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INTRODUCTION: WHERE CONTRACT LAW FALLS SHORT

America has become the land of the imprisoned. The number of individuals incarcerated in this country has swelled to unprecedented levels over the past three decades, and continues to grow.[1] During this same time period, the procedures employed to transform the accused into the convicted have changed drastically. Though trial by jury is a right upon which the nation was founded, and a right that remains firmly enshrined within the Sixth Amendment of the United States Constitution,[2] modern adjudication of criminal charges rarely involves

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1. According to the Bureau of Justice Statistics, more than 2.28 million Americans were incarcerated in prison or jail in 2009, compared to just 501,886 in 1980. *See Correctional Populations*, BUREAU OF JUSTICE STATISTICS, http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm (last visited Oct. 20, 2011). The statistics represent a more than 400% increase over less than thirty years. The American population increased by approximately thirty-five percent during the same time period, according to U.S. Census Bureau data. *See Population Finder*, AM. FACTFINDER, http://factfinder.census.gov/servlet/SAFFPopulation?_submenuId=population_0&_sse=on (last visited Oct. 20, 2011) (displaying the 2009 United States population); *Monthly Estimates of the United States Population: April 1, 1980 to July 1, 1999, with Short-Term Projections to November 1, 2000*, U.S. CENSUS BUREAU (Jan. 2, 2001), http://www.census.gov/popest/archives/1990s/nat-total.txt (displaying the 1980 American population).

2. The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

a trial at all. Experts estimate that more than nine out of every ten criminal cases are instead resolved through plea bargain,[3] in which the defendant agrees to plead guilty and waive the right to trial in exchange for some consideration from the prosecution—typically in the form of reduced charges and/or a favorable sentence recommendation.[4]

Opponents of this practice levy a multitude of moral, practical, and social objections to widespread plea-bargaining. Commentators argue the practice reduces certainty of conviction, ignores the presumption of innocence, increases the likelihood of wrongful conviction, and grants an unacceptable amount of power to the prosecutorial role.[5] Perhaps most importantly, critics charge that the practice disserves the larger social purpose of public criminal adjudication by diminishing the system's legitimacy and framing the right to jury trial as a commodity to be bargained away.[6] On the other hand, proponents of plea bargaining laud the practice as an efficient and necessary evolution of criminal procedure, imperative in a present-day environment where courts are overwhelmed by the sheer number of cases to be tried.[7] Viewed this way, plea bargains save valuable state resources for use where they are most needed, and allocate benefits to defendants who take responsibility for their crimes.[8]

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cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

3. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 n.9 (2004) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS – 2002, at tbl. 5.17 (Kathleen Maguire & Anne L. Pastore, eds., 2003), *available at* http://www.albany.edu/sourcebook.

4. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1000 (5th ed. 2009).

5. Bibas, *supra* note 3, at 2467-68; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2008-09 (1992).

6. Bibas, *supra* note 3; *see also* Schulhofer, *supra* note 5.

7. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract,* 101 YALE L.J. 1909, 1911-12 (1992).

8. *See id.* at 1911.

Federal Judge and former U.S. Attorney Gerard Lynch defends plea bargains and argues that, at its core, modern criminal adjudication is no different than civil or administrative law.[9] Rather than a complex power struggle between state and individual, Lynch insists that a plea bargain is most analogous to an out-of-court settlement entered into by private actors, and accepted by the court as an alternative disposition that eliminates the need for public trial and judicial intervention.[10] Examined through this lens, the philosophical and moral arguments on both sides of the debate are exaggerated and misplaced. To Lynch, like-minded scholars, and judicial officials, a plea bargain is just another contract.[11]

This conclusion is flawed. Brushing aside the varied subjective objections to the practice of plea-bargaining, criminal adjudication differs so substantially from private contracts made in the free market as to render the "plea bargaining as contract" analogy inadequate and erroneous. The contract law standard is often misapplied in the review of plea bargain disputes, but the problem is more deeply rooted than mere mistake. Until courts recognize and accord proper judicial protection to the unique—and especially vulnerable—position of defendants contracting away their liberty, even a properly applied contract ideal will fall far short of justice.

Plea bargains take place in the shadow of the law, largely unregulated and immune to judicial review, with minimal and under-enforced oversight. This situation casts doubt on the convictions and sentences that result from these "agreements," and falls far short of the contract model often used to justify the practice. When courts fail to recognize the fundamental differences between plea bargains and standard contracts, and thus apply contract law without creating additional safeguards, the results are often unjust, illogical, and detrimental to both defendants' interests and overall system legitimacy.

Part I of this Article briefly reviews the historical development of and contemporary reliance on plea-bargaining in the criminal justice system. Part II examines the "plea bargain as a contract" analogy, and

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9. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118 (1998).

10. *Id.* at 2120-21.

11. Scott & Stuntz, *supra* note 7, at 1911.

critiques the outcomes reached by courts adjudicating plea disputes through misapplication of this framework. Part III further asserts that these outcomes are not only the result of judicial misapplication, but are also linked to the inherently unequal "market" in which plea contracts are negotiated.

Part IV more deeply explores one particular way that plea bargain practice has been judicially permitted to violate standard contract law by presenting two case studies—one involving a sex offender registration law in Connecticut, the other a draconian sentence enhancement law in California. These statutes and resulting case law illustrate the way in which courts have upheld unilateral modification of terms and unconscionable contractual results by enforcing post-conviction consequences legislatively created after the plea has been entered.

Part V argues that the current state of plea bargain adjudication under contract law illustrates the need for heightened judicial protections grounded in more than mere contractual obligations, and instead based in criminal defendants' unique constitutional rights.

I. THE PLEA BARGAIN: HISTORIC RISE AND CONTEMPORARY USE

The law of plea bargains is still in its infancy largely because the practice was only recently recognized and held constitutionally-sound by the United States Supreme Court. In *Brady v. United States*, a defendant who pled guilty at trial in exchange for a prosecutorial guarantee to not seek the death penalty challenged that plea on appeal, alleging that it was coerced by threat of capital punishment and was thus involuntary.[12]

In a unanimous decision, the Court recognized the efficiency of plea bargaining and held that a guilty plea, otherwise entered into voluntarily, could not be rejected as coercive merely because the defendant received some benefit in exchange for waiving the right to trial.

> [W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and

12. 397 U.S. 742, 744 (1970).

> willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.[13]

In holding that plea bargaining was not an unconstitutional practice, the Court explicitly sanctioned the grant of charge and sentence reductions in exchange for guilty pleas. In the decades since this decision, plea bargains—a common but concealed practice prior to *Brady*—have become a widespread and public method of closing cases, leaving trials an all-but-extinct anachronism in courts throughout the country.[14]

Thomas Jefferson once described jury trial as "the only anchor yet imagined by man, by which a government can be held to the principles of its constitution."[15] Indeed, two of the Bill of Rights' original twelve amendments concerned the right to jury trial.[16] Now, more than two centuries later, they are a rare feature in the day-to-day application of American criminal law; but this has scarcely been an overnight development. Though the *Brady* decision is barely four decades old, the process of plea bargaining's creation, development, and expansion began long before.

Plea bargains predate the Civil War, and were recognized as a dominant method of adjudicating cases throughout America as early as the 1920s.[17] Decades before it was upheld as legitimate in the eyes of the nation's highest courts, and perhaps at a time when Supreme Court review would have struck it down entirely,[18] plea bargaining's

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13. *Id.* at 753.

14. Bibas, *supra* note 3, at 2466.

15. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 266, 269 (Julian P. Boyd ed., 1958).

16. The Sixth Amendment guarantees the right to jury trial for the criminally accused. U.S. CONST. amend. VI. The Seventh Amendment dictates that federal civil trials will be tried by jury. U.S. CONST. amend. VII.

17. Albert W. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, 9-10 (1979); *see* MARY VOGEL, COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS AND THE MAKING OF POLITICAL AUTHORITY 95-96 (Keith Hawkins et al. eds., 2007).

18. *See* Ins. Co. v. Morse, 87 U.S. 445, 451 (1874). Nineteenth century Supreme Court jurisprudence was against the general concept, having held: "A man may not barter away his life or his freedom, or his substantial rights." *Id.*; *see also* Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and*

evolution and growth during the nineteenth and twentieth centuries depended upon the cooperation of individual trial judges, prosecutors, defense lawyers, and defendants. Each of these players was served by the move away from public trials and toward private bargains.[19]

Reviewing the history of plea bargains in Massachusetts, George Fisher explains that the early nineteenth century version was limited to murder and liquor crimes, and took place largely through the exercise of prosecutorial charging discretion.[20] In this type of "charge bargaining," defendants pled guilty and, in exchange, some charges were dropped and/or lessened.[21] Beginning around 1875, judges came to play a more active and supportive role in the process. "Sentence bargaining," in which defendants received reduced sentences in exchange for guilty pleas, emerged as the dominant format.[22]

Perhaps originating in prosecutorial efforts to ensure conviction and reduce caseload, plea bargains also came to serve defendants' immediate interests in minimizing punishment. As access to counsel became more widespread, plea bargaining additionally served defense lawyers' interest in minimizing their own caseloads.[23] Eventually faced with rising crime and arrest rates, expanded due process requirements, and overloaded dockets, judges too became institutional supporters and agents of a system that has now nearly replaced jury trials altogether.[24]

Although plea bargaining developed and flourished long before gaining official constitutional sanction, *Brady* brought the practice into the jurisprudential light and led to the establishment of rules and standards. The *Brady* decision itself mandated that all guilty pleas must be knowing, intelligent, and voluntary—including those entered

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Dance, 26 AM. J. CRIM. L. 505, 509 (1999) (noting that many nineteenth and early twentieth century state courts were suspicious or downright hostile to the idea of bargaining away the right to criminal trial).

19. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 12-16 (2004).

20. *Id.* at 12.

21. *Id.*

22. *Id.*

23. *Id.* at 13-15.

