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Kevin O'Keefe

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TWO WRONGS MAKE A WRONG: A CHALLENGE TO PLEA BARGAINING AND COLLATERAL CONSEQUENCE STATUTES THROUGH THEIR INTEGRATION

Kevin O'Keefe^{*}

In the modern criminal justice system, adherence to expedience and pragmatism have contributed to the prevalence of two practices that have questionable constitutional bases: plea bargains and postconviction civil penalties. Each practice has been challenged in the courts individually and has survived judicial scrutiny. And as these two practices have become more commonplace, their continued intersection and interaction has become increasingly inevitable; however, even a superficial analysis of this combination of plea bargaining and postconviction civil penalties demonstrates that the constitutionality of the two practices can no longer be justified by an uneasy compromise with practicality.

This Comment is intended to illustrate the nature and the extent of the intersecting practices of plea bargaining and postconviction civil penalties. Furthermore, by embracing the contract-based approach to the theoretical justification of plea bargaining, this Comment argues that retroactive postconviction civil penalty statutes—in particular the most recently enacted federal sexual offender registration and notification law—should not survive a due process challenge and accordingly should not apply to plea-convicted defendants. At the very least, this Comment hopes to demonstrate that the individually debatable practices of plea bargaining and postconviction civil penalties have grown and interwoven to such an extent that, in light of the basic dictates of fairness and due process, the state has finally gone too far.

^{*} J.D. Candidate, Northwestern University School of Law, May 2010; B.A., Harvard College, 2004. I would like to thank the 2008-2009 and 2009-2010 Editorial Boards and Staff of the Journal of Criminal Law & Criminology for the inestimable amount of assistance and patience that went along with the editing and publication of this Comment. Any errors in the foregoing comment are the responsibility of the author.

I. INTRODUCTION

The prevalence of plea bargaining in the U.S. criminal justice system is undisputed, though the desirability of such a system has been a subject of considerable debate for decades.¹ Regardless of the constitutional improprieties and injustices that both sides of the debate recognize as flaws inherent to the system, both sides acknowledge that plea bargaining derives most of its justification from the principles of contract.² The individual defendant exchanges certain constitutional rights for a more lenient sentence with absolute certainty.³ The prosecution, as the agent of the state, foregoes the opportunity to pursue a higher sentence for the defendant and saves the time and expense of proving the defendant guilty beyond a reasonable doubt.⁴ A closer inspection of the particulars of the plea bargaining system reveals that the plea bargain is not the classical theoretical bargain.⁵ However, the basic justification for its existence is that, at its most fundamental level, the plea bargain is a mutual exchange of considerations between two parties: the individual defendant and the state.⁶

Much like plea bargaining, postconviction civil penalties, arising out of what are known as collateral consequence statutes, have been part of the U.S. criminal justice system for a considerable period of time.⁷ At least

¹ See, e.g., Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237 (2008); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1906 (1992); Stephen A. Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265 (1978); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

² See generally Scott & Stuntz, *supra* note 1. See also Easterbrook, *supra* note 1, at 1974-75; Schulhofer, *supra* note 1, at 1980.

³ See Scott & Stuntz, *supra* note 1, at 1914.

⁴ See Easterbrook, *supra* note 1, at 1975.

⁵ In addition to a bilateral asymmetry of information, the parties to a plea bargain will always be of extremely disproportionate power; setting aside the instances of bargaining among multiple co-defendants, the only parties to a plea bargain are the individual defendant and the entire state law enforcement body. For further discussion, see *infra* Part II.A.

⁶ See Scott & Stuntz, *supra* note 1, at 1912-13.

⁷ See Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1061-64 (describing disenfranchisement statutes that were applied against convicted offenders during both the colonial period and the years following the ratification of the Constitution). For a brief survey of the more common collateral consequence statutes, see Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634-39 (2006).

with respect to convicted sexual offenders, the use of collateral consequences to punish individual defendants further after sentencing has become a pervasive practice in the United States. Most notably, on September 13, 1994, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act) was signed into law.⁸ Individual states have been creating their own systems of sexual offender registration since 1947;⁹ however, with the enactment of the Wetterling Act, states are now *required* to devise and implement sexual offender registration systems.¹⁰ While this was by no means the first instance of a collateral consequence statute, nor the beginning of the trend towards imposing civil penalties against convicted sexual offenders,¹¹ the passage of the Wetterling Act represented the first federal imposition of collateral consequences upon any criminal defendant convicted of a sexually based offense.¹² Through subsequent amendments and bills, Congress has supplemented this initial mandate with many more requirements for the state registration systems, most recently in the Adam Walsh Child Protection and Safety Act of 2006 (Walsh Act).¹³

Plea bargaining and collateral consequence statutes are two entirely separate practices, but are similar in the sense that neither seems to comport with the classic model of criminal justice: a trial followed by a sentence imposed by the trial court. Additionally, both practices are ubiquitous in the modern criminal justice system. By way of illustration, in the federal court system, guilty pleas account for 96% of convictions,¹⁴ and over forty different post-sentence restrictions automatically apply to individuals convicted of felonies.¹⁵ Accordingly, any analysis of collateral consequence statutes in the modern criminal justice system needs to be conducted with an eye toward plea bargaining, and vice versa. And because

⁸ Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)).

⁹ Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 5 (2008).

¹⁰ Wetterling Act § 170101(f)(1).

¹¹ New Jersey is widely credited with enacting the forerunner of modern sex offender collateral-consequence statutes, Megan's Law, in 1994. *See* Logan, *supra* note 9, at 5; *see also* N.J. STAT. ANN. § 2C:7-1 (West 2005).

¹² *See* Wetterling Act § 170101(f)(1); Logan, *supra* note 9, at 5.

¹³ Pub. L. No. 109-248, 120 Stat. 587 (codified as amended at 42 U.S.C. § 16901 (2006)).

¹⁴ U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2008), available at <http://www.ussc.gov/ANNRPT/2008/FigC.pdf>.

¹⁵ *See* COMM'N ON EFFECTIVE CRIM. SANCTIONS, A.B.A. & PUB. DEFENDER SERV. FOR D.C., INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS app. 2 (2009), available at <http://www.abanet.org/cccs/interalexile.pdf> [hereinafter INTERNAL EXILE].

these individual practices are so prevalent, the constitutional analyses and theoretical bases of plea bargaining and collateral consequences should be revisited with emphasis on their integration.

This Comment focuses on the sexual offender collateral consequence statutes, and the Walsh Act in particular, for two reasons. First, sexual offender collateral consequences have often been (and now must be, per the Walsh Act) applied retroactively.¹⁶ In other words, defendants who were convicted and served their sentences completely prior to the enactment of a collateral consequence statute are still subject to registration and notification requirements.¹⁷ Second, offenders are assessed civil penalties by way of the collateral consequence statute based solely on their previous conviction.¹⁸ A defendant's particular conviction determines whether and how the collateral consequence statute is applied.¹⁹ There are certainly other retroactively applied collateral consequences, but sexual offender registration systems under the Walsh Act provide the clearest example of how the legal justifications for collateral consequence statutes may not comport with the criminal justice system as it functions today.

Courts have upheld the use of plea bargains to waive constitutional rights in exchange for a presumably more lenient sentence, most notably in *Brady v. United States*.²⁰ Similarly, retroactive collateral consequence statutes have been found constitutional in response to challenges based on both the Ex Post Facto Clause²¹ and procedural due process requirements.²² The problematic aspect, and the thrust of this Comment, is that retroactive collateral consequence statutes violate the basic justifications for the guilty plea. In short, when an individual defendant bargains with the state for a

¹⁶ Sex Offender Registration and Notification, 28 C.F.R. § 72.3 (2009) ("The requirements of the [Walsh Act] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.").

¹⁷ *Id.*

¹⁸ Adam Walsh Child Protection and Safety (Walsh) Act of 2006 § 111(2)-(4), Pub. L. No. 109-248, 120 Stat. 587 (defining sex offender tiers through convictions of crimes that are comparable to a specified list of federal crimes).

¹⁹ By way of comparison, numerous states had enacted and used forward looking approaches prior to the Walsh Act. Those states would assess the defendant's risk of recidivism upon release based on a number of statutory or regulatory factors. That risk assessment would in turn define the extent of the duration of required registration and also the extent of community notification that his or her release would entail. See e.g., ARK. CODE ANN. § 12-12-917 (Supp. 2009); MASS. GEN. LAWS ch. 6, § 178K(1) (LexisNexis 1999 & Supp. 2009); N.J. STAT. ANN. § 2C:7-8 (West 2005); R.I. GEN. LAWS. § 11-37.1-6(b) (Supp. 2008).

²⁰ 397 U.S. 742 (1970).

²¹ U.S. CONST. art. I, § 9, cl. 3; e.g., *Smith v. Doe*, 538 U.S. 84 (2003).

²² E.g., *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

specific, more lenient sentence,²³ a retroactive collateral consequence statute is a unilateral change in terms by the state after the bargain, which adds to the defendant's offered consideration, consisting of the bargained-for sentence. This Comment argues that such retroactive statutes are a breach of the original contract by the state, and therefore plea-bargained defendants that are subject to these statutes should have some remedy available, such as non-application of the retroactive statute if not outright rescission of the original agreement.

