THE MYTH OF COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: INVOLUNTARY COMMITMENT OF "SEXUALLY VIOLENT PREDATORS"*

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ABSTRACT

For many defendants, the criminal case does not end when the sentence is over. Instead, it follows them out of the courthouse or prison doors in the guise of "collateral," or non-penal, sanctions. The last several decades have seen unprecedented expansion in the number and severity of the collateral consequences of criminal convictions, which include sex offender registration, deportation and bars on employment and housing. The most severe consequence is the involuntary commitment of "sexually violent predators." Nineteen states have now passed statutes, commonly known as "Sexually Violent Predator Acts" (SVPAs), which are being used to indefinitely confine thousands of men *after* they are released from prison.

The recent proliferation of these statutes has inspired scholars to critically examine the cost, effectiveness and constitutionality of SVPAs. This Article breaks new ground by examining involuntary commitment from the perspective of defendants in the guilty plea process. It is hard to imagine a more severe abridgement of one's liberties than involuntary commitment. Despite this, courts have consistently ruled that defendants have no constitutional right to be told that their guilty pleas could lead to involuntary commitment in a mental institution or prison-like setting for the remainder of their natural lives. Indeed, under the collateral consequences rule, the Due Process Clause and the right to counsel under the Sixth Amendment have been interpreted to require warnings of only the "direct" consequences of guilty pleas, meaning the actual penal sentence.

This Article exposes the fiction of the direct-collateral divide and examines the doctrinally-flawed rationale for the collateral consequences rule. It also critiques the rule for its singular focus on the extra-constitutional values of finality and efficiency in the administration of criminal justice. The current rule ignores the constitutional protections relevant to guilty pleas, with their underlying purpose of ensuring that defendants know what they are getting themselves into when they plead guilty.

Finally, the Article proposes a unique approach to this constitutional question so as to bring rationality to the intersection of collateral consequences and guilty pleas and to inject the defendant's perspective into the process. A defendant should be entitled to pre-plea warnings about consequences, "direct" or "collateral," whenever a reasonable person in the defendant's situation would deem knowledge of those consequences to be a significant factor in deciding whether or not to plead guilty. A test of reasonableness, common in other areas of constitutional criminal procedure, would bring much-needed transparency to the plea process.

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INTRODUCTION

Thomas Steele pled guilty to rape and other charges in exchange for a sentence of twelve to thirty years in a Massachusetts state prison.[1] Shortly before he became eligible for parole on this criminal conviction, the state classified Steele as a "sexually dangerous person." [2] Although Steele has completed his prison sentence, the state continues to confine him under a Massachusetts law that allows for the involuntary civil commitment of "sexually dangerous persons."[3] The order committing him stated that he could be held for a period ranging from one day to life.[4]

At the time of his guilty plea, Steele was presumably informed that he would receive a twelve to thirty year prison sentence. The constitutional principles governing guilty pleas and the right to counsel require a defendant to be advised of the criminal penalty that he faces. However, neither the sentencing court nor defense counsel in his criminal case was required to tell Steele about the potential lifetime involuntary commitment at the time that he entered his guilty plea.

According to the First Circuit, "the possibility of commitment for life as a sexually dangerous person is a *collateral* consequence of pleading guilty."[5] The court reasoned that, even though the charges of aggravated rape, kidnapping and assault to which Steele pled guilty "perhaps made him a likely candidate for being classified a sexually dangerous person," the consequence was properly categorized as collateral because it did not flow directly, immediately and automatically from the fact of his guilty plea.[6] As a result, the court rejected Steele's argument that the failure to inform him about involuntary commitment prior to his guilty plea violated due process.[7]

Direct consequences include the amount of time spent in jail or prison, fine, or other criminal punishment that a trial judge may impose after conviction. Almost everything else is deemed "collateral."[8] Under the collateral consequences rule, a defendant has no constitutional right to be made aware of such consequences before he pleads guilty. Consequently, he has no right to withdraw his guilty plea if he was unaware of its collateral consequences.