24. *Id.* at 15-16.

in exchange for consideration from the prosecution.[25] Subsequent U.S. Supreme Court cases held a trial court could use its discretion to accept a guilty plea from a professedly innocent defendant seeking the benefit of the bargain,[26] and a guilty plea is only questionable when its "consensual character" is doubted.[27] Most notably, the concurring opinion in *Santobello v. New York* recognized plea bargains as "important in the administration of justice both at the state and at the federal levels,"[28] and held that a prosecutor's failure to adhere to such an agreement would require remand.[29]

As strong and clear as these standards may appear, their application has been muddled and inconsistent. This is largely due to the ad hoc project of precedent setting and rulemaking that seeks to interpret and regulate plea bargains under an often misapplied model of contract law.[30] Within this largely unquestioned framework, judicial bodies envision defendants simply as one party and the state another, each with interests to be served by the agreement and consideration to offer in exchange.[31] Even legal scholars, many of whom express much greater distaste for plea bargaining than do the system's actual practitioners, often use the same path to reach an alternative conclusion. Leading critics, like Albert Alschuler and Stephen J. Schulhofer, argue contract theory supports the complete abolition of plea-bargaining due to its inherently coercive nature.[32]

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25. *See* Brady v. United States, 397 U.S. 742, 747 (1970).

26. *See* North Carolina v. Alford, 400 U.S. 25, 37-38 (1970).

27. Mabry v. Johnson, 467 U.S. 504, 508-09 (1989).

28. 404 U.S. 257, 264 (1971) (Douglas, J., concurring).

29. *Id.* at 262-63.

30. *See* Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 161-62 (2008); Scott & Stuntz, *supra* note 7, at 1911; Recent Case, *Plea Agreements--Ninth Circuit Allows Post-Plea Agreement Collateral Attack Based on Change in Underlying Law.*-- United States v. Sandoval-Lopez, *122 F.3d 797 (9th Cir. 1997)*, 111 HARV. L. REV 603, 608 (1997).

31. *See* United States v. Sandoval-Lopez, 122 F.3d 797, 800 (9th Cir. 1997) ("Plea bargains are contractual in nature and subject to contract-law standards. Just as with other forms of contracts, a negotiated guilty plea is a bargained-for quid pro quo.").

32. Albert Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 695-703 (1981); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 70-74 (1988).

In reality, judicial attempts to apply contract law principles to plea disputes have been inconsistent and sometimes disingenuous, begetting rulings that fail to uphold basic legal protections or the bargains themselves. The next section reviews scholarly literature and case law related to the "plea bargain as contract" analogy in practice, demonstrating the unjust results that too often follow.

II. WHEN IS A PLEA A CONTRACT?

As "one of the basic institutions of our social fabric [and] . . . a principle of order of universal usefulness,"[33] the contract is a foundational legal concept that defies simple definition. In its most skeletal form, a contract is understood to be an agreement between parties, each exchanging goods, services, or other items of value in exchange for value gained.[34] An economy is largely defined by how freely parties may enter into such contracts, and how much governmental regulation is applied toward its creation and enforcement. The United States was founded and is based upon the ideal of a primarily "free market." Under this model, independent actors free to contract as they wish voluntarily enter into contractual exchanges; thus government restriction and regulation of contracts is restrained and limited, imposed only to prevent extreme abuses arising out of fraud and force.[35]

To many, the contract model is perfectly analogous to the plea bargain practice so commonly employed in our modern criminal courts: defendants exchange the right to trial for a guaranteed sentence recommendation or charge reduction from prosecutors. Rather than a stain on the fabric of American criminal justice, proponents argue that plea bargaining is rooted in the freedom of choice and individual autonomy that makes the country great, and is often found in other branches of legal procedure. Extrapolating the adjudication of federal

33. FRIEDRICH KESSLER ET AL., CONTRACTS: CASES AND MATERIALS 1 (Aspen Law & Bus. 3d ed. 1986).

34. *Id.*

35. *See generally* Murray N. Rothbard, *Free Market*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS (2d ed. 2008), *available at* http://econlib.org/library/Enc/freemarket.html.

white collar crimes to the state of criminal justice as a whole,[36] Judge Lynch claims there is little reason to see a substantial distinction between the plea bargain method of "settling" criminal cases and the much less controversial contracts that result from civil settlements.

> While some special rules apply to criminal cases, in its essential structure a criminal case is nothing more than an ordinary lawsuit: the state, like a private party in a tort or contract action, is just one entity that may come before the court to present a claim for relief, and the defendant is nothing more or less than the party from whom that relief is sought. Just as in a civil case, if the plaintiff party elects to withdraw its complaint, or if the defendant acknowledges his liability and agrees to the relief, there is no longer a dispute for the court to resolve. And as in a civil case, the parties may settle their disagreement by jointly agreeing to some compromise, and if they do, the court will not (much) inquire into whether that is the 'right' result under the law, for their compromise once again has the effect of leaving no dispute for the court to arbitrate.[37]

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36. Lynch, *supra* note 9, at 2125. It is notable that Judge Lynch cites federal white collar cases as the primary example from which he draws these conclusions, yet claims they can be more generally applied:

> The practices characteristic of federal white-collar criminal investigations involving well-financed defendants disclose a system fairly far along in the transformation from "plea bargaining" to "administrative justice," and therefore provide an opportunity for examining a somewhat idealized version of the plea bargaining process. Such cases are not necessarily typical of the operation of plea bargaining or prosecutorial discretion in all American cases, but they do represent the system in its most elaborate form, partly because the defendants in such cases typically have the most resources to avail themselves of effective defense counsel . . . .

Id. Indeed, as many as seventy-five percent of criminal defendants are indigent, thus represented by public counsel due to their inability to afford private attorneys. *Indigent Defense*, BUREAU OF JUSTICE STATISTICS (Feb. 1, 1996), http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=995. Even if Judge Lynch's claim that plea bargains in white collar cases is a balanced, administrative-like negotiation, there is little basis to conclude that such could be expected—or achieved—in cases involving fundamentally different allegations, defendants and legal representatives.

37. Lynch, *supra* note 9, at 2120-21.

Indeed, many scholars and courts have embraced the conflation of criminal and contract law, concluding: "a plea bargain is not like a contract; it is a contract."[38]

If this conclusion is accurate, plea bargains are presumptively valid upon creation and can only be invalidated by a legally recognized contractual defense raised by one of the parties. As mentioned above, the primary bases by which law will interfere with private contract negotiations are those alleging the process to have been tainted by fraud or force, thus rendering the entire contract "unconscionable" —that is, impermissibly unfair.[39]

In the context of structural objections to plea-bargaining, duress and coercion are the most relevant and most common challenges to the practice's contractual validity. Duress renders a contract voidable at the election of the coerced party if he or she can prove that the contract was formed solely under threat of harm intentionally manipulated by the other party.[40] If that threat of harm—physical, economic or otherwise—is proven to be sufficiently grave and aimed at forcing the contractual agreement, the resulting contract is involuntary and therefore legally unenforceable.[41]

Leading critic of plea bargaining Albert Alschuler levies a host of contract-based objections to the practice. His objections include the claim that agreements resulting from plea bargains are, by definition, the result of coercion, made under duress by defendants facing the infamous trial tax: a risk of substantially higher penalty if convicted at trial.[42]

Legal scholars Robert E. Scott and William J. Stuntz defend plea bargains against critics' most common contract-based objections in

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38. Cicchini, *supra* note 30, at 173; *see also* United States v. Ballis, 28 F.3d 1399, 1409 (5th Cir. 1994); United States v. Hembree, 754 F.2d 314, 317 (10th Cir. 1985).

39. KESSLER ET AL., *supra* note 33, at 273.

40. *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 273-84 (6th ed. 2009).

41. *Id.*

42. Alschuler, *supra* note 32, at 695. The United States Supreme Court rejected a version of this argument in *Brady v. United States*, 397 U.S. 742, 754 (1970), by holding the risk of execution faced by a defendant who pled guilty in exchange for a prosecutor's promise not to seek the death penalty did not render the plea contract impermissibly coercive.

their 1992 article *Plea Bargaining as Contract*,[43] concluding the practice exhibits neither the "defective bargaining process" nor the "systematically unfair [and] distributionally unjust outcomes" that would warrant its wholesale abolition.[44] Under their analysis, objections based in claims of duress and coercion fail because the allegedly coercive elements operating at the time the contract is made —the defendant's risk of conviction at trial, potential maximum sentence if convicted, stigma of arrest and imprisonment—exist prior to the start of negotiations and result from standard law enforcement practice rather than intentional manipulation on the part of state actors.[45] In other words, the State does not arrest and charge an individual in order to force him into a plea bargain; the arrest and charge occur independently, and create a situation in which both parties have an interest in plea-bargaining.

Scott and Stuntz also reject Alschuler's claim that plea bargains are per se unconscionable. The scholars dismiss allegations that defendants lack complete information before agreeing to a plea bargain, and assert that defendants objectively prefer such bargains and are left better off than they would be after trial.[46] They then conclude neither the process nor the outcome of this type of contract-making is so fundamentally unfair as to call for its complete invalidation.[47]

The result of this reasoning in academia and the judicial branch is the finding that plea bargains are not so unique in their terms and formation to warrant their treatment as "special" contracts. Underlying this position is the assumption that, when applied to the facts of individual plea bargain disputes, standard contract law alone will ensure just outcomes. The case law, however, does not bear out the accuracy of this assumption.

According to Michael D. Cicchini, just outcomes do not necessarily follow plea bargains partially because courts often misapply contract law when deciding plea bargain cases.[48] Though

43. Scott & Stuntz, *supra* note 7.
44. *Id.* at 1911.
45. *Id.* at 1920-21.
46. *Id.* at 1928.
47. *Id.* at 1921-22.
48. Cicchini, *supra* note 30, at 163.

coercion and duress claims usually involve a defendant seeking to withdraw his or her guilty plea, Cicchini explores the justifications proffered by prosecutors seeking to invalidate plea bargains after they had been accepted, and the strained judicial reasoning courts employed to justify granting those requests.[49]

In cases throughout the country, courts have permitted the State to withdraw plea bargains after acceptance because the prosecutor "did not look at the file until after he proposed the original plea bargain" and later determined it was too lenient;[50] because the prosecutor failed to adequately research the law to learn his recommended sentence was illegal;[51] and because a newly-assigned prosecutor did not like the deal his predecessor had offered.[52] As Cicchini observes, "these mistake excuses could not be used by a private party to escape a civil contract, or even by a defendant when defending against some type of criminal allegations."[53] These cases and others suggest that when courts review plea bargain disputes, they are most likely to venture from traditional contract law principles in ways that benefit the State.

