); *see supra* notes 99–100 and accompanying text.

121. *See* SAINT LOUIS, MO., CODE OF ORDINANCES § 11.18.020 (littering); SAINT LOUIS, MO., CODE OF ORDINANCES § 11.60.300 (marijuana possession).

122. *Grady*, 495 U.S. at 521.

123. *See Blockburger*, 284 U.S. at 304.

124. 532 U.S. 742, 750 (2001).

125. *Id.* at 749 (quoting Pegram v. Herdrich, 530 U.S. 211, 227 n.8 (2000)).

This doctrine is designed "'to protect the integrity of the judicial process'. . . by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment.'"[126]

While the Supreme Court refused to elucidate discrete standards to govern judicial estoppel in *New Hampshire v. Maine*, it highlighted three factors that are relevant to a court's considerations of whether or not to apply the doctrine:[127]

> First, a party's later position must be "clearly inconsistent" with its earlier position. . . . Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled" . . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.[128]

Because judicial estoppel is an equitable doctrine, different jurisdictions have adopted different applications of the doctrine.[129] Although the federal courts do offer some guidance, the Missouri courts' application of the doctrine best determines whether judicial estoppel would protect Leigh from subsequent prosecution in this case.[130]

In Missouri, the doctrine of judicial estoppel exists "to prevent parties from playing fast and loose with the court."[131] If parties could "take inconsistent positions at their whim, it would allow chaotic and unpredictable results in our court system, which of course would be problematic for a host of reasons."[132] To determine whether a party is playing fast and loose with the court, the Missouri courts apply the factors that the Supreme Court announced in *New Hampshire v. Maine*.[133] While the Missouri courts note that these are not "fixed or inflexible prerequisites,"

126. *Id.* at 749–50 (citations omitted) (first quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982); and then quoting United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993)).

127. *Id.* at 750–51.

128. *Id.* (citations omitted) (quoting *Edwards*, 690 F.2d at 599).

129. Nicole C. Frazer, Note, *Reassessing the Doctrine of Judicial Estoppel: The Implications of the Judicial Integrity Rationale*, 101 VA. L. REV. 1501, 1513 (2015).

130. Missouri is a useful example of how states apply judicial estoppel; however, any analysis of cases similar to Leigh's case will need to consider that the rules on judicial estoppel may be very different in other states and jurisdictions.

131. Brooks v. Fletcher, 337 S.W.3d 137, 143 (Mo. Ct. App. 2011) (quoting State *ex rel.* KelCor, Inc. v. Nooney Realty Trust, Inc., 966 S.W.2d 399, 404 (Mo. Ct. App. 1998)).

132. *Id.* at 144.

133. *Id.* at 140.

they predominantly analyze judicial estoppel issues using these factors.[134] Additionally, in Missouri, there is no requirement that the inconsistent positions be taken in the same, or even related, proceedings.[135] Finally, there is no requirement that the position be taken under oath, although whether a statement is under oath may factor into a court's decision on whether to apply the doctrine.[136]

While no Missouri courts have applied judicial estoppel to criminal proceedings, there is ample authority from jurisdictions around the country that judicial estoppel should apply in criminal matters.[137] Most jurisdictions that apply judicial estoppel to criminal matters note that the doctrine is intended to achieve fair and just results.[138] Therefore, many courts have used the same *New Hampshire* factors that govern in civil cases in criminal cases[139] because applying the doctrine is "designed to preserve the dignity of the courts and insure order in judicial proceedings,"[140] and parties that take inconsistent positions can undermine the dignity and order of the courts in both civil and criminal cases.[141]

VI. PROPOSAL: APPLYING JUDICIAL ESTOPPEL TO SUBSEQUENT PROSECUTIONS ARISING FROM FACTUALLY BASELESS PLEAS

Applying judicial estoppel to block subsequent prosecutions in state court after a defendant accepts a factually baseless plea in municipal court ensures that prosecutors "cannot have [their] cake and eat it too."[142] An equitable doctrine is a sensible solution to this loophole in the Double Jeopardy Clause because judicial estoppel is flexible and not bound by the same rigid rules as the double jeopardy doctrine.[143] However, in Missouri