The analysis of the duty to warn in the guilty plea context focuses on two constitutional norms: due process and the effective assistance of counsel. The former applies to all parties involved in the plea process, while the latter controls only the behavior of defense counsel. Courts have applied the collateral consequences rule in both

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[1] *See* Steele v. Murphy, 365 F.3d 14, 15 (1st Cir. 2004).
[2] Telephone Interview with Willie J. Davis, appellate counsel for Thomas Steele, in Boston, Mass. (June 13, 2007).
[3] *See* MASS. GEN. LAWS ch. 123A (West 1986), *amended by* 1999 MASS. ACTS 265-66.
[4] *Steele*, 365 F.3d at 15.
[5] *Id.* at 17 (emphasis added).
[6] *Id.* at 18; *see also infra* Part ___ , describing and critiquing "definite, immediate and largely automatic" definition of direct consequence.
[7] *Steele*, 365 F.3d at 17 (citing Brady v. United States, 397 U.S. 742 (1970)). A Massachusetts law requires trial courts to "inform the defendant on the record, in open court: . . . where appropriate, of the . . . sexually dangerous persons provisions of the General Laws, if applicable." MASS. RULE CRIM. PRO. 12(c)(3)(B). However, the court in *Steele* noted that any violation of this state procedural rule "does not affect our analysis of Steele's federal constitutional claim." *Steele*, 365 F.3d at 19 n.2.
[8] *See infra* text accompanying notes __ to __.

constitutional contexts. This means that neither the judge (nor any other party), during the entry of the guilty plea, nor counsel, during the counseling process leading up to the guilty plea, must warn the defendant. This rule holds true regardless of the severity of the particular consequence. It applies not only to involuntary commitment but also to deportation, revocation of the right to vote or professional licenses, and lifetime community notification of sex offender status, among others.

The *Steele* case neatly illustrates the formalistic distinction courts have drawn between direct and collateral consequences. Courts decide which consequences are collateral (and thus outside the scope of constitutionally-required warnings to a defendant) based on a bright-line rule that focuses on the role of the institutions which impose the consequence. By strictly circumscribing the category of direct consequences, courts promote finality and efficiency in the plea bargain process. The fewer consequences that a defendant must be aware of prior to a guilty plea, the simpler and more efficient the plea process and the lesser the chance of post-conviction attack upon the guilty plea based on a failure to warn.

This approach completely ignores the defendant. Institutional concerns, although pervasive throughout the plea bargain jurisprudence and literature, do not reflect the relevant constitutional values of due process and effective assistance of counsel. Those values protect an individual defendant's right to knowledge about what he is agreeing to when he pleads guilty and about the right to competent assistance in making that important and complex decision. Professional standards and some criminal procedure codes now recommend or statutorily require warnings about at least some collateral consequences (immigration, largely). The constitutional standard, however, lags far behind the evolving professional norms.

The unprincipled, outdated collateral consequences rule has a far greater negative effect on defendants than it did at its inception and development over the last half century. The number and severity of collateral consequences, including increasing bars to employment and housing, have greatly expanded in recent years.[9] Many of these collateral consequences now apply to relatively minor criminal convictions, and even to certain non-criminal convictions. Perversely, collateral consequences often far outweigh the direct penal sanction of that conviction because of the explosion of arrests and prosecutions for minor offenses over the last two decades.

It is time to revisit the rule. This Article proposes a reasonableness standard, which takes the defendant's perspective into account. Under this standard, warnings must be given whenever a reasonable person in the defendant's situation would deem knowledge of the consequence, penal or otherwise, a significant factor in deciding whether to plead guilty.[10] Two main criteria would factor into an evaluation of reasonableness and

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[9] *See* Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 15-16 (1996) (describing how an "analysis of state legal codes reveals an increase between 1986 and 1996 in the extent to which states restrict the rights of convicted felons," and noting "an increase in the number of states restricting six rights: voting, holding office, parenting, divorce, firearm ownership, and criminal registration increased").

[10] This Article focuses on the consequences of guilty pleas because more than ninety percent of criminal prosecutions terminate with a plea. *See infra* note ___ and accompanying text. In addition, the problem generally arises when a defendant enters a guilty plea without knowledge of one or another collateral consequence that may or will apply as a result of that plea. When a defendant exercises his right to trial, in theory he has no control to reject the conviction that might come as a result of that trial, and that could lead

significance in this context: the severity of the consequence and the likelihood that it would apply. These factors should be considered along a sliding scale, such that highly severe consequences would qualify for warnings even if there was only a relatively low probability of their occurrence.

This reasonableness proposal critiques the current due process approach to information in the plea bargain process. The vast majority of courts rely on this constitutional norm in analyzing both due process and ineffective assistance challenges to guilty pleas based on lack of information. This is not to say that defense counsel, who must deliver effective assistance under the Sixth Amendment, has an identical obligation to disclose information; a number of commentators have effectively critiqued such an erroneous conflation of the two standards and have noted that counsel is both constitutionally obligated and best situated to offer defendants information on collateral consequences.[11] Still, a broader conception of due process in guilty pleas would apply to defense counsel and would require that courts ensure defense counsel's compliance with the critical need for information about certain collateral consequences.[12] It would be a floor above which the norm for effective assistance should, and presumably would, rest.