One notable exception is *United States v. Sandoval-Lopez*, in which the Ninth Circuit Court of Appeals rejected a federal prosecutor's claim that defendants violated their plea agreement by filing a habeas petition to challenge the legality of their conviction after a subsequent court decision held the governing statute did not criminalize the conduct for which they had pled guilty.[54] Though the agreement required the defendants not appeal the plea bargain itself,

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49. *Id.* at 163-69.

50. *Id.* at 164 (citing State v. Bourland, 862 P.2d 457, 458-49 (N.M. Ct. App. 1993)).

51. *Id.* (citing Jackson v. Schneider, 86 P.3d 381, 383-84 (Ariz. Ct. App. 2004)).

52. *Id.* at 165 (discussing State v. Edwards, 279 N.W.2d 9, 10 (Iowa 1979)). Cicchini notes that this outcome is especially erroneous, considering "the basic agency law principle that '[p]rosecutors are agents of the State, and it is the State rather than the individual prosecutor which is bound by the agreement.'" *Id.* (quoting State v. Scott, 602 N.W.2d 296, 305 (Wis. Ct. App. 1999)).

53. *Id.*

54. 122 F.3d 797, 802 (9th Cir. 1997).

the court held the bargain could not also restrict their habeas rights unless that restriction was explicitly stated in the bargain.[55]

Though the court found in favor of the defendants, even this decision has a questionable basis in contract law, and is another example of how contract law's application to plea bargain cases is often unpredictable and ad hoc.[56] A *Harvard Law Review* article published shortly after the *Sandoval-Lopez* decision argued the opinion failed to address other contract law considerations that might have justified finding in the State's favor, and concluded the case left more questions than answers.

> [T]he extent to which judges actually adhere to contract law [when analyzing plea agreements] is often not clearly delineated and varies considerably across the circuits. . . . Because the Ninth Circuit lacks a reasoned basis for selectively applying contract law in the plea bargain context, the manner in which it will approach future plea bargain analyses is unclear.[57]

As these cases demonstrate, there are many contractual claims that can arise out of a plea bargain, and the standards by which courts evaluate them are largely unpredictable. However, contract law's failure to adequately ensure fairness in the plea bargain context is not just a problem of judicial misapplication; it is also a result of the structurally distinct environment in which plea bargains are created.

III. SHOPPING FOR A SENTENCE: HOW THE PLEA BARGAIN "MARKET" IS DIFFERENT

The discussion thus far has examined judicial misapplication of contract law doctrine to plea bargain disputes; this Part takes the argument further. While judicial application of contract law to plea bargain cases is often applied in an inconsistent and illogical manner, contract law is also an inadequate means of adjudicating plea bargain

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55. *Id.* at 800 (quoting United States v. Pruitt, 32 F.3d 431, 433 (9th Cir. 1994) (explaining that "[a] plea agreement does not waive the right to bring a [28 U.S.C.] § 2255 motion unless it does so expressly. The government gets what it bargains for but nothing more.")).

56. *See* Cicchini, *supra* note 30, at 160, 174-75.

57. Recent Case, *supra* note 30.

disputes on its face. Many market features that empower contracting parties and ensure balanced negotiating power are absent from the plea bargain environment.

Sandoval-Lopez and other cases discussed in Part II simultaneously demonstrate (1) inconsistent and flawed judicial application of contract law to plea bargains, and (2) an imbalance of power and lack of alternative options that leave courts and prosecutors free to violate their own contracts with little fear their bargaining power will be negatively affected. In this way, contract law as an analytical tool is both misused and inadequate for the task of plea bargain adjudication.

The free market vision of contractual freedom is based on the premise that rational choice among independent economic actors will lead to more just outcomes than heavy government regulation.[58] Consider the example of a store in a very simple economy: the store owner has the goods for sale and the consumer has the money needed to buy them. In a government-controlled economy, the price would be legislatively determined, but in the free market, both actors are free to negotiate.

Each party's relative bargaining power is based on his or her respective options: if the store owner is the only supplier of a particular good, he has more power to set a price. However this power is not without limitations: if the price is too high the consumer may choose to leave the market altogether, foregoing that good and/or replacing it with a substitute.

Alternatively, if multiple suppliers of the good are in competition with this store, the consumer is a more valued commodity. Thus, various stores will try to attract consumers with increasingly appealing offers, such as lower prices or additional benefits. Consumers and suppliers will enter and exit the market as demand and prices fluctuate, achieving economic equilibrium and stability.

This model is destroyed when the balance is disrupted, not due to a temporary ripple in the economy, but instead resulting from the system's fundamental design. When one contracting party has substantially more power than the other and exerts monopolistic control over the market, the resulting contract cannot be called "free" at all.

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58. *See* KESSLER ET AL., *supra* note 33, at 3-4.

In the plea bargain context, the "market" in which these agreements are reached is substantially different from one in which free market principles are typically employed. There is no competition because "defendants cannot shop around for prosecutors."[59] Indeed, individual prosecutors are identical agents of the office they work for, indistinguishable under the eyes of the law.[60] As such, each prosecutor's office has an absolute monopoly on plea bargains and a massive premium on bargaining power compared to the defendants with whom they negotiate. As professor Fred C. Zacharias explains:

> The prosecution, in contrast, can exercise coercion unilaterally for the purpose of encouraging a settlement; for example, by threatening lengthy pretrial detention and interfering with the defendant's ability to earn his livelihood. The defendant can do nothing in response, other than to refuse a plea. Thus, in a limited sense, plea bargaining is inherently unequal.[61]

In this plea bargain "economy," prosecutors set the rules and, with charging power and the growth in mandatory minimum legislation, often exercise the greatest sentencing power in the courtroom—even greater than that of the judge. In 2009, Federal District Judge Steven J. McAuliffe described the practical results of sentencing power in an opinion that expressed his dissatisfaction with the too-severe sentence a defendant had agreed to under a plea bargain when facing the risk of even more severe charges and higher mandatory minimums if convicted at trial:

> It is an unfortunate reality of our current system that, in a very real sense, broad prosecutorial discretion, coupled with a mandatory minimum statutory scheme and the prosecution's ability to effect the imposition of a mandatory minimum sentence (in this case, either 10 years or 20 years) simply by choosing to file or not file an information under Section 851, all combine to empower prosecutors to effectively impose criminal sentences in many cases, usually involving drugs, bypassing Article III sentencing authority.

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59. *See* Cicchini, *supra* note 30, at 163.

60. State v. Scott, 602 N.W.2d 296, 305 (Wis. Ct. App. 1999).

61. Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1133-34 (1998).

> In such circumstances, when a sentencing court determines the stipulated sentence to be too severe, the judicial sentencing function can be relegated to little more than the ministerial act of approving the stipulated sentence in lieu of being required to impose an even higher, mandatory, sentence [if the plea is rejected and additional charges are added].[62]

With such largely unrestrained power in prosecutors' hands, it is little wonder defendants lack the collective action efficacy so crucial to consumer power in the free market model.

Many scholars accurately recount the substantial benefits prosecutors, courts, and the public at large derive from plea bargaining's widespread use: the practice saves significant time and money that would otherwise be spent on lengthy trials and investigations if defendants were unwilling to "sell" their Sixth Amendment rights.[63] Some believe this value gained should restrain State abuse of the plea bargain process because, as Cicchini writes, "such behavior could seriously jeopardize the very system from which [the State] derive[s] so many benefits."[64] Yet plea bargaining's persistent and growing popularity, amidst increasingly negative case law and what Cicchini himself describes as "negligent and even bad faith behavior [by the State],"[65] does not support the claim that defendants will reject a plea bargaining system that treats them unfairly. This is yet another example of the difference between the "free market" and the "plea bargain market."

While defendants' plea bargain "consumption" is indeed very beneficial to prosecutors and courts, the State faces little risk that reneging on plea bargains or enforcing them in a way that eradicates their worth as prospective guarantees will result in widespread loss of consumers. Cicchini characterizes persistent contract violations among State prosecutors and courts as "short-sighted[ness]."[66] In fact,

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62. United States v. Taliaferro, No. 08-cr-7-1-SM, 2009 WL 3644114, at *2 (D. N.H. Oct. 30, 2009).

63. Cicchini, *supra* note 30, at 161-63; *see* Scott & Stuntz, *supra* note 7, at 1916.

64. Cicchini, *supra* note 30, at 163.

65. *Id.* at 169.

66. *See id.* at 163.

such behavior evidences these institutional actors' very realistic understanding of the extreme bargaining power they yield.

The State knows it controls the market and is the only means by which defendants can access the good they provide: plea bargains. Though defendants can always elect to go to trial instead, the State—that is, prosecutors and courts—exercises substantial influence over this substitute good and has a definite interest in making it as unattractive as possible. As long as trial presents a risk of conviction, and thus a substantially harsher sentence than offered in exchange for a plea, even the most skewed plea bargain system will attract defendants to enter into such contracts. With no competitors and substantial influence over the only available substitute good, the State does not have to ensure plea bargains remain an objectively attractive option; they must simply remain more attractive than the alternative. In this era of overburdened indigent defense systems, increasingly punitive sentencing laws, and unprecedented mass incarceration rates, that is not a difficult task.

Though typical free market-based contract law allows for regulation of contracts that are created through the use of duress and coercion, or that would qualify as procedurally or substantively unconscionable, a truly free market contains its own protections against those abuses[67]: the more balanced the bargaining power between two actors, the lower the risk that one will be able to pressure the other into a contract that is against his or her interest.[68] This institutionalized protection justifies the legal presumption that all contracts are valid unless proven otherwise.[69] It also explains why duress and coercion defenses are most commonly successful in extreme cases involving use or threat of physical force, and unconscionability claims are most often raised with respect to one party's competence to enter the contract (based on age, intelligence, and other factors;[70] these are the circumstances under which even free market protections would fail to prevent the formation of an unjust contract.

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67. *See* KESSLER ET AL., *supra* note 33, at 5.
68. *See id.*
69. *See id.* at 7-8.
70. *Id.*

When a market is skewed in favor of one bargaining party, the above protections do not exist. Further, there is an especially acute risk that duress, coercion, and unconscionability will result from the contracts it creates. Agreements made in this environment are hardly presumptively valid, and adjudicating them using standard contract law alone fails to take this into account.