In a purely contractual context, a plea-convicted defendant's right to challenge the application of retroactive statutes seems fair and intuitive, but there are several legal hurdles to overcome before an argument for remedy or rescission based on contract law will appear legally legitimate and non-frivolous. As a threshold matter, a purely contractual approach to revisiting a plea bargain is almost irrelevant in practice, because principles of contract law and criminal law have had an uneasy coexistence with respect to plea bargaining. Quite simply, there are certain inherent aspects of plea bargaining that are antithetical to the assumptions of the classic theoretical contract.²⁴

Furthermore, there are several established principles of contract law that a defendant would have to overcome in order to receive a remedy. The sovereign acts doctrine, as originally recognized in *Horowitz v. United States*,²⁵ creates a considerable hurdle for an individual to properly assert that the legislative acts of the state can be viewed as acts of a contracting party.²⁶ Additionally, the question of risk assumption in the context of guilty pleas has considerable bearing on whether stronger remedies, such as non-application of the statute or rescission, may be justified.²⁷ Finally, there is the issue of whether application of these retroactive collateral consequence statutes can even be considered a breach of the agreement.²⁸

²³ It is the court, and not the government, that has the ultimate sentencing authority in every plea bargain case. However with very few exceptions, the resulting sentence in actual practice is always either the bargained sentence or within the bargained range of sentences. See Easterbrook, *supra* note 1, at 1973.

²⁴ See Easterbrook, *supra* note 1, at 1974; Scott & Stuntz, *supra* note 1, at 1911-13. Several examples are discussed *infra* Part III.A.

²⁵ 267 U.S. 458 (1925).

²⁶ *Id.* at 461.

²⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 154 (1981).

²⁸ As with any contract, the issue of whether there is a breach is not always clear, particularly in light of the fact that the collateral consequence statutes at issue will have been enacted years after many of the plea bargains were thought to have been fully performed. The Supreme Court has addressed the issue of existence of breach in the context of performance of services contemplated in a plea bargain. See, e.g., *Mabry v. Johnson*, 467 U.S. 504, 509-11 (1984).

Even if the ultimate remedies of rescission or non-application of the civil penalty are not available, this Comment intends to demonstrate that while plea bargaining and retroactive collateral consequences are both accepted and prevalent practices in the U.S. criminal justice system, the combination of the two is not theoretically justified. At the very least, one or both systems should be reevaluated in light of their conflicting rationalizations.

This Comment begins with short histories of guilty pleas and collateral consequence statutes in the U.S. criminal justice system. In particular, Part II describes the rise in prominence of plea bargaining and the rationale for its legitimacy in the law, paying particular attention to the pragmatic justifications driving the increase in guilty pleas and forming the basis for the legality of the practice. It then goes on to describe the history of collateral consequences, focusing on the largely recent developments in sexual offender registration and notification laws. In particular, it explains that the newly mandated federal system for classification of offenders and its retroactive application eviscerates the bargains contemplated by guilty pleas. Stringent notification and registration requirements are levied upon defendants who had bargained for, and may have even completed, particular sentences prior to the enactment of the new federal law. Part II concludes with a survey of the previous constitutional challenges to sexual offender registration and notification statutes along with a brief description of why they were unsuccessful. In short, conviction-based offender classification systems do not violate procedural due process because their application is determined by the outcome of a criminal trial, and registration and notification laws do not violate the Ex Post Facto Clause because they are civil and non-punitive measures.²⁹ Finally, previous substantive due process challenges have failed because there is neither a history nor tradition of not having to register oneself for past sexual offenses.

Part III of this Comment focuses on the contractual rationale for plea bargains and serves to describe the underlying basis for my eventual argument. First, it briefly describes the contract-based arguments for and against plea bargaining. It then continues with a more detailed analysis of three Supreme Court cases that invoke doctrines of contract law to adjudicate cases concerning alleged breaches of plea agreements. These three cases in turn create a limited jurisprudence for analyzing whether plea agreements are breached by subsequent state action.

²⁹ The fact that registration and notification statutes are constitutional because they rely solely upon the outcomes of criminal trials, but are simultaneously deemed civil sanctions, did not escape the author's attention. This Comment does not attempt to reconcile these conflicting rationales because the author is simply unable to do so.

Part IV builds on the jurisprudence derived from these three cases and explains how it informs the subsequent analysis of the integration of collateral consequence statutes and plea agreements. In short, if the state is the bargaining partner to the plea agreement, and the enactment and enforcement of a collateral consequence statute is a subsequent act by that party to the contract, then compelling compliance with that statute should be considered a breach of that plea agreement by the state. Part IV continues the plea agreement breach analysis by casting the hypothetical defendant's claim as a substantive due process challenge. In contrast to the cases recounted in Part II that were based on the defendant's right to not have his or her conviction publicized, this challenge relies instead on the defendant's right to have his or her plea agreement enforced—a right that has considerably more history and tradition.

Having identified a possibly successful challenge to the retroactive enforcement of collateral consequence statutes, Part V concludes the Comment by addressing two responses to this contract-based challenge: the severability doctrine and whether the defendant has assumed the risk of a subsequently enacted collateral consequence statute. While both defenses are plausible, neither is particularly conclusive, and, in light of the obvious unfairness resulting from retroactive collateral consequence statutes, neither should be fatal to the defendant's hypothetical claim.

II. BACKGROUND

A. GUILTY PLEAS

It is unclear when the practice of plea bargaining began, as it is difficult to determine what sentences were the result of a bargain, as opposed to the result of the normal processes of criminal law.³⁰ Prior to the 1920s, the earliest reported instances of plea bargaining in judicial opinions concerned the courts' disapproval of the practice.³¹ However, studies suggest that the Prohibition era, possibly due to its corresponding expansion of criminal codes, was when the widespread usage and acceptance of the guilty plea in the United States was first acknowledged.³² Surveys of the criminal justice systems conducted during this period revealed that in at

³⁰ Alschuler, *Plea Bargaining and Its History*, *supra* note 1, at 1-6.

³¹ *Id.* at 5-6.

³² *Id.*; GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 6 (2003) ("The first wave, in the 1920's and early 1930's, marked the true age of plea bargaining's discovery.").

least eight major cities, the rate of felony convictions obtained through guilty pleas was well over 70%.³³

Plea bargaining continued without clear judicial legitimacy until the Supreme Court officially sanctioned the practice in 1970 in *Brady v. United States*.³⁴ In *Brady*, the defendant initially pleaded not guilty to kidnapping with the aggravated circumstance of inflicting harm upon the victim.³⁵ Upon learning that his codefendant had pleaded guilty and was willing to testify against him, the defendant pleaded guilty in exchange for a fifty-year prison sentence and foreclosure of the possibility of a death sentence.³⁶ The defendant challenged the conviction on the basis of coercion, realized through the threat of testimony from the codefendant and potential death penalty if he went to trial.³⁷ Citing the prevalence of the pleas and the infeasibility of abolition of the practice, the Court upheld the conviction and validated the practice of plea bargaining.³⁸ The Court's legal basis for the decision was that juries and judges have considerable discretion to sentence defendants; thus, precluding the maximum penalty is a rational choice by the defendant,³⁹ and guilty pleas are constitutional so long as they meet the knowing and voluntary requirements of Rule 11 of the Federal Rules of Criminal Procedure.⁴⁰ The Court then specifically noted the "mutuality of advantage" that is inherent in the plea bargaining process to further support its holding.⁴¹

At the time of the *Brady* decision, over 75% of all criminal convictions were obtained through guilty pleas.⁴² In June of 2009, the Court noted that guilty pleas now account for over 95% of state and federal convictions.⁴³

³³ Alschuler, *Plea Bargaining and Its History*, *supra* note 1, at 26. In 1908, the federal rate of convictions by guilty plea was about 50%; it increased to 72% in 1916 and was almost 90% by 1925. *Id.* at 27.

³⁴ 397 U.S. 742 (1970).

³⁵ *Id.* at 743.

³⁶ *Id.* at 743-44.

³⁷ *Id.* at 749-51.

³⁸ *Id.*

³⁹ *Id.* at 751.

⁴⁰ *Id.* at 751-52. "Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)." FED. R. CRIM. P. 11(b)(2).

⁴¹ *Brady*, 397 U.S. at 752.

⁴² *Id.*

⁴³ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009).

B. COLLATERAL CONSEQUENCES

The practice of attaching civil penalties to felony and misdemeanor convictions is just as pervasive as the practice of plea bargaining. Depending on one's definition, collateral consequences, at least with respect to felony disenfranchisement, have origins that predate the U.S. criminal justice system.⁴⁴ Currently, federal and state collateral consequence statutes encompass a number of facets of everyday life, including eligibility for welfare, public housing, student aid, and alien residency; the right to vote and serve on a jury; and restrictions on employment, including the military.⁴⁵

Sexual offender registration, on the other hand, has a considerably shorter history. California was the first state to enact a general registration system for all convicted sexual offenders in 1947.⁴⁶ Between 1947 and 1993, thirteen states and the federal government passed sexual offender registration laws,⁴⁷ but it was not until 1994 that sexual offender registration gained national prominence with New Jersey's passage of Megan's Law.⁴⁸ Like all of the previously enacted statutes, New Jersey's Megan's Law created a registration system,⁴⁹ but unlike all but one other state,⁵⁰ the New Jersey statute also created a community notification system.⁵¹ The previously enacted federal statute, the Wetterling Act, mandated that the states implement registration programs, but merely permitted the states to

⁴⁴ Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 283, 331 (2007).

⁴⁵ Pinard, *supra* note 7, at 635-36 (citations omitted); *see also* INTERNAL EXILE, *supra* note 15, app. 2.

⁴⁶ Logan, *supra* note 9, at 5.

⁴⁷ *See id.* at 5-6.

⁴⁸ *Id.*; N.J. STAT. ANN. § 2C:7-1 (West 2005).

⁴⁹ N.J. STAT. ANN. § 2C:7-2 (West 2005).

⁵⁰ Washington was actually the first state to allow for community notification. 1990 Wash. Sess. Laws 25 § 117 ("Public agencies are authorized to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection."). It is unclear why New Jersey's community-notification law, and not Washington's, triggered such interest nation-wide and motivated the federal government to subsequently mandate notification laws in each state.

