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2011

Bargaining with Double Jeopardy

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Recommended Citation

Saul Levmore & Ariel Porat, "Bargaining with Double Jeopardy" (John M. Olin Program in Law and Economics Working Paper No. 553, 2011).

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CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 553
(2D SERIES)

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THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

May 2011

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Bargaining with Double Jeopardy

Saul Levmore and Ariel Porat

Forthcoming: Journal of Legal Studies (2011)

Abstract

Virtually every legal system specifies a variety of burdens of proof for different kinds of claims, and then secures each specification with another, nominally unrelated rule pertaining to relitigation. In criminal law, where a prosecutor might be required to prove guilt beyond a reasonable doubt, the prosecutor is prevented from repeatedly drawing from the urn, as it were, by the familiar and nearly universal rule of double jeopardy. We suggest that if law were to weaken the protection, or more likely to permit the defendant to waive the double jeopardy protection, both private and social benefits might follow. The benefits derive from the notion that with a simple double jeopardy rule, the prosecutor – like most people who take a test knowing that there is no opportunity for retesting – will overinvest in preparation. This starting point also illuminates relitigation, or retesting, in other areas, far from criminal law. Thus, deficit spending by a legislature can be understood as a product of a system in which spending proposals that are rebuffed can be pushed forward again, while those that pass are often irreversible. Our focus is on the idea that a prosecutor might offer defendants the option of waiving their double jeopardy protection, in return for a reduction in prosecutorial investment in the “first” trial and perhaps other benefits. In response, innocent defendants might be more likely to accept the prosecutor’s offer, in which case there will be socially beneficial sorting of criminal defendants.