Due to the unique circumstances under which plea bargains are made and enforced, they are more different than similar to standard contracts, such that "laissez-faire" plea-bargaining institutionalizes unfairness to a greater degree than similarly unregulated private contracting. The imbalance of power inherent to criminal prosecution impedes the creation of fair and consistent agreements and diminishes State accountability and incentive to deal fairly with the defendant. Treating plea agreements as normal contracts ignores the increased likelihood that these agreements will result in unfair "bargains" where many of the usual incentives to deal fairly do not exist, and does nothing to protect against unfairness. Furthermore, judicial application of contract law to settle plea bargain disputes on review refuses to recognize the unfairness of the bargain after the fact, perpetuates the legal fiction of "plea bargain as contract," and turns an institutional blind eye toward the reality of the practice.

This cyclical, self-reinforcing process can only be improved through the imposition of uniform and heightened standards to protect against the kinds of abuse and unfairness inherent to the market in which plea bargains are negotiated. The following case studies explore the practical consequences of the current state of the law, in the context of retroactively applied collateral consequences.

IV. "SUBSEQUENT CHANGE IN THE LAW," POST-PLEA CONSEQUENCES, AND UNCONSCIONABILITY: TWO CASE STUDIES

Though incarceration may be the first consequence of criminal conviction that comes to mind, there are many less tangible penalties that can and do result from a guilty plea. These "invisible punishments" typically exist outside the realm of regular criminal laws, and are often instead legislatively created without consideration of the judicial committee, codified outside of the penal code, and

sometimes even classified as regulatory provisions rather than criminal punishments.[71]

Just as the past three decades have ushered in unprecedented prison growth fueled by "tough on crime" legislation and mandatory minimum sentences for drug offenses and other crimes, collateral consequences of conviction have also expanded. For example, individuals with past drug felony convictions—even a first offense possession charge—are barred from living in public housing, receiving federal welfare benefits or federal financial aid for college.[72] In addition, felons remain the only category of U.S. citizens without constitutionally-protected voting rights.[73] Experts estimate as many as 5.3 million Americans—or one in forty-one adults—are disenfranchised by a patchwork of state laws.[74] More than two million of these otherwise eligible voters have completed their criminal sentences.[75]

These collateral consequences can also take the form of sentence enhancements for subsequent convictions, or charge-specific registration requirements imposing either a short-term or lifetime duty to abide by rules and keep local law enforcement informed of one's residence. In 1969, the U.S. Supreme Court declared that defendants have a right to know the consequences of a conviction prior to entering a guilty plea.[76] This decision effectively created the "canvass" procedure in which, prior to accepting a guilty plea, a judge questions the defendant to assure there has been adequate notice and consideration of the results to follow.[77]

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71. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 16-17 (Marc Mauer & Meda Chesney-Lind eds., 2002).

72. *Id.* at 18.

73. *Id.* Section 2 of the Fourteenth Amendment to the U.S. Constitution declares that no state can abridge the voting rights of male citizens over age 21, "except [as punishment] for participation in rebellion, or other crime." U.S. CONST. amend. XIV, § 2.

74. *Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT (Dec. 2011), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinusDec11.pdf.

75. *Id.*

76. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

77. *Id.* at 243-44.

As the list of conviction consequences has expanded, the duty to fully inform defendants of all consequences has threatened to become unwieldy. Interestingly, the increasingly high stakes of plea negotiations and substantially weightier and longer-term rights, privileges, and opportunities defendants sacrifice by accepting criminal conviction through the plea process has not translated into similarly heightened protections and oversight in the plea process. Even if contract law was initially sufficient to protect a defendant's interests when the results of guilty pleas were fairly straightforward and easy to predict, a stronger doctrine is clearly needed as the risks have become much greater, complex results can be so easily obscured, and plea bargain adjudication has become the norm.

Instead, courts have responded to the explosion of conviction consequences and plea bargain adjudication by attempting to narrow the protection elucidated in *Boykin*, through creation of a distinction between "direct" and "collateral" consequences of conviction. "Direct" consequences are defined as those that have a "definite, immediate and largely automatic effect on the range of the defendant's punishment."[78] Despite the dubious legitimacy of this often blurry distinction, the labels are consequential: courts are generally required to inform defendants of direct consequences, but not necessarily collateral consequences, in order for defendants' pleas to be valid.[79]

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78. State v. Andrews, 752 A.2d 49, 55 (Conn. 2000) (citing Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973)).

79. Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 138 & n.81 (2009) (citing *Bustos v. White*, 521 F.3d 321, 325-26 (4th Cir. 2008), *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988), and *Hill v. Lockhart*, 731 F.2d 568, 570 (8th Cir. 1984) as cases in which courts held parole eligibility was not sufficiently related to criminal conviction as to render a plea voluntary when entered in reliance on erroneous parole advice); *see also* Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010) (holding that a legal permanent resident could challenge his guilty plea to drug charges on the grounds that his attorney misinformed him as to the risk of deportation). In *Padilla*, the Court stated:

> Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation

Defendants often challenge the legitimacy of their pleas in the context of ineffective assistance of counsel claims, alleging that inadequate pre-plea notification rendered their pleas involuntary. Such defendants argue the plea was not knowing and voluntary, because a defense attorney failed to provide information regarding a particular consequence of conviction.[80] Notably, these claims hinge on the appropriateness of the defense attorney's representation rather than on an analysis of the plea bargain's enforceability under contract law, and seek to declare the agreement void due to lawyer failure rather than structural bargaining inequity.

Through this lens, the judicial reasoning may appear rational. Perhaps attorneys cannot be expected to stay informed of growing state and federal laws regarding a criminal conviction's impact on a defendant's ability to obtain public housing, welfare benefits, educational loans, and other services not directly within the purview of the judicial system. This is particularly true when the prosecutor has no authority to mitigate these consequences once discovered, and when their applicability to a particular defendant may depend on personal characteristics of which the lawyers are not aware. Perhaps knowledge of this wide array of consequences is a research task better left to the due diligence of the defendant and his counsel, and an advocacy effort better aimed toward the legislature than the courthouse.

Nevertheless, in cases where the consequence flows directly from conviction and/or is applied at the discretion of the prosecutor's office, the calculus must come out differently. In cases where the consequence is challenged as a violation of the plea agreement rather than a dereliction of duty on the part of defense counsel, contract law must be employed to settle the dispute in such a way that upholds the original bargain, and recognizes the risks of deciding otherwise. If failure to advise a defendant of a direct consequence of conviction is enough to overturn a plea on ineffective assistance grounds, should it not follow that defendants who enter a guilty plea before the direct and automatic consequence in question exists cannot have that

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is not categorically removed from the ambit of the Sixth Amendment right to counsel.

Id. at 1482.

80. Roberts, *supra* note 79, at 125-26.

consequence subsequently read into the earlier contract without some additional consideration or negotiation?

In fact, such retroactive contract modification has occurred and been judicially upheld in the two case studies analyzed below. Both Connecticut's sex offender registration law and California's Three Strikes law apply retroactively to individuals convicted prior to the legislation's passage, including those who entered a guilty plea as part of a plea agreement. Though individuals in both circumstances were effectively precluded from considering these consequences when weighing the bargain offered by the prosecution, courts in both states have permitted imposition of these statutory innovations as mere subsequent changes in the law.[81] In reality, they constitute unilateral modifications to the terms of the plea contract: modifications initiated by one party—the State—with neither the consent nor approval of the other party—the defendant.

Applying these collateral consequences of conviction against individuals who entered into plea bargains before the consequences existed constitutes both procedurally and substantively unconscionable enforcement of the plea bargain contract. The Connecticut and California courts' unwillingness to recognize and uphold this basic tenet of contract law, in the plea bargain context, should shatter the faith of those who claim contract law is a sufficient framework to ensure the just adjudication of plea bargain disputes.

A. Connecticut Sex Offender Registration: Post-Conviction Punishment v. Regulatory Provision

In 1998, Connecticut became one of many states to enact a sex offender registration law during that decade. These "Megan's Law" statutes were inspired by the death of seven-year-old Megan Kanka, who was sexually assaulted and murdered in New Jersey by a repeat violent sexual offender during the summer of 1994.[82] Though sex offender registration requirements date back to the 1940s in states

81. People v. Gipson, 12 Cal. Rptr. 3d 478, 482 (Ct. App. 2004); Ramos v. Comm'r of Corr., 789 A.2d 502, 508 (Conn. App. Ct. 2002).

82. Tim O'Brien, *Would Megan's Law Have Saved Megan?*, 145 N.J. L.J. 109, 109 (1996).

such as California,[83] these more recent iterations were backed by federal authority,[84] and featured more public and stringent rules. Such rules included community notification of sex offenders residing in the local area,[85] public access to sex offender registries, and restrictions on where sex offenders may, for example, reside upon release.[86]

Connecticut's law states that anyone "convicted or found not guilty by reason of mental disease or defect of a sexually violent offense" and released into the community between October 1, 1988, and October 1, 1998, or released into the community after October 1, 1998, must register as a sex offender for life and is subject to all restrictions that flow from that label.[87] Failure to register constitutes a class D felony.[88]

In order to encompass individuals convicted of qualifying offenses prior to the law's passage, the date of release, rather than date of conviction, triggers the law.[89] In 2003, a six-to-three majority of the U.S. Supreme Court rejected an ex post facto challenge to a similar Alaska law, and held registration laws, civil rather than criminal, accord regulatory rather than punitive consequences.[90] In the same year, the Court unanimously rejected a procedural due process challenge to Connecticut's registration statute, holding federal due process does not require the opportunity to disprove dangerousness, and that reputational injury does not constitute deprivation of liberty.[91] Though the Constitution has not yet been interpreted to limit these

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83. Office of the Att'y Gen., Cal. Dep't of Justice, *Sex Offender Registration and Exclusion Information*, CAL. MEGAN'S LAW, http://www.meganslaw.ca.gov/sexreg.aspx?lang=ENGLISH (last visited Oct. 21, 2011).

84. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, requiring all states to create a registry for sex offenders and child abusers residing in their borders. 42 U.S.C. § 14071 (2006). In 1996, this law was amended by "Megan's Law," further requiring that law enforcement release relevant sex offender registration information to the public. Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996).