⁵¹ N.J. STAT. ANN. § 2C:7-6 (West 2005):

Within 45 days after receiving notification . . . that an inmate convicted of or adjudicated delinquent for a sex offense . . . is to be released from incarceration and after receipt of registration as required therein, the chief law enforcement officer of the municipality where the inmate intends to reside shall provide notification . . . of that inmate's release to the community. If the municipality does not have a police force, the Superintendent of State Police shall provide notification.

create community notification systems.⁵² Shortly after New Jersey enacted its Megan's Law, Congress amended the Wetterling Act with its own Megan's Law in 1996, this time requiring states to implement their own community notification systems in addition to the existing offender registration requirement.⁵³

Congress has continued to amend the requirements for state sexual offender registration and notification systems following the federal Megan's Law.⁵⁴ For the purposes of this Comment, the most recent amendment, the Walsh Act,⁵⁵ is the most significant. In particular, it changed the existing state requirements for registration and notification in two fundamental ways. First, states must now apply the modified sexual offender registration and notification requirement provisions of the act retroactively.⁵⁶ Second, the Walsh Act requires that states follow a three-tiered notification system based solely upon the conviction of the sexual offender (the "backward-looking" approach).⁵⁷

Tiered notification systems that are based on the severity of a defendant's conviction were not particularly new; numerous states had already implemented such an approach⁵⁸ in which more serious crimes result in community notification, but less serious crimes only result in notification to law enforcement.⁵⁹ This backward-looking approach was not universal, however, as approximately fifteen other states instead used "forward-looking" approaches, in which tier designations that determine the extent of community notification are based not just on the severity of the offender's conviction, but also on that particular offender's risk of recidivism.⁶⁰ Therefore, the problematic aspect of this provision of the

⁵² Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. § 14701(b) (2006)).

⁵³ Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345, 1345 (1996) ("The designated State law enforcement agency . . . shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section . . .") (codified as amended at 42 U.S.C. § 14701(e)(2) (2006)).

⁵⁴ Reforms included the creation of a national registration system primarily for law enforcement purposes and a mandate for states to publish registration information on the internet. Logan, *supra* note 9, at 6.

⁵⁵ Pub. L. No. 109-248, 120 Stat. 587 (codified as amended at 42 U.S.C. § 16901 (2006)).

⁵⁶ Sex Offender Registration and Notification, 28 C.F.R. § 72.3 (2009).

⁵⁷ Walsh Act § 111.

⁵⁸ Among them, the New Jersey system created by Megan's Law. N.J. STAT. ANN. § 2C:7-1 (West 2005).

⁵⁹ *Id.*

⁶⁰ Logan, *supra* note 9, at 10. For example, the New Jersey Megan's Law, enacted in 1994, determined notification tier designations through the analysis of these non-exclusive factors:

Walsh Act is that it requires that each state use the backward-looking approach for community notification, which is in direct conflict with the forward-looking approach that a number of states had individually implemented and used for some time.⁶¹

The significance of these two provisions of the Walsh Act is that, theoretically, any individual in any state who has pleaded guilty to a sexual offense for a specified sentence at any time is now subject to, at a minimum, the registration and notification requirements specified in the act, regardless of whether or not the individual had pleaded guilty to the offense or even served the agreed sentence before the enactment of the Walsh Act in 2006.⁶² Federalism concerns aside,⁶³ the Walsh Act embodies a

(1) Conditions of release that *minimize risk of re-offense*, including but not limited to whether the offender is under supervision of probation or parole; receiving counseling, therapy or treatment; or residing in a home situation that provides guidance and supervision;

(2) Physical conditions that *minimize risk of re-offense*, including but not limited to advanced age or debilitating illness;

(3) Criminal history factors *indicative of high risk of re-offense*, including: (a) Whether the offender's conduct was found to be characterized by repetitive and compulsive behavior; (b) Whether the offender served the maximum term; (c) Whether the offender committed the sex offense against a child;

(4) Other criminal history factors to be considered in determining risk, including: (a) The relationship between the offender and the victim; (b) Whether the offense involved the use of a weapon, violence, or infliction of serious bodily injury; (c) The number, date and nature of prior offenses;

(5) Whether psychological or psychiatric profiles *indicate a risk of recidivism*;

(6) The offender's response to treatment;

(7) Recent behavior, including behavior while confined or while under supervision in the community as well as behavior in the community following service of sentence; and

(8) Recent threats against persons or expressions of intent to commit additional crimes.

N.J. STAT. ANN. § 2C:7-8(b) (West 2005) (emphasis added).

⁶¹ Logan, *supra* note 9, at 10.

⁶² See Sex Offender Registration and Notification, 28 C.F.R. § 72.3 (2009); see also Walsh Act § 124 ("Each jurisdiction shall implement this title before . . . 3 years after the date of the enactment of this Act . . ."). States that do not implement the requirements of the Walsh Act will be subject to a 10% decrease in federal crime prevention funding unless the state's highest court rules that certain requirements would violate that state's constitution. See *id.* § 125.

⁶³ Several district courts have held that certain aspects of the Walsh Act are not within Congress' power under the Interstate Commerce Clause. *E.g.*, *United States v. Powers*, 544 F. Supp. 2d 1331 (M.D. Fla. 2008) (noting that the Congress does not have power under Interstate Commerce Clause to criminalize failure to register by an individual convicted of a state sex offense). For a more thorough treatment of the federalism problems that the mandated registration requirements of the Adam Walsh Act creates, see Logan, *supra* note 9, at 7-13.

significant change in terms for those sexual offenders who bargained for a specific sentence.

C. PREVIOUS CHALLENGES TO SEXUAL OFFENDER REGISTRATION

1. *Procedural Due Process*

In *Connecticut Department of Public Safety v. Doe*,⁶⁴ the state agency appealed district court and circuit court decisions enjoining it from employing its sexual offender registration and notification system.⁶⁵ An unnamed individual who was subject to the sexual offender registration and notification system of Connecticut successfully brought suit under 42 U.S.C. § 1983 claiming that the statute creating the registration and notification system deprived him of a liberty interest—namely his right to due process.⁶⁶ At the time of the suit, Connecticut's registration system was, like the systems required by the Walsh Act, backward-looking: it determined the extent of community notification based on the offense of conviction.⁶⁷ At the district and circuit court levels, Doe successfully argued that the registration requirements violated his right to due process because he was not afforded a hearing to dispute the determination that he was "currently dangerous."⁶⁸ However, the Supreme Court reversed.⁶⁹ Declining to reach the issue of whether the registration and publication requirements infringe on a liberty interest,⁷⁰ the Court held that Doe's dangerousness was irrelevant under Connecticut's registration statute since it relied solely upon the previous conviction.⁷¹ Since Doe's tier designation was not based on his current dangerousness, but rather on the outcome of his trial, the state was not required to provide a hearing before imposing the sanction, and therefore did not violate procedural due process by failing to

⁶⁴ 538 U.S. 1 (2003).

⁶⁵ *Id.* at 6-7.

⁶⁶ *Id.*

⁶⁷ *Id.* at 4-5.

⁶⁸ *Id.* at 7.

⁶⁹ *Id.* at 8.

⁷⁰ *Id.* at 7. The Court's refusal to address whether there was a liberty interest at issue expressly left open the possibility that such an interest may exist and provide the proper basis for a substantive due process claim. *See id.* at 8 (Scalia, J., concurring) (noting that in order to succeed in challenging the Connecticut registration system, Doe would have to claim that a liberty interest was implicated and "that the liberty interest in question was so fundamental as to implicate so-called 'substantive' due process"). While several circuit courts have addressed substantive due process claims, the Supreme Court thus far has not. *See infra* Part II.C.3.

⁷¹ *Id.*

do so.⁷² It should be noted that states that employ forward-looking approaches to tier designations do provide hearings for the individuals to challenge the assessment of their current dangerousness.⁷³

2. *Ex Post Facto Clause*

In *Smith v. Doe*, the State of Alaska appealed a decision of the Ninth Circuit that enjoined the state from enforcing its retroactive, backward-looking sexual offender registration and notification system because it violated the Ex Post Facto Clause.⁷⁴ This case is particularly relevant because the sexual offenders who brought the § 1983 suit had pleaded *nolo contendere* to their initial offenses and completed their sentences well before the state registration system was created.⁷⁵

The first step for the Court was to determine whether the law was meant to impose punishment or to impose civil, non-punitive measures.⁷⁶ Accordingly, the Court looked to “the statute’s text and its structure to determine the legislative objective.”⁷⁷ The stated primary intent of the statute, according to the legislature, is “protecting the public from sex offenders,”⁷⁸ which is in keeping with the purposes of the state’s criminal law. The registration requirements were codified in Alaska’s criminal procedure code, but the notification provisions were codified in the state’s “Health, Safety, and Housing Code.”⁷⁹ Finally, after the enactment of the

⁷² *Id.* at 7-8.

⁷³ *E.g.*, MASS. GEN. LAWS ANN. ch. 6, § 178M (West 1999) (“An offender may seek judicial review . . . of the board’s final classification and registration requirements.”); OFFICE OF THE ATTORNEY GEN., STATE OF N.J., ATTORNEY GENERAL GUIDELINES FOR LAW ENFORCEMENT FOR THE IMPLEMENTATION OF SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS § 2 (revised 2007), *available at* <http://www.nj.gov/oag/dcj/megan/meganguidelines-2-07.pdf> (“The decision [of level of risk of re-offense] is subject to judicial review in accordance with the procedures established by the Supreme Court of New Jersey.”).

However, such systems with individual determinations of “current dangerousness” could give rise to equal protection claims. *See Conn. Dep’t of Pub. Safety*, 538 U.S. at 10 (Souter, J., concurring) (noting that legislative line-drawing among a class of convicted sexual offenders would be open to challenges under the Equal Protection Clause). Also, Professor Logan posits that Congress specifically rejected the forward-looking approach and chose the backward-looking approach for the Walsh Act, because it would not be challenged on procedural due process grounds in light of *Connecticut Department of Public Safety*. *See* Logan, *supra* note 9, at 13.

⁷⁴ 538 U.S. 84 (2003).

⁷⁵ *Id.* at 91.