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to various collateral consequences. In practice, however, a defendant will often choose to accept a particular plea bargain offer if it allows him to avoid a harsh collateral consequence that he would face should he be convicted of all charges after trial. For example, a defendant charged with sex abuse as well as endangering the welfare of a child might agree to plead guilty to the endangering count, even if both are the same level of misdemeanor with the same potential penal consequence. This is because the state where the defendant pleads guilty might require sex offender registration for misdemeanor sex abuse convictions but not endangering convictions. In such a case, a defendant could argue that he would have accepted the plea bargain had he known that it would have allowed him to avoid a consequence that he now faced based on conviction after trial. *See generally* Boria v. Keane, 83 F.3d 48, 53 (1996) (finding ineffective assistance of counsel based on fact that Boria's lawyer failed to counsel him to accept a plea bargain, where counsel's "professional judgment [was] that it was almost impossible for a 'buy and bust' defendant to obtain an acquittal"). Although a search has uncovered no cases where a defendant has sought to reverse a *jury* verdict (as opposed to a guilty plea) on these grounds, it is certainly a viable claim in the wake of *Boria*. For that reason, the standard proposed in this Article asks whether the consequence would cause a reasonable defendant to accept *or* reject any opportunity to plead guilty.

[11] *See, e.g.*, Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002); *see also infra* notes __ to ___ and accompanying text.

[12] Such judicial oversight is particularly important given the ongoing crisis in indigent defense. *See generally* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); Note, Gideon's *Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000); Gideon's *Broken Promise: America's Continuing Quest for Equal Justice*, A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings (Dec. 2004). Courts are already charged with ensuring, through the plea allocution process, that a guilty plea is knowing, voluntary and intelligent. *See* Brady v. United States., 397 U.S. 742 (1970). Just as defense counsel are able to ask a few more questions to determine if counseling about one or more collateral consequences is necessary, *see* McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 497 (2005) (urging defense counsel to incorporate "invisble punishments" into their plea bargaining strategies); Michael Pinard, *An Integrated Perspective on The Collateral Consequences of Criminal Convictions and Reentry Issues Faced By Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 , 685 (2006) (noting how "[i]Incorporating the collateral consequences and reentry components into [plea] negotiations would allow defense attorneys to more accurately lay out both the immediate and long-term effects of the particular disposition"), so too can the courts make minor adjustments to their plea allocution processes to protect such important rights.

This Article uses the lens of involuntary commitment of "sexually violent predators" to illustrate the flaws with the current collateral consequences rule and to demonstrate how to correct this through the reasonableness standard. Laws allowing for involuntary commitment of certain sex offenders are rapidly proliferating. Since 1990, nineteen states have enacted "Sexually Violent Predator Acts" (SVPAs) specifically designed to commit individuals convicted of certain sexual offenses, and who also suffer from a mental abnormality, *after* they serve their prison term.[13] Involuntary commitment is perhaps the harshest collateral consequence. However, the literature addressing the role of defense counsel, prosecutors and the courts involved in the criminal convictions that can lead to collateral consequences largely fails to discuss it.[14]

Although SVPAs are relatively new, the issue of whether failure to warn a defendant invalidates a guilty plea to a crime covered under the law has been litigated in numerous state and some federal courts. The decision in *Steele* is not unique. With few exceptions, defendants who plead guilty in the nineteen SVPA states have no constitutional right to be told about potential commitment under the SVPA prior to entering a guilty plea. Thus, silence about it during the plea bargaining, counseling and colloquy process is permissible.

The approach that most courts take demonstrates a fundamentally flawed conception of what a defendant needs to know to make a guilty plea constitutionally sound. Adhering to a formalistic distinction between "direct" and "collateral" creates a fiction that defendants knowingly and voluntarily plead guilty when they do not learn about those consequences, such as involuntary commitment, that may matter more to them than the "direct" criminal punishment. It also creates the fiction that defense counsel is competent despite failing to warn about such a critical consequence of the plea.

These are fictions because they do not consider the defendant's perspective. What would a reasonable person facing these criminal charges, potential criminal punishment, "collateral" consequences, and plea bargain offers need to know? It is only when this critical perspective is introduced into the picture that the right to a voluntary, knowing guilty plea begins to make sense. Putting the defendant back into the mix gives meaning to the constitutional protections surrounding guilty pleas.