85. Office of the Att'y Gen., *supra* note 83.

86. CAL. PENAL CODE § 3003 (West 2011).

87. CONN. GEN. STAT. § 54-252(a) (2009 & Supp. 2010).

88. § 54-252(d).

89. § 54-252(a).

90. Smith v. Doe, 538 U.S. 84, 94 (2003).

91. Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7 (2003).

laws' reach, some state courts have invalidated them on state constitutional grounds.[92] The unique situation of individuals whose sex offender registration requirements are the result of a plea agreement reached prior to the law's creation are especially implicated in Connecticut, where the statute explicitly requires that defendants have knowledge of these consequences before entering a plea to a qualifying offense:

> Prior to accepting a plea of guilty or no lo contendre from a person with respect to a sexually violent offense, the court shall (A) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section and (B) determine that the person fully understands the consequences of the plea.[93]

Though the broader portion of the statute applies the registration requirements to all individuals "convicted or found not guilty by reason of mental disease or defect" of a qualifying crime, subsection (a) provides heightened standards which must be met before the requirements can be imposed upon individuals who plead guilty.[94] This can be interpreted as a legislative finding that it would be unlawful to impose lifetime sex offender registration requirements on individuals who have not knowingly, intelligently, and voluntarily consented to that particular consequence prior to entering the plea. Similarly, it can be framed as a presumption that such plea contracts are unenforceable with respect to the registration consequence. It is impossible for a defendant to be warned of a consequence before it exists; it is likewise impossible for a defendant to consider the wisdom of conceding guilt and foregoing trial without fully knowing the consequences. How, then, can it be contractually and legally just to

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92. Doe v. Phillips, 194 S.W.3d 833, 852-53 (Mo. 2006) (en banc) (holding that the application of Missouri's sex offender registration law to individuals convicted prior to its passage violated the state constitution's ban on laws "retrospective in their operation"); State v. Bani, 36 P.3d 1255, 1268 (Haw. 2001) (holding that Hawaii's sex offender registration law violated the state constitution's due process clause by not providing an opportunity for individual hearings to determine dangerousness).

93. § 54-252(a).

94. *Id.*

impose those consequences upon him or her once the plea has been entered?

As written, the Connecticut statute acknowledges the significant impact of lifetime registration requirements and the considerable influence those requirements may have on an individual's decision to waive trial and plead guilty to a qualifying offense. Defendants charged with violent sexual offenses prior to the passage of Megan's Law were completely precluded from considering the consequence of lifetime registration when contemplating a guilty plea. Today's law recognizes the injustice of imposing those requirements on an individual who is unable to factor them into his or her decision to plea. Yet, that injustice exists regardless of when the plea took place.

The Connecticut Appellate Court considered and rejected this argument in 2002. In *Ramos v. Commissioner of Correction*,[95] a defendant pled guilty to a violent sexual offense in 1989 and was sentenced to fifteen years imprisonment suspended after ten, with five years of probation.[96] In 1999, while still incarcerated, he filed a habeas petition claiming, among other things, his 1989 plea had been involuntary "because he was unaware that he would have to comply with Megan's Law."[97]

The court acknowledged the registration requirements represented "grave and definite" consequences, ignorance of which could render a plea unknowing and involuntary "whether or not [registration is] termed 'punitive.'"[98] The court nevertheless held, because the defendant pled prior to the creation of this consequence, he was not entitled to the same warnings as post-Megan's Law defendants:

> When the petitioner entered his guilty plea, however, the effects of Megan's Law were far from 'definite, immediate and automatic.' Megan's Law had not even been drafted. As with all other 'collateral consequences' of a guilty plea, a trial judge should not be held to the impossible standard of predicting all future actions of

95. 789 A.2d 502 (Conn. App. Ct. 2002).
96. *Id.* at 504.
97. *Id.* at 504-06.
98. *Id.* at 508.

> the legislature that might impact a defendant who is pleading guilty.[99]

This holding prioritizes the regulatory interests of the State over the due process and contract rights of the defendant. Similarly, it focuses on the unfairness of requiring trial judges to warn defendants of not-yet-existent consequences of a guilty plea, rather than acknowledging the even-greater unfairness of subjecting individuals to additional consequences that were unforeseeable at the time of their plea, at a point when it is too late for that plea to be changed.

It is notable that the habeas petition in *Ramos* challenged the inmate's underlying sex offense conviction, and thus sought a complete invalidation of that plea rather than an exemption from the sex offender registration law.[100] Indeed, the *Ramos* decision expressed distaste for the idea of invalidating a plea and penalizing the trial court for something it could not have been expected to do differently: *Ramos* essentially asked the court to give him, and all other sex offenders who pled before Megan's Law and had not yet completed their sentences, a do-over on the original criminal charge.[101]

A narrower challenge with a far less extreme remedy would seek a judicial exemption from the law while leaving the underlying conviction undisturbed. Such a claim was raised in *State v. Jones*, an unreported 2007 Waterbury Superior Court decision in which a defendant moved to dismiss failure to register charges.[102] Jones had pled guilty to a violent sex offense prior to the passage of Megan's Law and faced criminal charges when, after his release from prison, he did not register as required.[103] Jones argued that because he was not warned of the registration requirements before pleading guilty, the requirements could not be imposed as a consequence of his plea.[104]

Jones's argument was rejected on a somewhat technical basis. Because Jones was released from prison prior to the enactment of the

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99. *Id.*

100. *Id.* at 504.

101. *See id.* at 508.

102. State v. Jones, CR06355760S, 2007 Conn. Super. LEXIS 3403, at *1 (Conn. Super. Ct. Dec. 17, 2007).

103. *Id.* at *2.

104. *Id.* at *1-2.

1998 revisions, he was subject to the law's predecessor, section 54-102r of the Connecticut General Statutes, which, unlike the current law, only applied registration requirements to individuals released into the community.[105] It did not require registration of sex offenders while incarcerated, and did not explicitly require warning of registration consequences prior to the entrance of a plea.[106]

In denying the defendant's motion to dismiss, the *Jones* court placed substantial importance on the fact that the defendant had been previously subjected to a version of Megan's Law that did not require that defendants be canvassed about registration requirements before entering a guilty plea, and thus his claim to such protection was particularly weak.[107] The court cited a provision of the current Megan's Law, which states that anyone who has been subject to the previous version of the law must now register under the updated revision:

> The language of C.G.S. Section 54-252(b) is plain and unambiguous, providing: Any person who has been subject to the registration requirements of section 54-102r of the general statutes, revised to January 1, 1997, as amended by section 1 of Public Act 97-183 shall, not later than three working days after October 1, 1998, register under this section and thereafter comply with the provisions of section 54-102q and 54-250 to 54-259 inclusive.[108]

Accordingly, the court found the defendant was subject to the provisions of section 54-252 of the Connecticut General Statutes in November and December of 2002.[109]

The narrow factual basis for the *Jones* ruling, coupled with the specific procedural history of the *Ramos* claim, could reveal an unsettled question in Connecticut jurisprudence. A defendant facing failure to register charges following completion of the original sex offense sentence, who had pled to that original charge prior to the passage of Megan's Law but was released post-1998, could argue: (1) that *Ramos* does not control because the instant claim seeks exemption

105. *Id.* at *3.
106. *Id.*
107. *Id.*
108. *Id.* at *4 (citing CONN. GEN. STAT. § 54-252(b) (2009 & Supp. 2010)).
109. *Id.*

from registration rather than a complete invalidation of the prior conviction, and (2) *Jones* does not control because, unlike that defendant, this individual was not released until after 1998 and thus is not subject to any version of Megan's Law other than the current iteration that requires pre-plea canvassing. This defendant would presumably have a stronger claim for invalidating the imposition of registration requirements based on his lack of pre-plea warnings.

Despite the nuanced procedural and remedial differences in *Ramos* and *Jones*, it remains true that a decision in favor of any such defendant would necessarily invalidate the imposition of sex offender registration requirements on others in his position. Few courts are likely to view that as an attractive and desirable outcome that warrants straying from the fairly direct precedent in *Ramos*, no matter how illogical its basis.

Like the Three Strikes decisions discussed in Part B, the *Ramos* decision recognizes the substantial and significant burden posed by registration requirements. The court requires that individuals be informed of this consequence before pleading guilty, yet concludes that those pleading before the law's creation have no claim to the same protection. Under this logic, defendants who enter into a contract with the State, only to have a new and devastatingly restrictive term added to that contract after its creation, are bound by that contract and that new term. Such a holding is unjust and unnecessary.

Courts are empowered to refuse to enforce, or limit the enforcement of, a contract that was unfairly created and/or which would lead to a significantly unjust result.[110] Among the factors determinative of a contract's unconscionability, the court may consider whether, at the time the contract was entered, the stronger party knew (1) "the weaker party [would] be unable to receive substantial benefits from the contract," or (2) "the weaker party [was] unable reasonably to protect his interests."[111]

In this case, the *Ramos* court expressed substantial concern about the stronger party's inability to protect its interest, decrying the injustice of holding the court responsible for advising the defendant of a now-recognized direct consequence of conviction at a time when that consequence did not exist. However, the court accords little

110. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

111. *Id.* § 208 cmt. d.

attention to the greater injustice that results from a contract regime that allows direct consequences to be created and applied after plea contract formation, and prevents defendants—the weaker party in any plea negotiation—from protecting their interests or benefitting from the plea agreement. In contrast, as recently as April 2011, the Appellate Court of Connecticut reversed a 2009 guilty plea and remanded for new proceedings when, in violation of statutory requirements, the trial court failed to advise the defendant of the registration requirements that would result.[112] This judicial approach recognizes the fallacy of imposing consequence without notice upon individuals who plead guilty after the registration law's passage, but ignores the unconscionable and illogical nature of applying that consequence to individuals who pled before it existed.

The imposition of admittedly "definite, immediate and automatic"[113] sex offender registration requirements as a consequence of a plea entered before that consequence existed imposes a substantial additional cost on one party to a contract. That cost has been created by the other party, subsequent to the contract formation, and at a time when the disadvantaged party can neither rescind acceptance, nor reject the new term. Such a result cannot be consistent with any conception of contract law as a means of ensuring bargain protection, and any contract doctrine that would permit such an outcome is inadequate.