⁷⁶ *Id.* at 92 (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

⁷⁷ *Id.*

⁷⁸ *Id.* at 93 (quoting 1994 ALASKA SESS. LAWS ch. 41, §1).

⁷⁹ *Id.* at 94.

system, Alaska amended its Rules of Criminal Procedure so that the court must notify defendants of the registration and notification implications of sexual offenses before it can accept a guilty plea.⁸⁰ The Court found that since there is nothing facially apparent from the statute to suggest otherwise, the statute's purpose is civil and non-punitive.⁸¹

The Court's next step was to determine whether the effects of the statute surpass its civil purpose to such an extent that the statute is in fact a punitive measure.⁸² Citing the seven-factor test from *Kennedy v. Mendoza-Martinez*,⁸³ the Court used five factors as a framework for its analysis:

[W]hether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose.⁸⁴

Though the Court remarked at some length upon the similarity of the statute's notification provisions to colonial era shaming punishments,⁸⁵ it found that the purpose of the scheme is to inform the public, which is non-punitive.⁸⁶ Furthermore, the Court stated that the registration and notification requirements are neither a disability nor a restraint.⁸⁷ Additionally, the primary purpose of the statute is to deter future crimes and not for retribution.⁸⁸ By maintaining its focus on the statute's purpose of ensuring safety, the Court found that the measures are reasonable in light of the non-punitive objective and are not excessive in light of (1) the high risk of recidivism, (2) the state's entitlement to categorically judge all convicted

⁸⁰ *Id.* at 95. The rule cited by the Court is the same rule in place today; courts are required to "infor[m] the defendant in writing of the requirements of [the sexual offender registration law] and, if it can be determined by the court, the period of registration required." ALASKA R. CRIM. P. 11(C)(4). It should be noted that this is the specific type of protection—informing the criminal defendant of postconviction consequences prior to acceptance of a plea—that would have barred the defendants in the present case, and any defendant for that matter, from asserting unfair bargaining on the part of the government. For a more detailed discussion on notification of criminal defendants in the bargaining process, see *infra* Part V.B.

⁸¹ *Smith*, 538 U.S. at 93, 96.

⁸² *Id.* at 92.

⁸³ 372 U.S. 144, 168-69 (1963).

⁸⁴ *Smith*, 538 U.S. at 97. The Court specifically noted that the *Kennedy* factors migrated into ex post facto analysis from double jeopardy jurisprudence. *Id.* Though there has been no double jeopardy challenge to sexual offender registration in the Supreme Court, it is assumed that such a case would be treated in a similar fashion.

⁸⁵ *Id.* at 97-98.

⁸⁶ *Id.* at 99.

⁸⁷ *Id.* at 99-101.

⁸⁸ *Id.* at 102-03.

sex offenders as dangerous, and (3) the passive nature of the notification system.⁸⁹

3. Substantive Due Process

Though the Court in *Connecticut Department of Public Safety v. Doe* expressly declined to rule on whether sexual offender registration and notification provisions violate the substantive due process guarantees of the Constitution,⁹⁰ five circuits have ruled that they do not.

In *Paul P. v. Verniero*,⁹¹ an individual subject to the registration and notification requirements of New Jersey's Megan's Law filed a substantive due process challenge based on the infringement of zones of privacy guaranteed by *Roe v. Wade*,⁹² specifically the "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'"⁹³ The Third Circuit held that insofar as the individual's status as a sexual offender is disclosed, it is a matter of public record and accordingly does not infringe upon a privacy interest.⁹⁴ With regard to the publication of the individual's home address, the court held that the public interest served through notification outweighs the privacy interest and denied the claim.⁹⁵

In *Gunderson v. Hvass*,⁹⁶ the offender (Gunderson) was originally charged with a violent sexual offense, but bargained to plead guilty to assault in exchange for the dismissal of the original indictment.⁹⁷ Gunderson later learned that he was still required to register as a sexually violent predator under the Minnesota registration and notification scheme, since his conviction arose out of the same set of circumstances as the predatory offense.⁹⁸ Gunderson argued that the statute infringed upon the

⁸⁹ *Id.* at 102-06.

⁹⁰ 538 U.S. 1, 7 (1992).

⁹¹ 170 F.3d 396 (3d Cir. 1999).

⁹² 410 U.S. 113 (1972).

⁹³ *Paul P.*, 170 F.3d at 399 (quoting *Roe*, 410 U.S. at 152).

⁹⁴ *Id.* at 403-04.

⁹⁵ *Id.* at 404.

⁹⁶ 339 F.3d 639 (8th Cir. 2003).

⁹⁷ *Id.* at 641-42.

⁹⁸ *Id.* This aspect of the Minnesota scheme is quite a departure from the general basis for states to impose registration requirements. Registration is required for every convicted defendant so long as they are only alleged to have committed a sex offense. *Id.* Apart from its incompatibility with the Court's reasoning in *Smith v. Doe*, see *infra* note 100, this "facts and circumstances" registration system has serious negative implications for criminal defendants. Criminal defendants do not even have the protections of a criminal trial before they are subjected to the harms of registration and notification. This problem is only exacerbated by the practice of prosecutorial overcharging to exert leverage in plea bargains. See *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting) (describing the practice of prosecutorial overcharging in plea negotiations).

fundamental right to the presumption of innocence.⁹⁹ The Eighth Circuit applied a two-part analysis to his substantive due process claim. Relying on *Smith v. Doe*,¹⁰⁰ the court held that the statute is civil and non-punitive, and therefore there was no presumption of innocence upon which it could infringe.¹⁰¹ Since there is no infringement on a fundamental right, the state need only show a rational relation to a legitimate governmental purpose.¹⁰² The stated purpose of that portion of the registration scheme was “to insure the inclusion in the registration rolls, of all predatory offenders, including those who take advantage of favorable plea agreements.”¹⁰³ Accordingly, the claim was denied.¹⁰⁴

Doe v. Tandeske was a subsequent appeal of the *Smith v. Doe* case,¹⁰⁵ this time on substantive due process grounds.¹⁰⁶ The Ninth Circuit did not explicitly state its basis for denying the claim, but it appeared to rely upon the lack of “deep[] root[s] in our history and traditions” to determine that sexual offenders do not have a fundamental right to be free from registration and notification.¹⁰⁷ The court then relied on *Smith v. Doe* to find a rational relation to legitimate government purposes and denied the claim.¹⁰⁸

The Eleventh Circuit also addressed substantive due process for sexual offenders in *Doe v. Moore*.¹⁰⁹ The plaintiffs contended that Florida’s registration and notification requirements infringed on their fundamental

⁹⁹ *Id.* at 643.

¹⁰⁰ 538 U.S. 84 (2003). The Eighth Circuit’s reliance on *Smith v. Doe*’s determination that Alaska’s registration was non-punitive is particularly questionable. A considerable part of the Court’s reasoning that the notification system differed from concededly punitive colonial shaming practices was based on the fact that Doe had been convicted of a sexual offense. *Id.* at 99 (“The [notification] process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality.”).

¹⁰¹ *Gunderson*, 339 F.3d at 643; *see also id.* at 644 (“The fact that such a registration policy may, in fact, require the inclusion of persons who are not predators, is not a fatal Constitutional defect, since the legislative purpose need only be reasonably related to the State’s interest, and here that legislative purpose is.”).

¹⁰² *Id.*

¹⁰³ *Id.* at 643-44.

¹⁰⁴ *Id.* at 644.

¹⁰⁵ 538 U.S. 84. For further discussion, *see supra* Part II.C.2.

¹⁰⁶ 361 F.3d 594 (9th Cir. 2004). Doe also claimed violation of procedural due process, but this claim was summarily dismissed in light of the Supreme Court’s ruling in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003). *Tandeske*, 361 F.3d at 596.

¹⁰⁷ *Tandeske*, 361 F.3d at 596-97 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

¹⁰⁸ *Id.* at 597.

¹⁰⁹ 410 F.3d 1337 (11th Cir. 2005).

rights of liberty and privacy.¹¹⁰ The court disagreed, finding that the only right at issue was “the right of a person, convicted of ‘sexual offenses,’ to refuse subsequent registration of his or her personal information . . . and prevent publication of this information.”¹¹¹ The court then proceeded to follow the holdings discussed above and deny the claim.¹¹²

In 2007, the Sixth Circuit addressed a substantive due process claim in *Doe v. Michigan Department of State Police*.¹¹³ The court followed the reasoning in *Doe v. Tandeske*¹¹⁴ and *Doe v. Moore*¹¹⁵ and defined the sexual offender’s infringed rights to be the right to refuse registration and the right to prevent publication of information regarding his conviction.¹¹⁶ The court then found that the infringement of these rights was rationally related to a legitimate government end based on the statute’s intention to assist law enforcement in preventing future criminal acts.¹¹⁷

Though these five circuits seem to have definitively answered the question of whether a substantive due process claim is viable, it is significant both that the Supreme Court has not ruled on the issue and that the circuit courts have thus far only addressed the issue in terms of the right to be free from registration and notification requirements. None of the five cases have addressed whether a defendant who was convicted pursuant to a plea bargain is entitled to the government’s performance of the bargain.

III. PLEA BARGAINS AND CONTRACTUAL ANALYSIS

A. THEORETICAL EVALUATIONS OF THE CONTRACTUAL PLEA BARGAIN

The plea bargain, as its name makes clear, is most often justified on contractual grounds. The defendant waives his or her constitutional “rights to a jury trial, to confront one’s accusers, to present witnesses in one’s defense, to remain silent, and to be convicted by proof beyond all reasonable doubt”¹¹⁸ in exchange for a reduced sentence recommendation. But the practice of imposing penal sentences, however the sentence is ultimately determined, resides in no other area apart from criminal law,

¹¹⁰ *Id.* at 1341.

¹¹¹ *Id.* at 1344.

¹¹² *Id.* at 1349.