134. *Id.*; *see, e.g.*, Vinson v. Vinson, 243 S.W.3d 418, 422 (Mo. Ct. App. 2007) (applying the *New Hampshire* factors and determining that once the court finds that positions are not clearly inconsistent there is no need to consider the other factors), *overruled in part by* Vacca v. Mo. Dep't of Labor & Indus. Relations, 575 S.W.3d 223 (Mo. 2019); Child Support Enf't v. North, 444 S.W.3d 905, 909 (Mo. Ct. App. 2014) **(**applying all of the *New Hampshire* factors and determining that the court must judicially estop a party from proceeding if they made unambiguous statements which are clearly inconsistent with a later position).

135. *Id.* at 145–46.

136. *Id.* at 145.

137. *See, e.g.*, Kimberly J. Winbush, Annotation, *Judicial Estoppel in Criminal Prosecution*, 121 A.L.R.5th 551 (2018) (collecting cases from around the country that apply judicial estoppel to criminal cases).

138. *Id.* § 2[a].

139. *Id.*

140. Jeffries v. Jeffries, 840 S.W.2d 291, 294 (Mo. Ct. App. 1992) (quoting Edwards v. Durham, 346 S.W.2d 90, 101 (Mo. 1961)).

141. *See* Brooks v. Fletcher, 337 S.W.3d 137, 143 (Mo. Ct. App. 2011) (civil case); People v. Gross, 465 N.E.2d 119, 122 (Ill. App. Ct. 1984) (criminal case).

142. Frazer, *supra* note 129, at 1543 (quoting Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1177 (D.S.C. 1974)).

143. *See supra* Section III.B.

and many other states, there are still some requirements that a defendant must meet in order to gain the protection of the doctrine.[144] Leigh, and other criminal defendants in similar situations, should be able to meet all of the requirements for the application of judicial estoppel, and garner the protection of the doctrine.

A. Municipal Prosecutors and State Prosecutors Are the "Same Party" for Purposes of Judicial Estoppel

While not necessarily on the "same hand,"[145] municipal prosecutors and state prosecutors should be the same party for purposes of judicial estoppel. In *Waller*, the Supreme Court held that municipal and state courts both draw their power from the same sovereign, and, therefore, should be treated as one unit for the purposes of double jeopardy.[146] In the same way, prosecutors for both of these entities should be treated as one party because both municipal prosecutors and state prosecutors draw their power to prosecute from the same source.[147]

Perhaps the best analogy for this situation is a well. When municipal prosecutors make an agreement, they are drawing water from the same well that state prosecutors use when making agreements.[148] Once a municipal prosecutor has taken water out of the well, the state prosecutor cannot dip a bucket in and take out that same water because it is already gone. In the same way, when a municipal prosecutor charge-bargains with a defendant, the state prosecutor cannot turn around and try to make the same bargain at a later date.

Applying judicial estoppel in this manner would not unfairly constrain municipal and state prosecutors because the doctrine would be limited to a very particular subset of cases. Normally, a state prosecutor would be prohibited from "double dipping" into the well by the doctrine of double jeopardy.[149] Therefore, state and municipal prosecutors who know that they may be pursuing the same charges against a defendant will, or at least should, already be communicating about their decisions.[150] Therefore, a holding that municipal and state prosecutors are the same party for the purposes of judicial estoppel would not operate to impose significant new

144. *See supra* Section V.

145. Santobello v. New York, 404 U.S. 257, 262 (1971).

146. Waller v. Florida, 397 U.S. 387, 393 (1970).

147. *Id.*

148. *Id.* at 395 (noting that a municipality and a state both derive their power to prosecute from the same source).