B. California Three Strikes: Statutory Sentence Enhancement v. Explicit Contract Terms

In March 1994, then-California Governor Pete Wilson signed A.B. 971, better known as the Three Strikes Law—one of the most punitive criminal justice policies in America.[114] Spurred by public and political outrage following the tragic murder of young Polly Klaas mere months before, the legislation provided for unprecedented sentence enhancements for individuals with prior felony convictions. The bill, with a long list of "strikes" that included non-violent offenses

112. State v. Davenport, 15 A.3d 1154, 1159 (Conn. App. Ct. 2011).

113. Ramos v. Comm'r of Corr., 789 A.2d 502, 508 (Conn. App. Ct. 2002).

114. Dan Morain, *A Father's Bittersweet Crusade*, L.A. TIMES (Mar. 7, 1994), http://articles.latimes.com/1994-03-07/news/mn-31132_1_mike-reynolds.

such as burglary and mayhem, subjected defendants to a term of twenty-five years to life imprisonment upon a third felony conviction.[115]

Early on, the law's excessive reach was clear: of the nearly 3,000 inmates convicted of a second or third strike by November 1994, more than eighty-two percent were charged with crimes not labeled serious or violent, consisting mostly of property and drug offenses.[116] In the most infamous cases, individuals were sentenced to "third strike" life sentences for petty theft of a slice of pizza,[117] nine videotapes,[118] and three golf clubs.[119]

The law also proved financially unwieldy. In fiscal years 1994 and 1995, Los Angeles County alone requested reimbursements of $169 million to finance Three Strikes' application,[120] and estimated as much as $300 million for 1996.[121] Massive increases in the prison population also necessitated new construction. California opened twenty-one new prisons between 1984 and 2004, bringing the state total to thirty-three institutions averaging an annual operating budget of more than $102 million per facility per year.[122] Indeed, many legal and policy experts trace the state's current economic and prison overcrowding crises to the era begun by Three Strikes.[123]

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115. *Id.*

116. *Stealing One Slice of Pizza Results in Life Sentence: Felon's Act Triggers "3 Strikes" Law*, S.F. CHRON. (Mar. 3, 1995), http://www.sfgate.com/cgi-bin/article.cgi?f=/e/a/1995/03/03/NEWS7012.dtl.

117. *Id.*

118. Bob Egelko, *High Court to Review 3 Strikes Law – Challenge Considered a Test of States' Role in Sentencing*, S.F. CHRON. (Apr. 2, 2002), http://articles.sfgate.com/2002-04-02/news/17539090_1_life-sentences-three-strikes-california-cases.

119. *Id.*

120. Barbara Sims, *Criminal Justice Public Policy*, *in* 1 ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY 287, 290 (Jack Rabin ed., 2003).

121. CHRISTOPHER DAVIS ET AL., CTR. ON JUVENILE & CRIMINAL JUSTICE, "THREE STRIKES": THE NEW APARTHEID 1 (1996); Andy Furillo, *L.A. Story: Begging Help for Swamped Courts, Jails,* SACRAMENTO BEE, Mar. 31, 1996, at A19.

122. *California Prison Growth*, CTR. ON JUVENILE & CRIMINAL JUSTICE, http://198.170.117.218/cpp/ccf_growth.php (last visited Oct. 21, 2011).

123. Ward Connerly, *State's Sentencing Laws Flood Jails and Prisons*, SACRAMENTO BEE, Mar. 7, 2010, at E5.

Legal challenges to Three Strikes have had mixed results. In 1996, the California Supreme Court ruled that judges could dismiss consideration of prior convictions—and thus avoid the law's sentencing guidelines—"in the furtherance of justice."[124] However, this victory was tempered by U.S. Supreme Court decisions holding that Three Strikes laws violate neither the Fifth Amendment protection against double jeopardy,[125] nor the Eighth Amendment protection against cruel and unusual punishment.[126]

As a legal matter, then, an individual can and likely will be subject to the sentencing enhancements dictated by California's Three Strikes law if, after pleading to or being convicted of two qualifying felonies, he or she is convicted of a third. Even individuals convicted at trial prior to the law's passage are subject to its enhancements, as ex post facto challenges have also failed.[127]

But what of that plentiful category of defendants who, rather than being convicted at trial, pled guilty to these prior felonies as part of a plea agreement with the State? Can they be said to have considered the Three Strikes-related consequences of that contract if the law had not even been passed at the time of their plea? Though the U.S. Supreme Court has not considered this question, it has been raised and reviewed by federal and state courts several times.

In 2004, California's Sixth District Court of Appeal considered Defendant Lonnie Gipson's challenge to the sentence he received following a jury trial convicting him of assault with a deadly weapon.[128] Pursuant to the Three Strikes law, the trial court doubled Gipson's base sentence based on one prior "strike" conviction.[129] On appeal, Gipson argued the 1992 plea agreement by which that prior charge was adjudicated was a contract the legislature could not impair when it passed the Three Strikes Law.[130] That written agreement had referenced section 667 of the California Penal Code, which at the time of pleading provided for a five-year sentence enhancement for each

124. People v. Superior Court, 917 P.2d 628, 640 (Cal. 1996).
125. Monge v. California, 524 U.S. 721, 734 (1998).
126. Ewing v. California, 538 U.S. 11, 30-31 (2003).
127. *See* People v. Helms, 936 P.2d 1230, 1230 (Cal. 1997).
128. People v. Gipson, 12 Cal. Rptr. 3d 478, 479-80 (Ct. App. 2004).
129. *Id.* at 480.
130. *Id.*

prior felony conviction.[131] Gipson argued subjecting him to a greater enhancement violated that contract and was inconsistent with constitutional provisions barring any state from passing a law interfering with contractual obligations.[132]

Despite endorsing the view that "plea bargains are contractual in nature and must be measured by contract law standards,"[133] and acknowledging "existing applicable law is part of every contract, the same as if expressly referred to or incorporated in its terms,"[134] the court rejected Gipson's claim. After reviewing the circumstances of the Three Strikes law's passage and concluding it was intended to "promote the state's compelling interest in the protection of public safety and in punishing recidivism,"[135] the court held:

> [The defendant's] plea bargain is deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. The plea bargain vested no rights other than those which related to the immediate disposition of the case. The 1994 amendment to [Penal Code] section 667 did not affect the 1992 plea bargain; it did not create or destroy any substantive rights defendant had in the plea bargain. Subsequent to the plea bargain, the Legislature amended the law; defendant committed another crime; defendant became subject to the penalty described in the amended statute. The increased penalty in the current case had nothing to do with the previous case except that the existence of the previous case brought defendant within the description of persons eligible for a five-year enhancement for his prior conviction on charges brought and tried separately.[136]

A federal district court reached a similar conclusion in 2008, when a defendant argued that a Three Strikes sentence enhancement for a drug conviction violated his robbery plea agreement that pre-

131. *Id.*

132. *Id.* (citing U.S. CONST. art. I, § 10, cl. 1; CAL. CONST. art. I, § 9).

133. *Id.* at 481 (citing United States v. Escamilla, 975 F.2d 568, 571 (9th Cir. 1992)).

134. *Id.* (citing Farmers & Merchs. Bank of Monroe v. Fed. Reserve Bank of Richmond, 262 U.S. 649, 660 (1923)).

135. *Id.* at 482.

136. *Id.* (emphasis added) (citations omitted).

dated the law.[137] In dismissing the claim as frivolous, the court held, though the sentencing judge who accepted the defendant's 1990 plea to robbery informed him that his conviction could be used to impose a five-year enhancement for any future serious felony convictions, the provision was not part of the plea agreement.[138] The court further cited *Gipson*'s holding that the Three Strikes law's passage qualified as a proper exercise of state power to amend and enact laws in the public interest.[139] Subsequent challenges have also failed.[140]

In *Jamerson v. County of Los Angeles*, a man serving a third strike sentence of twenty-five years to life sued Los Angeles County for breach of contract.[141] He asserted that the use of plea agreements from 1989 and 1992 as first and second strikes to justify an enhanced sentence following his 1999 conviction violated those prior plea contracts.[142] The court ultimately dismissed the suit on statute of limitation grounds; the Second District Court of Appeal affirmed the dismissal without discussion of the claim's merits.[143]

Davis v. Woodford is a rare case in which a defendant has prevailed on a contractual claim challenging a state attempt to sentence under the Three Strikes law.[144] The defendant pled guilty to eight robberies under a plea agreement that promised the case would be counted as one prior conviction for any future recidivist sentence enhancements.[145] When the defendant was convicted of new charges in 2000, prosecutors alleged that he had eight prior "strikes" and the trial court sentenced him to twenty-five years to life under the Three Strikes provisions.[146] After multiple unsuccessful appeals, the Ninth

137. Callegari v. Cnty. of San Joaquin, No. CIV S-08-214 JAM KJM P, 2008 U.S. Dist. LEXIS 51043, at *2 (E.D. Cal. June 3, 2008).

138. *Id.* at *3.

139. *Id.* at *2.

140. People v. Edwards, No. G043857, 2011 WL 190874, at *2 (Cal. Ct. App. May 20, 2011) (relying on state precedent to reject contract-based challenge to use of prior plea as strike).

141. Jamerson v. Cnty. of Los Angeles, B208910, 2009 WL 2992516, at *1 (Cal. Ct. App. Sept. 21, 2009).

142. *Id.*

143. *Id.* at *1, *3.

144. *See* 446 F.3d 957, 962-63 (9th Cir. 2006).

145. *Id.* at 958.

146. *Id.*

Circuit Court of Appeals invalidated the sentence, reasoning that the promise of limited future enhancements had induced the defendant to accept the original plea and the state's subsequent breach clearly violated the plea contract.[147]

Nevertheless, the court sought to limit its holding's application by distinguishing promises of law from promises of fact:

> The present case is easily distinguishable from *Gipson*. There, the court upheld application of the Three Strikes Law against a defendant whose plea agreement in an earlier case had incorporated [Penal Code] section 667(a) by reference. Here, the plea agreement did not merely incorporate existing law by reference; rather, it included a specific promise about how many prior convictions would be placed in Petitioner's criminal record as a result of the guilty plea. *Petitioner's plea bargain did not purport to freeze the law as it was in 1986. Instead, the parties agreed on the facts (number of 'priors') that could be used, later, to sentence Petitioner under whatever law might then be in effect.*[148]

Clearly, the unique facts of *Davis* coupled with the court's narrow holding renders the case inapplicable to the vast majority of contractual challenges to Three Strikes sentences. For most defendants, *Gipson*—and its dubious rationale—remains controlling precedent.