¹¹³ 490 F.3d 491 (6th Cir. 2007).

¹¹⁴ 361 F.3d 594 (9th Cir. 2004).

¹¹⁵ 410 F.3d 1337.

¹¹⁶ *Doe*, 490 F.3d at 500-01.

¹¹⁷ *Id.* at 501.

¹¹⁸ *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring) (citations omitted).

which makes for an uneasy fit in contract law.¹¹⁹ Numerous arguments have been made on constitutional as well as contractual grounds both for and against the continued practice of plea bargaining.¹²⁰ For the purposes of this Comment, the Supreme Court's validation of the practice in *Brady v. United States*,¹²¹ along with its specific reference to the "mutuality of advantage" that results from the bargaining process,¹²² restricts the argument to the contractual sphere.

The most common contract-based arguments against the practice of plea bargaining are acceptance under duress, information disparities, disparate bargaining power, and the prohibition on enslavement contracts.¹²³ Though each argument has merit, there are equally persuasive counter-arguments for each. The purely contractual analysis of plea bargaining by Robert Scott and William Stuntz is particularly on point for this purpose.¹²⁴

The basis for the duress argument is the notion that the large difference between post-trial and post-plea sentences has a coercive effect on the defendant.¹²⁵ However, under basic contract law, the limitation of available choices (here, pleading to a lesser sentence or risking a greater sentence) does not make the choice less voluntary.¹²⁶ Information disparities produced and encouraged by a party to the contract to the detriment of the other party will result in an invalid contract.¹²⁷ In the plea bargain setting, the claim is that the prosecutor has superior knowledge not only of the strength of the case but also of the "market value" for such a case.¹²⁸ However, the defendant is represented by counsel who presumably has experience in the "market," and the immediate terms of the plea bargain more often than not will be limited and clear.¹²⁹

Disparate bargaining power is easily analogized to "take it or leave it contracts."¹³⁰ This power imbalance is thought to enable the prosecutor to use leverage to exact specific concessions because the prosecutor is the only

¹¹⁹ Easterbrook, *supra* note 1, at 1974.

¹²⁰ See generally works cited, *supra* note 1.

¹²¹ 397 U.S. 742 (1970).

¹²² *Id.* at 751-52 (1970).

¹²³ See generally Alschuler, *The Changing Plea Bargaining Debate*, *supra* note 1.

¹²⁴ See *supra* note 1.

¹²⁵ Scott & Stuntz, *supra* note 1 at 1920-21.

¹²⁶ *Id.*

¹²⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981).

¹²⁸ Scott & Stuntz, *supra* note 1, at 1922-23.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1923.

bargaining partner available to the defendant.¹³¹ However, each plea bargain is an individual bargain, and there is a bilateral monopoly as neither the defendant nor the state is free to negotiate a particular plea agreement with any other party.¹³² The cost of trying a case for a prosecutor is far greater than the cost of individualizing a bargain, so the rational prosecutor has no choice but to negotiate to some sort of agreement.¹³³

Finally, contracts of enslavement are prohibited to prevent individuals from bargaining away their autonomy.¹³⁴ Where imprisonment is concerned, the plea bargain may be viewed as the “offer” of portions of life by the defendant as his or her consideration, which should therefore be prohibited.¹³⁵ Scott and Stuntz argue that instead of the bargaining of personal liberty, the plea bargain is the exchange of a risk of greater sentence for the certainty of lesser sentence.¹³⁶ Furthermore, the prohibition of plea bargaining would result in the reduction of individual autonomy by forcing the defendant to undertake the risk of longer imprisonment.¹³⁷

While there are considerably more detailed and nuanced arguments in contract law for and against the justification of plea bargaining, it is clear that the debate is not one-sided, and an academic resolution to the matter is not readily apparent. The importance, then, is the application of such contractual arguments in courts.

B. CONTRACT BREACH ANALYSIS IN THE COURTS

While the Supreme Court has not and undoubtedly will not evaluate plea bargains on purely contractual grounds, three cases addressing the breach of plea agreements demonstrate the Court’s willingness to evaluate disputes surrounding performance of plea bargains in traditional contractual terms. These cases demonstrate how a court might determine the existence of a breach, the performance required for an enforceable contract, and the available remedies.

In *Santobello v. New York*,¹³⁸ the defendant was offered and ultimately accepted a plea bargain whereby he would plead guilty to a lesser included offense in exchange for the prosecutor’s promise to refrain from making a sentence recommendation.¹³⁹ The plea was made, but sentencing was

¹³¹ *See id.*

¹³² *See id.*

¹³³ *Id.* at 1924.

¹³⁴ *Id.* at 1929.

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ *Id.* at 1929-30.

¹³⁸ 404 U.S. 257 (1971).

¹³⁹ *Id.* at 258.

delayed, in part because the defendant moved to withdraw the guilty plea.¹⁴⁰ After the replacement of both the original judge and prosecutor, the motion to withdraw the plea was denied.¹⁴¹ At sentencing, the new prosecutor recommended the maximum sentence for the lesser offense, and the new judge imposed it over the defense's objection that it was in clear violation of the plea agreement.¹⁴² In reversing the conviction, the Court deferred to the state court to determine the particular remedy, but stated quite clearly that such a breach of the agreement by the prosecution invalidates the plea, as plea bargains must be respected to ensure that the defendant receives what is reasonably expected when he surrenders fundamental rights.¹⁴³ The Court stated further that "a constant factor [in plea bargaining] is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."¹⁴⁴ While leaving resolution of the issue of the proper remedy due to the defendant in *Santobello* noticeably undecided,¹⁴⁵ the Court made clear that the failure of the prosecution to perform its end of the plea agreement should result in *some* remedy for the defendant.¹⁴⁶

The Court's next evaluation of the performance of a plea agreement concerned an offer, acceptance, and withdrawal before the plea could be entered in court. In *Mabry v. Johnson*, the defendant was already incarcerated for related offenses when plea negotiations began for a separate conviction that had been overturned on appeal.¹⁴⁷ In exchange for a plea of guilty to the outstanding charge, the prosecutor originally offered a sentence recommendation of twenty-one years, to be served concurrently with the sentence the defendant was already serving.¹⁴⁸ When the defense attorney called to accept, however, the prosecutor withdrew the offer, claiming it had been a mistake.¹⁴⁹ Instead, the prosecutor offered a plea of twenty-one years, to be served consecutively to the existing sentence, which the defendant ultimately accepted.¹⁵⁰ In denying the defendant's claim to

¹⁴⁰ *Id.* at 258-59.

¹⁴¹ *Id.* at 259.

¹⁴² *Id.* at 259-60.

¹⁴³ *Id.* at 262.

¹⁴⁴ *Id.* at 262.

¹⁴⁵ In a concurring opinion, Justice Douglas stated specifically that in cases of breach of plea agreement, the defendant should have the options of specific performance of the bargain or reclaiming his right to trial on the original charges. *Id.* at 267 (Douglas, J., concurring).

¹⁴⁶ *Id.* at 263.

¹⁴⁷ 467 U.S. 504, 505-06 (1984).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 506.

¹⁵⁰ *Id.*

compel performance of the prosecutor's first offer, the Court defined the point at which a plea bargain becomes enforceable: "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in a judgment of the court, does not deprive an accused of liberty or any other constitutionally protected interest."¹⁵¹ The Court stated further that the defendant's subsequent guilty plea foreclosed any argument for detrimental reliance on the original plea, finding that the question of whether the prosecutor was culpable in making an offer that was later withdrawn was irrelevant.¹⁵² The dispositive issue was whether the defendant was deprived of his liberty unfairly.¹⁵³

Mabry's importance goes beyond the affirmation of *Santobello's* requirement for a remedy upon the breach of plea agreements. The Court clearly stated that a finding of breach first requires the defendant's performance of the plea agreement. Furthermore, the breach is only material if there is a deprivation of liberty; prosecutorial intent or motive has no bearing on materiality.¹⁵⁴

The final case regarding the breach of plea agreements considered once again the extent of performance required by the parties and the determination of a breach. The defendant in *Ricketts v. Adamson* was charged with first-degree murder in connection with a car bombing.¹⁵⁵ The defendant agreed to plead guilty to second-degree murder, serve twenty years in prison, and testify against his codefendants, in exchange for which the prosecution dismissed the charge of first-degree murder.¹⁵⁶ The phrasing of the agreement is of particular importance in this case. As part of the deal, the defendant pledged to testify and to testify truthfully, or else the "entire agreement is null and void and the original charge will be automatically reinstated."¹⁵⁷ Additionally, the agreement provided that if it was nullified, "the parties shall be returned to the positions they were in before this agreement."¹⁵⁸ The defendant made the plea, testified against his codefendants, and began to serve the agreed upon sentence.¹⁵⁹ However, the convictions of his codefendants were overturned and remanded for retrial.¹⁶⁰ When the prosecution sought to have the defendant

¹⁵¹ *Id.* at 507.

¹⁵² *Id.* at 510-11.

¹⁵³ *Id.* at 511.

¹⁵⁴ *See id.*

¹⁵⁵ 483 U.S. 1, 3 (1987).

¹⁵⁶ *Id.* at 3-4.

¹⁵⁷ *Id.* at 4.

¹⁵⁸ *Id.* at 9.