149. *See supra* Section III.

150. *See Waller*, 397 U.S. at 396 (holding that a municipality and a state are the same sovereign for purposes of double jeopardy and thus prohibiting one from prosecuting a defendant if the other one has already done so for the "same offense").

burdens on prosecutors. Rather, it would reinforce existing responsibilities and close a loophole that unfairly prejudices criminal defendants and undermines the legitimacy of the courts.

B. Agreeing to Dismiss a Charge and Later Re-Charging a Defendant Is a Clearly Inconsistent Position

When a municipal prosecutor agrees to dismiss a charge, and a state prosecutor later re-charges a defendant for that crime, the prosecutors have taken clearly inconsistent positions. The act of dismissing a charge on its own may not be enough to establish a position, but any agreement that a prosecutor makes with a defendant agreeing to dismiss the charge is a position.[151] The fact that these would be two different prosecutions of the defendant makes no difference for purposes of judicial estoppel.[152] When a party accepts a plea agreement, he or she expects the other party to respect and abide by the terms of the plea agreement.[153] Failing to abide by an agreement to dismiss criminal charges is clearly inconsistent with the plea agreement and undermines the public's trust in the integrity of prosecutors and the courts.[154]

C. A Court's Acceptance of a Plea Agreement Constitutes the Successful Maintenance of a Prosecutor's Position

When a prosecutor charge-bargains or charge-slides, the goal is to reach a conclusion in the case.[155] Therefore, when a judge agrees to accept that plea agreement, the prosecutor has obtained their desired benefit—a guilty plea.[156] When a party obtains the benefits that it desires from its position, it has "successfully maintained" its position.[157] Therefore, unless judicial estoppel operates to bind the prosecutors to their earlier position of dismissing the charges, the prosecutors could undermine the integrity of the judicial process and reap its benefits.[158]

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151. *See* Brooks v. Fletcher, 337 S.W.3d 137, 145 (Mo. Ct. App. 2011) ("[E]ven when the prior statements were not made under oath, the doctrine may be invoked to prevent a party from playing 'fast and loose with the courts.'" (quoting State *ex rel.* KelCor, Inc. v. Nooney Realty Trust, Inc., 966 S.W.2d 399, 403 (Mo. Ct. App. 1998))).

152. *Id.* at 146.

153. Santobello v. New York, 404 U.S. 257, 260 (1971).

154. New Hampshire v. Maine, 532 U.S. 742, 749–50 (2001).

155. *See supra* notes 41–44 and accompanying text.

156. *Cf. Brooks*, 337 S.W.3d at 144 (finding a successfully maintained position when a party obtained benefits from its previously asserted position).

157. *Id.*

158. *New Hampshire*, 532 U.S. at 749–50.

D. Prosecutors Derive an Unfair Advantage from This Loophole in the Double Jeopardy Jurisprudence

Prosecutors who exploit this loophole in the double jeopardy jurisprudence are unfairly advantaging themselves and unfairly punishing criminal defendants. If prosecutors are actively using this loophole to guarantee plea agreements in municipal courts before pursuing stiffer punishments in state court, they are acting in bad faith and gaining an unfair advantage.[159] Unaware criminal defendants, such as Leigh, could find themselves punished twice for the same actions and placed at the mercy of prosecutors who already hold many of the bargaining chips.[160] However, even if prosecutors do not intentionally abuse this loophole, criminal defendants are still unfairly punished.[161] A criminal defendant caught in this unenviable situation will be subject to double punishment for one set of actions, regardless of the good or bad faith of the prosecutors involved.[162]

The "unfairness" requirement[163] bars the prosecution from using a judicial estoppel argument to prohibit a criminal defendant from claiming that a previous plea was baseless. An enterprising prosecutor could argue that, because a defendant admitted to committing the factually baseless crime in a plea colloquy, a defendant cannot now argue that the plea was factually baseless. This argument fails because a defendant is not "unfairly" claiming that the plea was factually baseless.[164] The defendant is simply trying to protect themselves from subsequent prosecutions. If a defendant had instead pleaded guilty to a factually based lesser-included crime, they would already be protected by the Double Jeopardy Clause.[165] This use of judicial estoppel merely closes a loophole in the double jeopardy doctrine.[166]