The *Gipson* court purported to uphold the application of a Three Strikes sentence enhancement despite a condition in the defendant's earlier plea contract limiting future enhancements to the substantially lower term of five years.[149] The court cited the State's inherent power to pass laws aimed at the public interest as justification for this result.[150] Yet to support that contention, the opinion relied on a 1972 California Court of Appeal case adjudicating a challenge to legislative changes in divorce law that rejected the plaintiff's claim that marriage was a legal contract and based its decision largely on the "substantial

147. *Id.* at 961-62.

148. *Id.* at 962 (emphasis added) (citations omitted).

149. People v. Gipson, 12 Cal. Rptr. 3d 478, 482 (Ct. App. 2004).

150. *Id.*

public interest" in the marriage relationship.[151] Nowhere in the *Gipson* decision does the court explain or even discuss why a plea agreement should be analogous to a marriage, nor does it reconcile the questionable contractual nature of marriage with the clearly articulated legal definition of a plea agreement as a contract. As such, it does not justify the extension of this tangentially related marriage law holding to the doctrine of plea contracts.

In some ways, applying Three Strikes sentence enhancements to defendants whose "strike-producing" pleas pre-date the law may seem substantially different—and less objectionable—than the situation of Connecticut sex offender registration discussed above. After all, an individual who pled guilty to a sex offense prior to the registration law's passage finds himself or herself subject to its provisions immediately and automatically, wholly as a result of that earlier plea, regardless of what crimes he or she may or may not commit later. In contrast, an individual who pled guilty to multiple felonies prior to California's Three Strikes law was passed will not be subject to its provisions unless or until a subsequent conviction occurs. How can one say that they are precluded from considering its impact when only the act of being convicted of a crime after the law's passage renders them subject to its provisions?

Actually, the California and Connecticut examples are plainly analogous when the focus is properly directed. In the situation of Three Strikes defendants, the contractual challenge does not claim the law's application precludes them from fully considering the

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151. *Id.* (citing *In re* Marriage of Walton, 104 Cal. Rptr. 472, 475-76 (Ct. App. 1972)). That opinion, *In re Marriage of Walton*, 104 Cal. Rptr. at 475-76, first rejected the claim that marriage is a contract within the meaning of the U.S. Constitution. It then further held, even if marriage was held to be a contract between individuals and the State, it is a sufficiently public relationship to be subject to future modification by state legislatures:

> When persons enter into a contract or transaction creating a relationship infused with a substantial public interest, subject to plenary control by the state, such contract or transaction is deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy, and such legislative amendments or enactments do not constitute an unconstitutional impairment of contractual obligations.

Id. at 476.

consequences of a plea to their most recent charges; instead, the challenge argues retroactive application weakens the bargaining power they exercised in the original plea negotiations that pre-dated the law, and deprives them of the benefit of that contract by rendering it substantially less beneficial.[152] Today, defense attorneys, prosecutors, and many defendants are well-versed in Three Strikes terminology and the law plays a significant role in plea negotiations; defendants and their representatives advocate for reduced or fewer charges to minimize the number of strikes that will result from a guilty plea, while prosecutors leverage their power to add charges (and potential "strikes") if the case is forced to trial.

Even proponents of the plea bargain system recognize the decision to plead guilty often represents a defendant's practical evaluation of the likelihood of conviction at trial and aversion to the risk of the stricter punishment that could result, rather than an honest or even accurate admission of guilt.[153] In this reality, the calculus leading a defendant to plead guilty prior to Three Strikes would likely play out much differently today. A defendant bringing such a contractual challenge does not claim it is unjust to prosecute and punish him for his most recent crime; he instead accurately asserts that it is contractually unlawful to use his prior plea for a purpose he was never permitted to consider before he entered it—especially when the plea itself incorporated alternative terms.

In the context of a contract between an individual and the State—as courts recognize plea agreements to be[154]—a later act of the legislature altering the term of a contract is not simply a "subsequent change in the law." Allowing the Three Strikes sentence enhancements to apply to individuals whose plea agreements explicitly or implicitly included a significantly different enhancement law permits the State to effect a unilateral change in the terms of that agreement without any modification or additional consideration provided to the other contracting party.

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152. *Gipson*, 12 Cal. Rptr. 3d at 480-81.

153. Scott & Stuntz, *supra* note 7, at 1942-43.

154. State v. Scott, 602 N.W.2d 296, 305 (Wis. Ct. App. 1999) (stating "[p]rosecutors are agents of the State, and it is the State rather than the individual prosecutor which is bound by the [plea] agreement").

This outcome is blatantly inconsistent with the Supreme Court's pronouncement 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."[155] Furthermore, regardless of the debatable "public interest" in enforcing Three Strikes legislation, the *Gipson* decision violates foundational tenets of contract law.

Though not explicitly addressing the issue of plea agreements, the nineteenth century Supreme Court case of *McGee v. Mathis* outlined the framework for understanding the limitations on legislatures' power to interfere with contracts between individuals and the State.[156] In 1850, the U.S. Congress granted the state of Arkansas ownership of federally held swampland within the state's borders.[157] The State accepted and passed a law providing for the land's sale and declaring all such property "exempt from taxation for the term of ten years."[158] This inducement was successful in attracting private buyers, including McGee, who purchased a considerable amount of land under the law.[159] However, in 1855, just four years into the ten-year term of tax exemption, the Arkansas legislature repealed the earlier law and began taxing the swampland like all other property in the state.[160] McGee appealed, alleging the new law impaired his prior contract with the State and was a violation of the U.S. Constitution.[161] In finding in his favor, the Supreme Court held:

> It seems quite clear that the act of 1851, authorizing the issue of transferable land scrip and its receipt from locators of land in payment, and the provision in the fourteenth section, offering inducements to purchasers and contractors by exempting from taxation, for ten years or until reclaimed, all the swamp or overflowed lands, constituted a contract between the State and the holders of the land scrip issued under the act. . . . All the elements of a contract met in the transaction, -competent parties, proper

155. Santobello v. New York, 404 U.S. 257, 262 (1971).
156. 71 U.S. 143 (1866).
157. *Id.* at 143.
158. *Id.*
159. *Id.*
160. *Id.* at 143-44.
161. *Id.* at 148.

> subject-matter, sufficient consideration, and consent of minds. *This contract was binding upon the State, and could not be violated by its legislation without infringement of the Constitution.*[162]

Though Arkansas argued the new taxation served the public interest by funding public improvements within the state, the Court concluded the social benefit did not outweigh the blatant contract impairment imposed by the law.[163] To the Court, the most relevant consideration was (1) the original contract term had been part of what induced McGee to enter into the contract, and (2) the new law deprived him of that benefit while providing him neither substitute inducement nor the opportunity to withdraw his original contract.[164]

The plea agreement contract violation implicated in *Gipson* is clearly analogous to the claim raised by *McGee* nearly 150 years ago. Though the legal basis for that decision remains controlling law today, that basic principle of contract law was not applied, or even discussed, in the *Gipson* opinion. While relying on a tangential and arguably erroneous claim to State "reserve power," the *Gipson* court turned a blind eye to the much more relevant contract law principles that called for a decision in the appellant's favor.

To the extent that the implicit or explicit inclusion of the pre-Three Strikes enhancement law in pre-1994 plea agreements served as an inducement or reassurance to defendants entering into such contracts, these contracts were unconscionable if the State knew it reserved the power to alter those terms of the contract at any time in the future, and the contracting defendants had no means of protecting themselves from that result. The *Gipson* decision and its progeny misapply contract law and ignore the unconscionable results of the contracts they enforce, according insufficient weight to the substantial consequence posed by having "prior strikes"—a consequence that defendants accepting plea agreements prior to 1994 were unable to even consider.

Though judicial and legislative manipulation of this issue seeks to suggest the change in law is minor and inconsequential for contract purposes, California's current Plea Agreement Form suggests

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162. *Id.* at 155-56 (emphasis added).

163. *Id.* at 156.

164. *Id.* at 156-57.

otherwise. Among the "explanation and waiver of rights" to which a defendant must consent before accepting a plea bargain, section (f)(1) reads:

> I understand that by pleading guilty or no contest to a serious or violent felony ("strike"), the penalty for any future felony conviction will be increased as a result of my conviction in this case, depending on the number of strikes I have, up to a mandatory prison sentence of double the term otherwise provided or a term of at least 25 years to life.[165]

For those whose plea contracts pre-date this consequence, this warning is too little, too late.

The above examples demonstrate unconscionability, a fundamental and basic principle of contract law designed to invalidate unjust outcomes resulting from improperly created and/or enforced contracts, can be misused and ignored by courts evaluating plea agreement disputes. Instead of recognizing the illogical and unjust results of their rulings, courts have misapplied contract doctrine to uphold these contracts out of California and Connecticut. The case studies raise concerns about courts' ability to properly use contract law to protect defendants' interests, and doubt regarding whether contract law alone is sufficient to do that.

V. RAISING THE BAR: ARGUING FOR HEIGHTENED PLEA BARGAIN PROTECTIONS

Declaring plea bargains are mere contracts is folly, and adjudicating them under contract law, even if done correctly, cannot lead to justice. In light of a criminal defendant's highly vulnerable position, his decision to contract away his explicit constitutional rights deserves far more public scrutiny than ordinary private exchanges between private parties. Imbalanced bargaining power between the parties, coupled with substantially higher stakes for the individual and the society as a whole, require the courts to apply heightened

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165. CAL. JUDICIAL COUNCIL, FORM CR-101: PLEA FORM WITH EXPLANATIONS AND WAIVER OF RIGHTS–FELONY 3 (2010), *available at* http://www.courts.ca.gov/documents/cr101.pdf.

protections to these types of contracts to uniformly oversee and regulate their creation and enforcement.