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.*

testify again, he refused unless the government agreed to release him following the trial.¹⁶¹ The prosecutor notified defendant's counsel that he was deemed to be in breach of the agreement and reinstated the original indictment a month later.¹⁶² Once the first-degree murder charge was reinstated, the defendant offered to testify, but the government refused, and the retrial of his codefendants proceeded without him.¹⁶³ The defendant was subsequently convicted and sentenced to death.¹⁶⁴

The defendant appealed on grounds that the reinstatement of the indictment violated the Double Jeopardy Clause of the Fifth Amendment.¹⁶⁵ The Court declined to uphold the challenge, focusing its analysis on the language and performance of the plea agreement.¹⁶⁶ First, the Court delineated the intended outcomes of the plea agreement and noted that each party "received substantial benefits" under its terms.¹⁶⁷ Next, the Court referenced the specific language of the agreement as the basis for its decision.¹⁶⁸ The enforcement of an agreement according to the plain language of its terms is not itself revolutionary, but is significant here in that the Court relied upon the terms of the agreement to infer the waiver of a constitutional right.¹⁶⁹ Such an inference is particularly noteworthy in light of previous statements by the Court that an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege."¹⁷⁰

The defendant also argued that he could not have waived his double jeopardy rights until his disputed obligations under the agreement were fully and completely determined by a court.¹⁷¹ The Court found that the defendant made a "voluntary choice" when he decided not to testify. Ricketts could have testified in the second trial at the risk of not being actually required to testify.¹⁷² Instead Ricketts chose not to testify and instead risked breaching the plea agreement.¹⁷³

¹⁶¹ *Id.* at 4.

¹⁶² *Id.* at 4-5.

¹⁶³ *Id.* at 7.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 8-11.

¹⁶⁷ *Id.* at 9.

¹⁶⁸ *Id.*

¹⁶⁹ *See id.* at 9-10.

¹⁷⁰ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights.") (citation omitted).

¹⁷¹ *Ricketts*, 483 U.S. at 10.

¹⁷² *Id.* at 10-11.

¹⁷³ *Id.*

Ricketts presents the most striking example of contract law's presence in claims concerning plea bargains. The Court not only held that the language of the plea agreement provided sufficient basis for an implicit waiver of constitutional rights, but also held that the loss of constitutional rights is within the scope of "damages" that can result from intentional nonperformance of the agreement.¹⁷⁴

The wholesale acceptance and usage of contract law in the criminal context of plea bargains is not only unlikely, but also undesirable. While contract performance and remedies often can be measured through some sort of market valuation, valuation of the utility of human life and inalienable rights is a troubling practice for the law to undertake, never mind the inherent difficulty. However, courts clearly have adopted contract law determinations of breach and performance. According to *Mabry*, actual performance of the plea agreement is the precursor to an enforceable contract.¹⁷⁵ *Santobello* provides that nonperformance will result in breach and remedy for the damaged party.¹⁷⁶ *Mabry* stated that infringement of a liberty interest is considered a material breach.¹⁷⁷ Finally, in *Ricketts*, the terms of a plea agreement and nonperformance are significant enough to implicate waivers of constitutional rights.¹⁷⁸ Though this is by no means a comprehensive jurisprudence, these cases provide an excellent framework for analyzing plea agreements in light of retroactive collateral consequence statutes.

IV. CHALLENGING RETROACTIVE COLLATERAL CONSEQUENCE STATUTES UNDER THE *SANTOBELLO*, *MABRY*, AND *RICKETTS* STRUCTURE

A. GENERAL FEASIBILITY AND APPLICATION

Having now established an admittedly scant but informative framework for the interpretation of plea agreements, it is possible to scrutinize the intuitive argument for defining retroactive collateral consequence statutes as breaches of bilateral contracts. In particular, this framework allows for evaluation of the specific circumstances of retroactive application of collateral consequence statutes to plea-convicted defendants. Furthermore, one can determine the feasibility of a successful challenge and the availability of a remedy.

¹⁷⁴ *See id.*

¹⁷⁵ *Mabry v. Johnson*, 467 U.S. 504, 507-08 (1984).

¹⁷⁶ *Santobello v. New York*, 404 U.S. 257, 262 (1971).

¹⁷⁷ *Mabry*, 467 U.S. at 509.

¹⁷⁸ *Ricketts*, 483 U.S. at 10-11.

According to *Mabry*, a plea agreement is only enforceable upon the entrance of the plea with the court.¹⁷⁹ For purposes of the present argument, which concerns only the retroactive application of collateral consequences, this requirement is moot, as the plea would necessarily have been entered for collateral consequences to apply. The plea agreements at issue here are therefore enforceable under *Mabry* and will not be deemed constitutionally insignificant on this ground. Whether such agreements nonetheless “deprive an accused of liberty or any other constitutionally protected interest”¹⁸⁰ will be addressed below.

Under *Santobello*, the existence of a contract between two parties is definitively established when a plea agreement is reached.¹⁸¹ Courts will safeguard plea agreements by requiring the parties to perform and fulfill promises when they are part of the inducement of (or consideration for) a plea bargain.¹⁸² For the purposes of this analysis, the plea-convicted defendant has a contract with the prosecutor. Additionally, the prosecutor must fulfill promises with regard to sentence recommendations, including duration and type of sentence imposed.¹⁸³ In return, the defendant must fulfill his obligations of the agreement upon actual acceptance of the plea agreement, which, per *Mabry*, means after the plea is entered. Any further obligations of the defendant under the contract must also be fulfilled according to *Ricketts*, presumably including serving the bargained-for sentence.

However, the prosecutor acts only in an agency capacity, so the true parties to the agreement are the defendant and the government. The defendant does not owe the individual prosecutor the continued obligations of service of sentence and other duties specific to his agreement. The converse would also be true. Under *Santobello*, the replacements of the prosecutor and the judge were irrelevant once the plea was entered and enforceable.¹⁸⁴ Accordingly, the obligation to fulfill sentencing promises lies with the government.

Both *Santobello* and *Ricketts* imply that an actionable breach of a plea agreement occurs when parties do not perform. Under *Santobello*, the failure to fulfill a promise that was an inducement to the agreement is a breach.¹⁸⁵ The determination of breach in *Ricketts* was considerably more specific to the circumstances of the agreement; however, the Court's

¹⁷⁹ See *Mabry*, 467 U.S. at 507-08.

¹⁸⁰ *Id.* at 507.

¹⁸¹ *Santobello*, 404 U.S. at 262.

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ *Id.*

determination that the defendant waived his constitutional right to protection from double jeopardy through his intentional nonperformance of the plea agreement is significant.¹⁸⁶

In the context of the contract between the government and the defendant, the government's failure to fulfill its promise of a specific sentence can be viewed as abreach per *Santobello*. Furthermore, the enactment of retroactive punitive collateral consequence statutes is an intentional act of nonperformance, even though undertaken by a different branch of the government.

A state bargains with the decided majority of defendants in sex offense cases; if those defendants complete their agreed upon sentences, it is hard to view the retroactive imposition of a registration and notification scheme enacted after the bargains as anything but the state reneging upon the terms of each of those plea bargains. The defendant agrees to serve a particular sentence, but the state violates this agreement by adding on numerous additional postconviction requirements that could not have even been contemplated during the actual bargaining process. In this scenario, the state has no constitutional rights to inferentially waive through intentional nonperformance. It is worth noting, however, that intentional nonperformance of a plea agreement can have implications that rise to the level of waiver of a constitutional right, at least according to the Court's reasoning in *Ricketts*.

With regard to remedy,¹⁸⁷ *Santobello* expressly left the issue open, though it suggested requiring specific performance of the plea and allowing the defendant the opportunity to withdraw the plea as possible remedies.¹⁸⁸ The inferential waiver of double jeopardy for the defendant in *Ricketts* only gives further credence to the availability of a remedy for the wronged party in a breach of plea agreement in suggesting that an appropriate remedy could be on the order of the waiver of a constitutional right.¹⁸⁹ For the purposes of the plea-convicted defendant, specific performance of the plea agreement would render application of the collateral consequence statute to the defendant a breach on behalf of the government and would render the retroactive aspect inapplicable under the same logic. Having completed or begun to undertake his bargained-for sentence, the defendant should be able to hold the state to the terms of the agreement, and disregard the newly enacted statute. Though it would be of much greater import to those plea-

¹⁸⁶ *Ricketts v. Adamson*, 483 U.S. 1, 9-10 (1987).

¹⁸⁷ The determination of whether such a breach would be material requires much more detailed analysis relative to this section, and accordingly is addressed *infra*, Part IV.B.

¹⁸⁸ *Santobello*, 404 U.S. at 262-63; *accord Mabry v. Johnson*, 467 U.S. 504, 510 n.11 (1984).

¹⁸⁹ *Ricketts*, 483 U.S. at 9-10.

convicted defendants who are currently incarcerated, the opportunity to withdraw the plea would be a considerable remedy for all plea-convicted defendants, as they would regain their most valuable consideration in the bargain: their waived constitutional rights.

B. MATERIAL BREACH AND SUBSTANTIVE DUE PROCESS

The *Mabry* court identified the “depriv[ation] of . . . liberty in any fundamentally unfair way” as the proper standard for a finding of breach.¹⁹⁰ Though the language is more lenient, the court was clearly alluding to a due process violation.¹⁹¹ The application of this standard to the posited scenario is admittedly daunting, as the Supreme Court and five circuit courts have already addressed the issue specifically as it pertains to sexual offender registration.¹⁹²

The possibility of a finding of a procedural due process violation is currently foreclosed by *Connecticut Department of Public Safety v. Doe*.¹⁹³ Similarly, all five of the circuits that have addressed challenges to retroactive sexual offender statutes have not found substantive due process violations.¹⁹⁴ However, in each of these decisions, the defendants claimed violations of their liberty and privacy interests.¹⁹⁵ In each case, the court invoked the first step of due process analysis and began its inquiry by crafting its own “careful description of the asserted right.”¹⁹⁶ Therefore, the asserted claims of liberty and privacy rights were limited to the rights (1) not to be compelled to register and (2) not to have one’s personal information published.¹⁹⁷ Since freedom from sexual offender notification and registration is not a right that is, by anyone’s definition, “deeply rooted

¹⁹⁰ See *Mabry*, 467 U.S. at 511. This would not necessarily be the exclusive definition of material breach. In the Restatement (Second) of Contracts, conditions for a finding of material breach include “[t]he greater or less hardship on the party failing to perform in terminating the contract; The wilful, negligent or innocent behavior of the party failing to perform; The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.” RESTATEMENT (SECOND) OF CONTRACTS § 275 (1981). Each of these factors is plainly relevant in this interpretation of retroactive collateral consequence statutes.