The "unfairness" requirement, and the balancing of the equities, enables judicial estoppel to fix this loophole in the Double Jeopardy Clause.[167] This doctrine is flexible, and it can be applied in a limited case-by-case

159. *See id.* at 755 (balancing the equities when applying judicial estoppel and finding that a party's assertion of two inconsistent positions would undermine "the integrity of the judicial process").

160. *See supra* Section I.

161. Child Support Enf't v. North, 444 S.W.3d 905, 910 (Mo. Ct. App. 2014) (recognizing that when one party obtains an unfair benefit, the other party is left with an unfair disadvantage).

162. *See supra* Section IV.

163. *New Hampshire*, 532 U.S. at 751 (discussing the third factor in the judicial estoppel doctrine, which looks at whether the party has derived an "unfair" advantage).

164. *See, e.g.*, *North*, 444 S.W.3d at 910 (finding that a father received an unfair benefit over a mother in child support proceedings when he took two inconsistent positions about his obligations to the mother).

165. *See supra* notes 84–87 and accompanying text.

166. *See supra* Section IV.

167. *See supra* Section IV.

manner.[168] Therefore, it can provide criminal defendants with necessary protections from abuse of the judicial process and ensure that prosecutors are not overly burdened or limited.

CONCLUSION

Factually baseless pleas undermine justice. Inherently, these pleas are lies that our system has adopted to patch together a case-by-case attempt to render fair verdicts.[169] While these factually baseless pleas may help individual defendants receive lenient sentences and may allow prosecutors and judges to quickly clear their caseloads, they do not provide a consistent and predictable criminal legal system.[170] These pleas undermine the intent of the legislature because the crimes that the legislature defined are no longer being enforced.[171] When a prosecutor amends a crime to a lesser-included or related crime, the crime still has some factual basis that ensures the defendant is being "appropriately" punished for his or her actions.[172] However, when the defendant accepts a factually baseless plea, his or her punishment is only related to the crime by the prosecutor's loose approximation of what justice requires.[173] This is an inappropriate way to determine justice.

Therefore, in order to avoid the issues presented by factually baseless pleas, specifically in the Double Jeopardy context, it may be best to follow the lead of Iowa[174] and eliminate factually baseless pleas entirely. However, in the interim, Courts should use the doctrine of judicial estoppel to protect criminal defendants from prosecutorial abuse of factually baseless pleas.[175] Hopefully, judicial estoppel can provide criminal defendants protection

168. Brooks v. Fletcher, 337 S.W.3d 137, 140–46 (Mo. Ct. App. 2011) (applying the factors enunciated in *New Hampshire v. Maine*, and also considering individualized factors such as time between the inconsistent statements, good faith, and the relationship of the lawsuits).

169. *See supra* Section II.

170. *See supra* Section II.

171. *See* Byrne, *supra* note 9, at 2967 n.28; *cf.* People v. Stephenson, 30 P.3d 715 (Colo. App. 2000). When the legislature defines the elements of the crime of littering, they intend for people who have littered to be punished accordingly. *See id.* However, when the prosecutor punishes someone under the littering statute for actions which constitute marijuana possession, they are re-defining the elements of the crime and superseding the legislature's intent. *See id.*

172. *See supra* Section II.

173. *See supra* Section II.

174. *See* Iowa Supreme Court Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 367 (Iowa 2005).

175. *See supra* Section V.

from abuses of prosecutorial power and ensure that defendants like Leigh do not "live in a continuing state of anxiety and insecurity."[176]

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176. Green v. United States, 355 U.S. 184, 187 (1957).

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