The issue here is not whether convicted sex offenders should or should not be involuntarily committed, but rather whether they should be informed about the possibility of involuntary commitment.[15] It is an argument for more complete information and

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[13] See Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at A1 (stating that "[a]bout 2,700 pedophiles, rapists and other sexual offenders are already being held indefinitely, mostly in special treatment centers, under so-called involuntary commitment programs in 19 states") [hereinafter Davey & Goodnough, *Doubts Rise*]. On July 27, 2006, President George W. Bush signed into law a bill that authorized the disbursement of federal grant money to states that establish civil commitment programs for sexually dangerous persons. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006).

[14] *See infra* text accompanying notes ___ to ___ , describing how legal scholarship on SVPAs focuses on cost, effectiveness and constitutionality of involuntary commitment and how literature on collateral consequences focuses almost exclusively on the consequence of immigration. A notable exception is Professor Nora Demleitner, who has devoted considerable attention to collateral consequences generally and more specifically to civil commitment of sex offenders. *See infra* note ___, describing Demleitner's work.

[15] The Article does not assess SVPAs generally, although certainly there is much to critique with respect to both the effectiveness and economic soundness of the burgeoning involuntary commitment movement.

transparency in the plea bargaining process, so that defendants like Thomas Steele can truly weigh the costs and benefits of pleading guilty.

Part I of this Article sets out the conceptual and constitutional landscapes surrounding collateral consequences. After exploring the formalistic manner in which courts separate "direct" from "collateral" consequences, it goes on to examine the two main constitutional rights framing the guilty plea process: due process and effective assistance of counsel. This Part also critiques the doctrinally-flawed origins of the collateral consequences rule. The rule is more specifically considered in the context of Sexually Violent Predator Acts in Part II, which first briefly describes the growing trend among states for such legislation. Part III introduces the reasonableness standard, and then applies it to the consequence of involuntary commitment of "sexually violent predators." This Part then explains how the reasonableness standard corrects the current rule's overemphasis on the institutional values of finality and efficiency and under emphasis on the value of an individual's right to information in the plea bargain process.

I. UNDERSTANDING COLLATERAL CONSEQUENCES[16]

A. The Conceptual Landscape's Formalistic Distinction Between "Direct" and "Collateral" Consequences.

Under the categorization scheme in the jurisprudence of criminal convictions, there are two types of consequences: direct and collateral. However, these terms are not self-defining. As one commentator has described them, collateral consequences "are not part of the explicit punishment handed down by the court; they stem from the fact of conviction rather than from the sentence of the court."[17] Rather than appearing in the state or federal statute defining permissible sentences for the particular conviction,[18] collateral consequences are scattered throughout a variety of state and federal statutes and regulations, and increasingly in local laws.[19]

See, e.g., JOHN Q. LA FOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 127-65 (2005) (addressing, as part of chapter on "Sexually Violent Predator Laws," such things as "Cost of Implementing an SVP Law") [hereinafter LA FOND, PREVENTING SEXUAL VIOLENCE]; Nora V. Demleitner, *Abusing State Power or Controlling Risk? Sex Offender Commitment and* Sicherungverwahrung, 30 FORDHAM URB. L.J. 1621 (2003) [hereinafter *Abusing State Power*].

[16] This Article uses "collateral" as that term is most commonly used in the cases and professional standards. However, some commentators have noted that there are perhaps better – and more transparent – terms. *See, e.g.*, Smyth, *supra* note ___ at 493 (stressing importance of using term "invisible" as the strict definition of "collateral sanctions" does not encompass all consequences of a criminal conviction, such as those requiring a discretionary decision by an independent governmental agency).

[17] Pinard, *supra* note ___ at 634.

[18] *See, e.g.*, N.Y. PENAL LAW ART. 70 (McKinney 2007) ("Sentences of Imprisonment").