¹⁹¹ *Mabry*, 467 U.S. at 510-11.

¹⁹² See *supra* Parts II.C.1 & 3.

¹⁹³ 538 U.S. 1 (2003); see *supra* Part II.C.1.

¹⁹⁴ See *supra* Part II.C.3.

¹⁹⁵ See, e.g., *Paul P. v. Verniero*, 170 F.3d 396, 399-400 (3d Cir. 1999). *Paul P.* in particular referenced the “guarantee of certain areas or zones of privacy” of *Roe v. Wade*, 410 U.S. 113, 152 (1973).

¹⁹⁶ *Reno v. Flores*, 507 U.S. 292, 302 (1993).

¹⁹⁷ See, e.g., *Doe v. Moore*, 410 F.3d 1337, 1344 (11th Cir. 2005).

in this Nation's history and tradition,"¹⁹⁸ each substantive due process claim was therefore subject to the highly deferential rational basis standard of review.¹⁹⁹ Though the stated purposes for the statutes differed in each case, each court disposed of the remainder of the two-prong test with references to the legislative purposes of the statutes: to deter criminals and protect the public.²⁰⁰

By framing the argument in terms of contract enforcement, the plea-convicted defendant may be able to make a stronger substantive due process claim. The defendant, when confronted with a retroactive collateral consequence statute, could claim a substantive due process violation of his right to be free from government impairment of his contracts instead of his liberty or privacy interest.²⁰¹ In keeping with the steps for analyzing a substantive due process claim, a more particular description of that asserted right would be the right to performance of the obligations specified by a plea bargain contract. As noted above,²⁰² such a right is deeply rooted in U.S. history and traditions, as plea agreements have been used and enforced in the United States since the end of the nineteenth century at the latest,²⁰³ and gained prevalence in the criminal justice system almost one hundred years ago.²⁰⁴ By framing the claim in terms of enforcement of a bargain, plea-convicted defendants should have a better chance at least to require the courts to provide more than a facial justification from the state statute under the rational basis standard.

A finding of infringement of a fundamental right or liberty interest, and the resulting need for strict scrutiny analysis, has been fairly rare in substantive due process claims, at least relative to the rational basis standard. It is even less likely that plea-convicted defendants asserting a contractual enforcement right would be deemed a "suspect class," which normally provides the basis for strict scrutiny and requires the state to show a compelling state interest.²⁰⁵ A possible argument could be made for the implementation of intermediate scrutiny, though it has yet to be applied to substantive due process claims.²⁰⁶

¹⁹⁸ *Id.* at 1343.

¹⁹⁹ *See id.* at 1345-46.

²⁰⁰ *See, e.g., id.* at 1346-47.

²⁰¹ *See* U.S. CONST. art I, § 10 ("No state shall . . . make . . . [any] law impairing the obligation of contracts . . .").

²⁰² *See supra* Part II.A.

²⁰³ Alschuler, *Plea Bargaining and its History*, *supra* note 1, at 19-24.

²⁰⁴ *Id.* at 26-27.

²⁰⁵ *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

²⁰⁶ *See, e.g.,* *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

Though the substantive due process argument on the basis of the right to contract performance admittedly relies heavily on a relatively small number of opinions to create a possible cause of action, the previous practice of challenging collateral consequence laws through direct constitutional challenges has to this point been unsuccessful.²⁰⁷ If the substantive due process claim can be reframed as an impairment of contract performance, and the imposition of collateral consequences on plea-bargained defendants can be found to be a “depriv[ation] of [] liberty in any fundamentally unfair way,”²⁰⁸ then that deprivation will constitute a material breach of the agreement. Plea-convicted defendants would be able to make a successful challenge against retroactive collateral consequence statutes, and the remedies of rescission and specific performance from *Santobello*²⁰⁹ and *Mabry*²¹⁰ would be available to enforce their original bargains.

V. CHALLENGES FOR THE PLEA-CONVICTED DEFENDANT WHERE THE STATE IS THE BARGAINING PARTNER

A. SEVERABILITY AND THE SOVEREIGN ACTS DOCTRINE

The contractual challenge to retroactive collateral consequence statutes for plea-convicted defendants relies considerably upon the premise that the state as bargaining partner is deemed the equivalent of the state as lawgiver. The sovereign acts doctrine, though exclusively applied towards the state in commercial contracts,²¹¹ nonetheless should be addressed. The notion of severability is particularly relevant in this context, as the judiciary arm of the state is the bargaining partner, and the legislative arm is responsible for the nonperformance of the contract through passage of the retroactive collateral consequence statute.

*Horowitz v. United States*²¹² is one of the more notable cases applying this doctrine. Horowitz contracted with the government for the purchase of silk, which he then intended to resell at a profit.²¹³ Horowitz made payment as dictated, but the shipment from the government was delayed several days, due in part to the government's imposition of an embargo on silk. In the intervening days between the agreed shipping date and Horowitz' actual

²⁰⁷ See *supra* Part II.C.3.

²⁰⁸ *Mabry v. Johnson*, 467 U.S. 504, 511 (1984).

²⁰⁹ 404 U.S. 257, 262-63 (1971).

²¹⁰ 467 U.S. at 511 n.11.

²¹¹ 30 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 77:56 (4th ed. 2008).

²¹² 267 U.S. 458 (1925).

²¹³ *Id.* at 459.

receipt, the price of silk dropped substantially, causing him to lose over ten thousand dollars in the subsequent transaction.²¹⁴ Horowitz filed suit against the government for the amount of the loss. The Court denied his claim under the sovereign acts doctrine, stating that “the United States when sued as a contractor cannot be held liable for an obstruction to the performance of a particular contract resulting from its public and general acts as a sovereign.”²¹⁵ The Court’s further rationale for the decision, that “the two characters which the government possesses as a contractor and as a sovereign cannot be thus fused,”²¹⁶ was cited with approval for seventy years afterwards. In the context of the plea bargain, such precedent would clearly be a bar to recovery for the defendant. The stated intent and purpose of every sexual offender registration and notification statutory scheme involves some invocation of the protection of the public, which is undoubtedly within the purview of “public and general acts as a sovereign.”²¹⁷

In 1996, the Court retreated from the stance of *Horowitz* considerably. The case of *United States v. Winstar Corp.* concerned a more complex transaction, but addressed the severability precedent of *Horowitz* directly.²¹⁸ Winstar and other financial institutions agreed with the government to purchase failing banks, in exchange for preferable regulatory accounting treatment on those purchases.²¹⁹ A subsequent congressional act in 1989 forbade the favorable accounting practice that had been given to the institutions in exchange for their purchase of the failing banks.²²⁰ The institutions then brought suit on contractual grounds for their lost value.²²¹ By allowing the suit to go forward in spite of the sovereign acts doctrine, the Court severely limited the scope of the pronouncements from *Horowitz*. The government argued that the sovereign acts doctrine requires a showing that the legislature acted to avoid the government’s contractual obligations.²²² The Court found that severability was not so clear and that attempts to draw a line between government as contractor and government as lawgiver would prove more difficult.²²³ The Court instead advocated for a more holistic approach, achieved “by asking whether the sovereign act is

²¹⁴ *Id.* at 459-60.

²¹⁵ *Id.* at 461.

²¹⁶ *Id.* (quoting *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865)).

²¹⁷ *Id.*

²¹⁸ 518 U.S. 839 (1996).

²¹⁹ *Id.* at 847-48.

²²⁰ *Id.* at 847-57.

²²¹ *Id.* at 858.

²²² *Id.* at 891.

²²³ *Id.* at 894.

properly attributable to the Government as contractor.”²²⁴ If it is not, the Court asks “whether that act would otherwise release the Government from liability under ordinary principles of contract law.”²²⁵

The sovereign acts defense raises a number of interesting issues in the context of the plea-convicted defendant. Following the Court’s two-step approach in *Winstar*, the first question is whether a collateral consequence statute is attributable to the state in its role as a plea bargain partner. The government’s purpose for contracting with a defendant is for the traditional purposes of criminal justice: deterrence and retribution. The legislative purpose behind the government’s retroactive collateral consequence statute is generally the same: promotion of public safety.²²⁶ While the purposes of government actions in both the legislative role (enacting collateral consequence statutes) and the executive role (prosecuting and bargaining with defendants) are more or less equivalent, it is unclear whether collateral consequence statutes are attributable to a state government acting in the particular capacity of plea bargaining partner. Government actions in both roles are for the same purpose, but the purpose of such acts is broad—for the public and general welfare of its citizens—which cuts against a finding of attribution.²²⁷

As for the second question in the *Winstar* inquiry, substituting an individual in place of the government as contracting party would allow for the sovereign acts defense. If the defendant had bargained with another individual for a fixed-term manual labor contract in return for a waiver of his or her constitutional rights, subsequent legislation that extended all labor contracts by ten years would not create liability for the defendant against the individual. Accordingly, if the sovereign acts doctrine was applicable to plea bargaining, under *Winstar* it could provide a considerable defense.

A more recent decision in the Federal Claims Court stated the determining factors for the sovereign acts doctrine differently, but in keeping with *Winstar*. This alternative articulation states that “the inquiry into possible ‘targeting’ by Congress is relevant to determining whether the alleged breach is merely an incidental effect of a sovereign act designed to promote the public good, or instead is a deliberate attempt by Congress to

²²⁴ *Id.* at 896.

²²⁵ *Id.*

²²⁶ For example, Congress enacted the Walsh Act “[i]n order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below.” Pub. L. No. 109-248, § 102, 120 Stat. 587, 590 (codified as amended at 42 U.S.C. § 16901 (2006)).