Plea bargains are made in an environment where one contracting party is especially vulnerable, and typical methods of market self-correction are muted. This necessitates that courts take a more active role in protecting against unconscionability, precisely because the plea bargain market is not equipped to do so on its own.[166] The Constitution is the basis by which contract law can be augmented to incorporate a higher standard and achieve a greater result.

The U.S. Constitution's Bill of Rights explicitly guarantees the criminally charged and criminally convicted protection from cruel and unusual punishment,[167] unreasonable search and seizure,[168] and compelled self-incrimination.[169] The Bill of Rights also ensures access to legal counsel,[170] trial by jury,[171] and the right of due process.[172] Similarly, constitutional jurisprudence already recognizes application of these rights to the plea bargain process. As discussed above, the Supreme Court's decision in *Brady v. United States* held due process required all guilty pleas be knowing, intelligent, and voluntary.[173] Nevertheless, as demonstrated throughout this discussion, many courts have been reluctant to combine contract law doctrine with these constitutional protections to create a higher standard for evaluating contractual plea agreement disputes.

One notable exception is the case of *State v. Scott*, in which the Wisconsin Court of Appeals rejected a prosecutorial attempt to renege on a plea bargain after the defendant had already provided some of the cooperation required by the terms of the agreement.[174] Though

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166. Cicchini, *supra* note 30, at 186 ("Under the contract approach, there is no reason why an individual who bargains with his liberty should receive fewer contractual protections than an individual or business in the commercial marketplace that buys products or services. . . . In fact, criminal defendants should actually be afforded greater protection than persons contracting in the civil arena.").

167. U.S. CONST. amend. VIII.

168. U.S. CONST. amend. IV.

169. U.S. CONST. amend. V.

170. U.S. CONST. amend. VI.

171. *Id.*

172. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

173. 397 U.S. 742, 748 (1970).

174. *See* State v. Scott, 602 N.W.2d 296, 305 (Wis. Ct. App. 1999).

standard contract law might conclude the agreement was not yet in force, because the defendant had not yet pled guilty, the court forced the state to honor the agreement and insisted: "The constitutional concerns undergirding a defendant's contract rights in a plea agreement demand broader and more vigorous protection than that accorded private contractual commitments."[175]

The Fourth Circuit also "refus[ed] to accept contract theory as an exclusive test for determining plea bargain breaches"[176] in *Cooper v. United States*.[177] Like the *Scott* court, the Fourth Circuit forced prosecutors to honor a prior plea agreement offer on the grounds that allowing the State to withdraw the offer would interfere with the defendant's Sixth Amendment right to counsel by "compromising" his faith in his lawyer.[178] Though this application of constitutional law was "unique"[179] and has not been followed by other circuits, it does represent a rare instance of judicial willingness to craft the kind of heightened protections that standard plea agreement jurisprudence lacks—to the benefit of the defendant's interest and the system's legitimacy.

The combination of existing constitutional protections and accurately-applied contract law would provide the kind of legal doctrine necessary to overcome the inherent inequality of bargaining power within the plea bargain market. It would also better ensure that courts considering complex and nuanced challenges to plea agreement enforcement will accord adequate weight both to the contractual issues involved, as well as to the unique circumstances of criminal defendants. Grafting the knowing, intelligent, and voluntary[180] standard onto the contract law of plea bargains, for example, would more clearly point the courts to a logical and just result in the Connecticut and California cases discussed above. Though those decisions are flawed even under standard contract law, a standard

175. *Id.* at 302.

176. Randall R. Conklin, *Constitutional Constraints on Prosecutorial Discretion in Plea Bargaining*, 17 HOUS. L. REV. 753, 769 (1980).

177. 594 F.2d 12, 18 (4th Cir. 1979).

178. *Id.* at 18-19.

179. Conklin, *supra* note 176, at 764.

180. Brady v. United States, 397 U.S. 742, 748 (1970).

accounting for the circumstances of plea agreements would reduce the opportunity for variation on that point.

Furthermore, as the *Scott* and *Cooper* decisions demonstrate, this kind of hybrid standard can extend protection to individuals currently left largely uncovered by standard contract law. Because most courts envision plea agreements as unilateral contracts that are not accepted until a defendant enters a guilty plea, defendants are left largely vulnerable until that takes place.[181] Even those who have been offered a plea agreement, accepted it, and performed some part of the bargain —having not formally entered a guilty plea—possess little legal basis to claim breach if and when the State chooses to withdraw the offer and reinstate charges. Reading constitutional law into contract doctrine can correct this injustice as well.

The precise details and language of this heightened standard is best left to the judicial process, to be developed in response to individual cases and jurisdictional circumstances. Rather than propose a specific doctrine, this Article simply seeks to encourage consideration of the need for this development and means available for its achievement. As defense attorneys litigating plea disputes advance constitutional arguments in connection with contractual bases, and as courts consider the potential results of their decisions, the justice system will have the opportunity to correct some of the "economic imbalance" inherent to the plea agreement market.

VI. CONCLUSION: MOVING FORWARD, DREAMING BIGGER

For all the moral and legal objections to plea-bargaining as an institution, its use by practitioners and endorsement by judicial authorities leaves little doubt it will persist as a dominant method of adjudicating criminal cases for the foreseeable future. If, as the U.S. Supreme Court asserted in *Santobello*, plea bargains are indeed a valuable good that benefit the society, the State, and the criminal justice system,[182] they should not operate at the expense of defendants and overall system legitimacy. Plea bargains should not be governed by inconsistent and easily manipulated standards based in a doctrine of contract law premised on assumptions of market activity that do not

181. *Id.* at 755.

182. Santobello v. New York, 404 U.S. 257, 261 (1971).

exist in the plea bargain context. If plea bargains are truly a form of contract, both contracting parties should be guaranteed fairness, foreseeable outcomes, and the prospective benefit of their bargain.

The two case studies examined in Part III demonstrate this goal is far from achieved. The "subsequent change in the law" rationale for upholding the imposition of new consequences of conviction upon individuals whose guilty pleas pre-date their statutory creation fails because, in the case of a contract between an individual and the State, subsequent changes in the law that directly impact the administration of that contract constitute unilateral changes in the contract terms.

Judicial decisions upholding these outcomes weaken the already inadequate judicial oversight and enforcement of the knowing, intelligent, and voluntary[183] standard. Unlike most contracts, the State has no incentive to maintain a level bargaining table because it faces no market competition. In addition, the alternative good, a trial, is associated with an incredible risk of increased sentence, such that even the risk of future changes in the law is unlikely to diminish many defendants' willingness to take the "deals." If plea bargains are to be justified as mere contracts, the current state of plea-bargaining violates rules of fairness and consideration inherent to contract law. Additional safeguards, grounded in constitutional rights and a realistic evaluation of the "plea bargain market," are necessary to truly elevate these agreements to the status of presumptively valid contracts.

Many reading this argument will find themselves unmoved and question why a level playing field should be a goal in interactions between the State and "criminals." Notably, the two case studies explored in this paper involve some of the most unsympathetic defendants: sex offenders and repeat felons. Yet there are several reasons why the violation of contract law in plea bargains should make us question the legitimacy of plea bargaining's outcomes.

For one, there is the presumption of innocence, along with empirical evidence that innocent people calculate risk and benefit in essentially the same way as the guilty.[184] In other words, a decision to plead guilty stems more from a logical consideration of the options

183. *Brady*, 397 U.S. at 748.

184. *See* Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got To Do With It?*, 23 CRIM. JUST. 28, 29-30 (2008).

than from an implicit acknowledgment of culpability.[185] There is thus considerable reason to worry that general plea bargaining law that places defendants at a huge disadvantage in making these deals—while providing a huge disincentive to go to trial—leads to unfair outcomes for the innocent as well as the guilty.

Also, to the extent that one's sense of fairness is more nuanced than black and white conceptions of guilt or innocence, we might feel that there are situations in which a person has committed the crime charged but should nevertheless not be subject to the particularly harsh terms of a law enacted after that plea was entered. We may cringe at the fates of individuals serving twenty-five-to-life for stealing a golf club, for example, or those convicted of statutory rape and then banished to homelessness as a result of crippling sex offender housing restrictions. If courts expect defendants to make appropriate decisions regarding pleas, and live with the consequences of those decisions, should they and their counsel not also be provided the opportunity to make a truly thoughtful and educated evaluation of their options?

Despite these reasons to be concerned by the inadequate judicial protections accorded to plea bargains under contract law, this Article does not seek to affirm that the contract model is the best or even an appropriate way to adjudicate criminal charges. Nor does it mean to assert that legally sound contracts light a path that leads to justice.

A clear and consistent collection of standards for adjudicating plea bargain disputes, based in contract law with special attention to the unique circumstances and constitutional issues inherent to this specific form of contract, would be a massive improvement over the current system and prevent the kind of illogical results that have been reached in California and Connecticut. But this solution would not quiet the nagging concerns of those troubled by the shift from public trials to private negotiation, uncomfortable with the extensive and largely unreviewable exercise of prosecutorial discretion, and wary of the dominance of a plea bargain system that seems to punish the exercise of constitutional rights and assume all defendants are guilty. This Article asserts that, if we seek to justify plea bargaining as a rational, logical, and regulated method of adjudicating crime through

185. *See id.*

contract law, we are far from establishing practices that meet that standard. If we seek justice, we are not even close.

With a criminal adjudication process that might be appropriately renamed the American criminal *punishment* system, this nation appears to have deemed incapacitation a more worthy goal than rehabilitation. Perhaps it is thus fitting that the trial has been largely replaced by plea bargaining, a practice which aspires to efficiency rather than justice.[186] If readers find themselves wondering why contractual conceptions of fairness and equal bargaining power should be a concern when issues as important as public safety and individual liberty are at stake, they are actually questioning the appropriateness of plea bargaining in criminal law. They are actually pondering what justice really looks like and what kind of system could really achieve it. And that is wonderful—because building something new begins with questioning what is.

If the goal is true plea bargaining as contract, there are many reforms to make and judicial decisions to reverse. But if the aspiration is higher—if this nation truly seeks criminal law that results in justice—there is an entire system and society to overhaul. The importance of that project is well within the consciousness of this author, even if far outside the scope of this Article.

186. *See* Stephanos Bibas, *Bringing Moral Values into a Flawed Plea Bargaining System*, 88 CORNELL L. REV. 1425, 1425-32 (2003).