[19] *See, e.g.*, 42 U.S.C. § 1437n(f) (permanently barring individuals convicted of manufacturing methamphetamine from access to federally subsidized housing); N.Y. REAL PROP. ACTS § 711(5) (McKinney 2007) (allowing for eviction proceedings following any illegal manufacture or business); NEW YORK CITY HOUSING AUTHORITY, GUIDE TO SECTION 8 HOUSING ASSISTANCE PROGRAM (Sep. 2007), available at http://www.nyc.gov/html/nycha/downloads/pdf/070213N.pdf (local regulations denying assistance to persons with certain convictions). There are also many potential effects of a criminal conviction that are not codified, such as the difficulties a person with a criminal record may have in finding a job. *See* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIOLOGY 937, 960 (2003). These

Direct consequences thus appear limited to the penal sanction that will be imposed as a result of a plea of guilty.[20] Yet even consequences that seem to go to the heart of criminal punishment foster disagreement. For example, in some circuits, a defendant may be sentenced in a federal criminal case without knowing that his federal sentence will not begin until he has finished serving a state sentence. The fact that the defendant will thus serve more prison time on the two cases than he expected when he pled guilty is deemed "collateral."[21] In other circuits, it is "direct."[22] In some circuits, the fact that a guilty plea to a particular charge will result in a defendant's ineligibility for parole is not a direct consequence.[23] In other circuits, the opposite is true.[24] In at least one circuit, the fact that the defendant would have to admit to a sexual offense as part of counseling required as a condition of his probation was considered collateral, even where

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are the social effects of convictions and incarceration that relate to the convicted individual, his family and his community. *See generally* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002).

This Article uses, for its limited purposes, a restricted definition of "collateral consequences," including only consequences that result from some federal, state or local law or regulation that takes the fact of conviction into account in deciding whether or not to impose the particular consequence.

[20] There is little caselaw on what constitutes a direct consequence, as the issue most often arises when an individual tries to vacate a guilty plea based on consequences almost always deemed "collateral" by the reviewing court. However, it seems clear from the cases addressing due process in the guilty plea context that a defendant must at least know the sentence or range of sentences to which he will be exposed should he plead guilty. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 244 n.7 (1969).

[21] *See, e.g.*, Kincade v. United States, 559 F.2d 906, 909 (3d Cir. 1977) (finding that the federal statute that states that the sentence begins to run when the defendant is *received* into federal custody "did operate to increase the length of Kincade's overall incarceration, but not by modifying his federal punishment"); United States v. Hernandez, 234 F.3d 252 (5th Cir. 2000). The court refused to allow Hernandez to vacate his guilty plea despite an affidavit from the state prosecutor affirming that all parties involved in the federal and state cases had agreed that he would be allowed to serve his 188-month federal sentence concurrent to his 20-year state sentence and that, in fact, the state plea was postponed precisely to effectuate this aspect of the bargain. *Id.* at 253-54. Although the state court eventually dismissed the charges so that Hernandez could begin his federal sentence, this happened after Hernandez spent five years in state prison. *Id.* at 254 n.2. In other words, Hernandez spent five years longer in prison than he had expected under what he believed were the terms of his plea. This is still far better, for Hernandez, than what would have happened under the Fifth Circuit's ruling and without the state court intervention – namely, spending 188 extra months in custody.

[22] *See, e.g.*, United States v. Myers, 451 F.2d 402, 404 (9th Cir. 1972) (finding that federal law making district court powerless to impose concurrent federal sentence when defendant also faces state charges impacts defendant's maximum total imprisonment, and thus is a direct consequence that defendant must be aware of prior to entry of any guilty plea in the federal case) (superseded by statute). Although the federal statute at issue in *Myers* has since been amended to allow federal judges to impose a federal sentence concurrent to some state sentences, *see* 18 U.S.C. 3584, the cases nonetheless illustrate how different circuits have approached an issue with such an enormous effect on the knowledge a defendant has about the amount of prison time he will serve.

[23] *See, e.g.*, Trujillo v. United States, 377 F.2d 266, 269 (5th Cir. 1967) (finding that parole eligibility is a matter of "legislative grace" and thus is not a direct consequence of guilty plea) (internal quotations omitted).

[24] *See, e.g.*, Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964) (holding that "one who, at the time of entering a plea of guilty, is not aware of the fact that he will not be eligible for probation or parole, does not plead with understanding of the consequences of such a plea").

the court had allowed that defendant to enter a *nolo contendere* plea, meaning that he did not have to admit guilt as part of his plea.[25]

It is thus far from clear exactly where the line between direct and collateral consequences falls. At a minimum, the actual term of jail or prison time imposed by the court, as well as any fines or term of probation, fall on the "direct" side of the line.[26] Beyond that, the convoluted jurisprudence of what constitutes a collateral consequence in each particular jurisdiction governs.