²²⁷ See *Winstar*, 518 U.S. at 895-96 (stating that “public and general” acts are attributable to the government as sovereign and not as contractor).

alter its previous bargain with the contractor.”²²⁸ Under this formulation, the issue is closer. Sexual offender registration and notification systems target anyone who has been convicted of a sexual offense, regardless of how that conviction was obtained. The Walsh Act defines “sex offender” as “an individual who was convicted of a sex offense,” without qualification,²²⁹ and applies to any “individual convicted of a sex offense”²³⁰ at any time.²³¹ While the stated purpose of the registration requirements applies to all offenders, the prevalence of the practice of plea bargaining has made plea-convicted defendants the de facto targets of retroactive registration and notification requirements. In 2008, over 88% of sexual offense convictions were obtained through plea bargaining.²³² Keeping this percentage in mind, one could also argue that the state must be acting deliberately to frustrate these individual plea bargains when it enacts these types of registration and notification laws.

B. ASSUMPTION OF RISK

A typical proposed solution to the problems resulting from collateral consequences and plea bargaining is to require full disclosure of such consequences prior to the acceptance of a plea.²³³ While such requirements are in place in some systems for certain collateral consequences,²³⁴ some commentators have argued that the consequences that attach to any given conviction are both too numerous and disparately codified to be realistically disclosed prior to the entry of a typical plea.²³⁵ In particular, the court practitioners themselves (the judge, prosecutor, and defense attorney) cannot accurately identify or anticipate the extent of collateral consequences that will result from a particular conviction, especially when some of those consequences may be applied retroactively.²³⁶ Therefore, an argument can be made that the duty and responsibility of information and

²²⁸ *Coast-to-Coast Fin. Corp. v. United States*, 45 Fed. Cl. 796, 804 (2000).

²²⁹ Walsh Act § 111(1).

²³⁰ *Id.*

²³¹ Sex Offender Registration and Notification, 28 C.F.R. § 72.3 (2009).

²³² U.S. SENT’G COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.11 (2008), available at <http://www.ussc.gov/ANNRPT/2008/Table11.pdf>.

²³³ *E.g.*, COMM’N ON EFFECTIVE CRIM. SANCTIONS, A.B.A., REPORT TO THE HOUSE OF DELEGATES ON REPRESENTATION RELATING TO COLLATERAL CONSEQUENCES (2007), available at <http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Report.V.PDF.121306.pdf>.

²³⁴ Alaska courts are required to “infor[m] the defendant in writing of the requirements of [the sexual offender registration law] and, if it can be determined by the court, the period of registration required.” ALASKA R. CRIM. P. 11(C)(4).

²³⁵ Pinard, *supra* note 7, at 638-39.

²³⁶ *Id.*

disclosure should not lie with anyone. Instead, the imposition of unknown collateral consequences on plea-bargained defendants can be justified on the grounds that they had assumed the risk of unknown civil sanctions or retroactive sanctions to be enacted after the plea is entered.

This defense appears meritorious, and numerous courts have held that there is no duty on the part of the state to disclose the collateral consequences resulting from a conviction.²³⁷ The application in this specific context, however, conflicts with basic theoretical premises of contract law. Since neither party can claim to have knowledge of the collateral consequences, the plea-convicted defendant has the option of voiding the contract unless the risk is specifically allocated to him.²³⁸ Scott and Stuntz provide the most reasonable justification for the voiding power of the plea-convicted defendant in their risk-centered description of the plea bargain:

Before contracting, the defendant bears the risk of conviction with the maximum sentence while the prosecutor bears the reciprocal risk of a costly trial followed by acquittal. An enforceable plea bargain reassigns these risks. Thereafter, the defendant bears the risk that a trial would have resulted in acquittal or a lighter sentence, while the prosecutor bears the risk that she could have obtained the maximum (or at least a greater) sentence if the case had gone to trial.²³⁹

While the prosecutors may not have the duty to inform, there is simply no justification for the plea-convicted defendant to bear the risk of the mutual lack of knowledge of collateral consequences that are in effect an extension of his or her sentence.

VI. CONCLUSION

The practice of plea bargaining and the extensive imposition of collateral consequence statutes are both justified for practical reasons, and

²³⁷ See, e.g., *Wilson v. McGinnis*, 413 F.3d 196, 200 (2d Cir. 2005) (expressing that there is no need to inform defendant that state sentence would run consecutively with previously imposed state sentence); *Steele v. Murphy*, 365 F.3d 14, 17 (1st Cir. 2004) (expressing that there is no need to inform defendant that committal for life as sexually dangerous person was possible result of guilty plea); *United States v. Hernandez*, 234 F.3d 252, 256-57 (5th Cir. 2000) (expressing that there is no need to inform defendant that federal sentence would run consecutive to state sentence); *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988) (expressing that there is no need to inform defendant that plea could lead to collateral consequence of deportation); *United States v. Yearwood*, 863 F.2d 6, 7-8 (4th Cir. 1988) (expressing same).

²³⁸ Restatement (Second) of Contracts § 152(1) (1981):

Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake . . .

²³⁹ Scott & Stuntz, *supra* note 1, at 1914.

the prevalence of each in the United States criminal justice system represents an acceptance, if not a full embrace, of each. Both practices are also subject to extensive criticism, largely stemming from often legitimate concerns about the protection of individual criminal defendants. Both practices have been challenged individually on numerous constitutional grounds, and both have withstood that scrutiny more often than not.

The overwhelming presence of both collateral consequences and plea bargaining has led to the inevitable combination of the two. At this point of intersection, the criticisms find more resonance, and the theoretical justifications seem less suited to the task. My argument has focused on one particular act, the Walsh Act, primarily because it seems to embody the most dangerous aspects of both practices retroactivity for collateral consequence statutes and extended punishment for plea bargaining hidden in a civil sanction.

Both practices have numerous supporters and detractors in legal scholarship, but their existence in the courts provides the most substance with which to analyze both systems. The fundamental theoretical justification for plea bargaining, freedom of contract, has been both recognized and adopted by the courts. Collateral consequence statutes, specifically with regard to sexual offender registration, have been challenged numerous times on constitutional issues, and thus had the greater survey of precedent.

Having adopted a limited framework for the analysis of plea bargaining, I intended to create an argument for the defendant that resides at the intersection of both practices. Though the contract-based approach for which I advocate requires some longer logical leaps than others, the plea-convicted defendant has a possible means of defending against the retroactive collateral consequence statutes that the Walsh Act represents. What is most important about the process is the recognition that plea bargaining and collateral consequences have an uneasy coexistence constitutionally, regardless of their pervasiveness in the U.S. criminal justice system. Additionally, it is possible that this type of argument may have already won in a federal court.

Currently, Nevada's attempt to implement the requirements of the Walsh Act is enjoined by a federal district court order.²⁴⁰ The American Civil Liberties Union of Nevada and a number of unnamed plaintiffs filed suit to enjoin Nevada's enactment of Assembly Bill No. 579, which would,

²⁴⁰ See *ACLU v. Mastro*, No. 2:08-cv-00822-JCM-PAL, at *4 (D. Nev. Oct. 7, 2008) (granting a permanent injunction), *appeal docketed*, No. 08-17471 (9th Cir. Dec. 16, 2008) (order granting preliminary injunction); see also Carri Geer Thevenot, *Offender Statute Restricted*, LAS VEGAS REV.-J., Sept. 11, 2008, at A1.

among other things, require retroactive application of sexual offender registration and notification and replace Nevada's previous forward-looking classification system with a conviction-based scheme.²⁴¹ Though the district court in *ACLU of Nevada v. Masto* based its opinion on constitutional grounds that, as noted above, have already been invalidated by the Supreme Court (the Ex Post Facto Clause, procedural due process), the court also stated that the new registration system violated the Contracts Clauses of both the U.S. and Nevada Constitutions.²⁴² While the case has yet to be heard by the Ninth Circuit, and the injunction order was not accompanied by an opinion, *Masto* indicates that courts are willing to consider arguments based on performance of plea bargains. At the very least, it has held up enforcement of the Walsh Act in Nevada.

While this legal argument could easily be invalidated by a number of minor adjustments to either system, more likely than not, these minor adjustments would affirm some of the rights of the defendant that carry less weight in the current system. Some proposals for adjustments that I have come across include requiring disclosures of all possible future collateral consequence to criminal defendants, regardless of their plea; promoting entirely forward-looking risk assessments of sexual offenders upon release; requiring individualized assessments of sexual offenders for tier designations and notifications; presenting the defendant with the option to try his case, plea bargain, or be tried by an informal bench tribunal; requiring all plea bargains to be made and executed in writing; and, perhaps most importantly, increasing resources for indigent criminal defense, prosecutors' offices, and the judiciary.²⁴³

The practices of plea bargaining and collateral consequences are far too pervasive to continue without a challenge that specifically addresses the combinations of the two. I believe that there is a reasonable argument in contract to support that assertion.

²⁴¹ *Masto*, at *4; see also NEV. REV. STAT. §§ 179D.113, 115, 117 (2008).

²⁴² *Masto*, at *4.

²⁴³ Because of scarce financial resources, the argument against the Walsh Act may have been mooted already. As of October 2009, only one state and a Native American Reservation have implemented a registration and notification system that complies with the Walsh Act. Press Release, U.S. Dep't of Justice, Justice Department Announces First Two Jurisdictions to Implement Sexual Offender Registration and Notification Act (Sept. 23, 2009), available at <http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/SMART09154.htm>; 2007 OHIO LEGIS. SERV. ANN. 10 (West); see also Abby Goodnough & Monica Davey, *Effort to Track Sex Offenders Draws Resistance from States*, N.Y. TIMES, Feb. 9, 2009, at A1. In addition to the belief that their pre-existing systems are more effective, states are refusing to implement the Walsh Act because it would cost more than the presumptive loss of grant money. *Id.* With a statutory effective date of July 27, 2009, it appears that many states may in fact repeal the Walsh Act by ignoring it.