B. The Constitutional Landscape: Due Process, Effective Assistance, and Guilty Pleas.

When a criminal defendant pleads guilty, he gives up his constitutional rights against self-incrimination, to a jury trial, and to confront and cross-examine the government's witnesses.[27] The vast majority of criminal defendants plead guilty to resolve the criminal charges against them.[28] There are two sets of constitutional rules relevant to the waiver of these important rights and to the process surrounding, and leading up to, any guilty plea: the Sixth Amendment right to the effective assistance of counsel, and the Fourteenth Amendment due process standards.[29]

All pleas must be voluntary, knowing and intelligent.[30] The defendant must enter the plea in front of a judge or magistrate who guards, through the plea allocution process, against coerced or unknowing pleas.[31] In addition, a defendant must have a competent attorney who, among other things, counsels him so that he does not abandon his rights without understanding what they mean.[32]

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[25] Duke v. Cockrell, 292 F.3d 414, 417 (5th Cir. 2002). Duke was originally sentenced, under the plea bargain, to ten years of probation with the condition that he complete a sexual offender treatment program. Since he was unable to complete the program, the court re-sentenced him to twenty years in prison. *Id.* at 416; *see also infra* Part ___, discussing *nolo contendere* pleas.

[26] *See, e.g., Duke*, 292 F.3d at 417 (explaining that "the direct consequences of a defendant's plea are the immediate and automatic consequences of that plea such as the maximum sentence length or fine") (citation omitted).

[27] *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969); *see also* U.S. CONST. amends. V and VI. "[A] plea of guilty is more than an admission of conduct; it is a conviction." *Boykin*, 395 U.S. at 242.

[28] Federal criminal cases against 83,391 defendants were terminated during 2004. Ninety percent of these defendants were convicted. Of those, 96 percent pleaded guilty or *nolo contendere*. Bureau of Justice Statistics, U.S. Dept. of Justice, http://www.ojp.usdoj.gov/bjs/fed.htm (last visited Feb. 20, 2008). Approximately 56,146 felony cases were filed in state courts of the seventy-five largest counties during May 2002. Ninety-five percent of convictions occurring within one year of arrest were by guilty plea. Bureau of Justice Statistics, U.S. Dept. of Justice, http://www.ojp.usdoj.gov/bjs/cases.htm (last visited Feb. 20, 2008).

[29] *See* U.S. CONST. amends. VI and XIV.

[30] Brady v. United States., 397 U.S. 742, 748 (1970) (stating that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences"); *see also* Bousley v. United States, 523 U.S. 614, 618 (1998) (noting that a "plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent'").

[31] *See Boykin*, 395 U.S at 242 (finding, under due process principles, that trial court must ensure that record demonstrates defendant's guilty plea was knowing and voluntary).

[32] *See* Iowa v. Tovar, 541 U.S. 77, 81 (2004) (noting how "[t]he entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres") (internal citations omitted).

Given these seemingly robust protections,[33] one might imagine that defendants know what they are getting themselves into when they plead guilty. Yet courts continue to pursue the fiction that lawyers are "effective" despite failing to warn about any number of consequences, and that judges who accept guilty pleas in the absence of knowledge of such consequences preside over voluntary, knowing and intelligent pleas.

This fiction cuts across all types of consequences deemed "collateral," so that a defendant may be surprised to learn that his guilty plea meets constitutional standards even if taken in the absence of knowledge of, for example, mandatory sex offender registration;[34] mandatory deportation;[35] loss of the right to vote;[36] loss of public housing for family members, even if the defendant does not live in that housing;[37] revocation of a driver's license;[38] discharge from the armed forces;[39] and even, in some jurisdictions, the statutory minimum sentence for the crime to which he is pleading guilty and the date that he becomes eligible for parole.[40]

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[33] They are "seemingly" robust because anyone who has practiced in the criminal justice system knows that the words in the constitutional jurisprudence of guilty pleas do not always translate into strong protections. For example, judges often find pleas "voluntary" despite evidence (or even without having considered) that a defendant was seriously mentally ill at the time he took the plea, or under the influence of drugs. *See, e.g.*,Godinez v. Moran, 509 U.S. 389 (1993) (defendant's guilty plea upheld despite the trial court's knowledge that defendant was under the influence of medication to control seizures, a byproduct of cocaine addiction); Patterson v. Hampton, 355 F.2d 470 (10th Cir. 1966) (describing how court accepted guilty plea without holding hearing on defendant's mental capacity to plead guilty, despite court's knowledge of two state hospital psychiatric examinations and reports). In a similar vein, judges can be quick to ignore evidence that a defendant could not knowingly and voluntarily waive his *Miranda* rights due to mental illness or retardation. *See* STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 203-07 (2005) (describing how judge rejected testimony of three experts, including director of psychology department for county courts, that the defendant was too mentally retarded to knowingly waive his *Miranda* rights).

[34] *See, e.g.*, Doe v. Weld, 954 F.Supp. 425, 438 (D. Mass. 1996) (denying juvenile sex offender's motion for preliminary injunction against Massachusetts' Megan's Law and finding that "entering the guilty plea without knowledge of the potential for registration and community notification does not render his plea involuntary and, thus, does not violate the Constitution").

[35] *See* State v. Paredez, 101 P.3d 799, 803 (N.M. 2004) (citing cases from numerous Circuit Courts of Appeal finding deportation to be a collateral consequence).

[36] *See, e.g.*, Meaton v. United States, 328 F.2d 379, 381 (5th Cir. 1964).

[37] *See generally* Alicia Werning Truman, Note, *Unexpected Evictions: Why Drug Offenders Should Be Warned Others Could Lose Public Housing If They Plead Guilty*, 89 IOWA L. REV. 1753 (2004); *see also* Dep't. of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002).

[38] *See, e.g.*, Moore v. Hinton, 513 F.2d 781, 782 (5th Cir. 1975).

[39] *See, e.g.*,Redwine v. Zuchert, 317 F.2d 336 (D.C. Cir. 1963) (per curiam).

[40] *See* Brown v. Perini, 718 F.2d 784, 788 (6th Cir. 1983) (noting how "[t]his Circuit has expressly declined to consider parole eligibility a direct consequence of a guilty plea"); *see also* Meyers v. Gillis, 93 F3.d 1147, 1153 (3d Cir. 1996) (stating that "[i]t is well settled that the Constitution does not require that a defendant be provided with information concerning parole eligibility"). *But see* Michel v. United States, 507 F.2d 461, 463 (2d Cir. 1974) (explaining that defendant must be advised of parole term that automatically attaches to sentence of imprisonment); Craig v. People, 986 P.2d 951, 963 (Colo. 1999) (en banc) (finding that "[m]andatory parole is a direct consequence of pleading guilty to a charge which subjects a defendant to immediate imprisonment because it has an 'immediate and largely automatic effect on the range of possible punishment'") (internal citation omitted); People v. Catu, 825 N.E.2d 1081, 1082-83 (N.Y. 2005) (holding that mandatory post-release supervision is a direct consequence that requires notification to defendant).

1. Due Process and Collateral Consequences: No Duty to Warn Defendants

Due process is "the dominant source of constitutional regulation" in the plea bargaining arena.[41] The body of law distinguishing direct from collateral consequences arises from the jurisprudence of plea bargains, namely the requirement that guilty pleas must be knowing and voluntary to satisfy due process. [42] The knowledge prong establishes the minimum amount of information that a defendant must possess before a court may accept his guilty plea; the due process clause speaks to the role of both defense counsel and the trial judge as providers of this information.[43]

The question is: exactly what information must a defendant possess in order to make his plea valid under the Due Process Clause? The general answer is very little beyond the criminal sanction that the trial court can impose through the jurisdiction's penal sentencing laws.

a. *Brady v. United States*: The Doctrinal, and Doctrinally Flawed, Cornerstone of the Collateral Consequences Rule

The United States Supreme Court has never addressed the issue of whether a defendant's ignorance of the collateral consequences of his guilty plea violates due process.[44] However, lower federal and state courts have established what this Article refers to as the "collateral consequences rule," namely, that lack of knowledge about collateral consequences will not cause a guilty plea to violate constitutional norms.

The vast majority of decisions considering claims of a due process violation based on pre-plea lack of information about a collateral consequence relate to deportation. As the New Mexico Supreme Court recently noted:

> Each federal circuit that has directly considered the issue has held that deportation is a collateral consequence of pleading guilty so that the trial court is not required to inform the defendant of the immigration consequences of his or her plea. Furthermore, the remaining federal circuits that have not directly addressed the issue have signaled that they would reach the same holding.[45]

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[41] WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 2.7(a) (3d ed. 2000).
[42] *See* Brady v. United States, 397 U.S. 742, 747 n.4 (1970).
[43] For constitutional, ethical and practical reasons, prosecutors do not generally communicate with a represented defendant unless defense counsel is present. Thus, the prosecutor is not the party responsible for communicating information about direct or collateral consequences to a defendant. However, a prosecutor can cause a guilty plea to violate the Due Process Clause if she affirmatively misrepresents a consequence of a conviction and if this misrepresentation is not corrected. *See, e.g.*, United States v. Russell, 868 F.2d 35, 36 (D.C. Cir. 1982) (holding that, since the "record on appeal makes it clear that the prosecution made misrepresentations concerning the deportation consequences of the defendant's plea . . . we must vacate the defendant's guilty plea"); United States v. Briscoe, 432 F.2d 1351, 1354 (D.C. Cir. 1970) (finding that "[c]alculations of the likelihood of deportation may thus rightly be included in the judgment as to whether an accused should plead guilty, and any actions by Government counsel that create a misapprehension as to that likelihood may undercut the voluntariness of the plea").
[44] *See, e.g.*, Bustos v. White, 2007 WL 914229, at *6 (D.S.C. Mar. 22, 2007) (noting how "[t]he Supreme Court of the United States has not addressed whether parole ineligibility is a direct consequence of a plea").
[45] State v. Paredez, 101 P.3d 799, 803 (N.M. 2004).

Like the First Circuit's opinion in *Steele*, described in the Introduction, most courts tightly circumscribe the constitutional right to information about collateral consequences.

Yet, they do so on the basis of a doctrinally flawed analysis. The courts have fashioned the collateral consequences rule through reliance on the Supreme Court's statement, in *Brady v. United States*, that defendants must be "fully aware of the *direct consequences*, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel."[46] These brief words in *Brady* did not result from careful reasoning about exactly what type and quantum of information a defendant must have to meet the "knowledge" requirement for guilty pleas. Indeed, as knowledge of consequences was not the issue presented in *Brady*, the Court did not go any further in defining what it meant by "direct consequences." Instead, the words spring from dicta in a decision that focused on a different aspect of the plea process, that of voluntariness.

Whatever its force in the original opinion, the "direct consequences" language from *Brady* has become the doctrinal cornerstone of the distinction between direct and collateral consequences.[47] Closer examination of *Brady* illustrates why this is such shaky ground upon which to build a rule, particularly one that has such an enormous effect on the transparency and legitimacy of the criminal justice system.

Robert Brady was charged under a federal kidnapping statute which allowed for the death penalty only upon a jury verdict. The judge could not impose death without such a verdict, and thus a guilty plea foreclosed a death sentence. Brady originally pled not guilty, but later changed that plea and the judge sentenced him to fifty years in prison.[48] Some years later, Brady filed a petition for *habeas corpus*. Among other things, Brady challenged the voluntariness of his guilty plea "because [the federal statute under which he was prosecuted] operated to coerce his plea, because his counsel exerted impermissible pressure upon him, and because his plea was induced by representations with respect to reduction of sentence and clemency."[49] He did not claim that lack of knowledge invalidated his plea.[50]

Brady is perhaps best known for clearly stating the rule that guilty pleas "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[51] The bulk of the Court's analysis examined Brady's claim that his guilty plea was coerced, and thus focused on

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[46] *Brady*, 397 U.S. at 755 (internal quotation omitted) (emphasis added).

[47] *See* Chin & Holmes, *supra* note ___, at 726 (noting how "[t]he collateral consequences rule is based in large part on the *Brady* Court's implication that a trial court need advise a defendant only of direct consequences to render a plea voluntary under the Due Process Clause").

[48] *Brady*, 397 U.S. at 743-44 (noting that 50-year sentence was later reduced to 30-year sentence).

[49] *Brady*, 397 U.S. at 744.

[50] Brief for the Petitioner at 18, Brady v. United States, 397 U.S. 742 (1970) (No. 270), 1969 WL 119963 (arguing that "the fear of the death penalty was a factor, if not the primary factor, in influencing the Petitioner to plead guilty to the kidnapping charge against him, and, therefore, his guilty plea was involuntary and in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States"). However, the Supreme Court did analyze the knowledge prong in a brief portion of its opinion. *Brady*, 397 U.S. at 756-57; *see also infra* text accompanying notes ___ to __, noting knowledge discussion in *Brady*.

[51] *Brady*, 397 U.S. at 748. However, as the Court noted, "[t]he requirement that a plea of guilty must be intelligent and voluntary to be valid has long been recognized." *Id.* at 747 n.4.

voluntariness. At the end of its voluntariness analysis, the Court quoted from *Shelton v. United States*, an unrelated Fifth Circuit case:

> The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit: "[A] plea of guilty entered by one fully aware of the *direct consequences*, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)."[52]

In this quote the Court clearly references awareness of "direct consequences" in determining the validity of a guilty plea. This has led some commentators to declare that "[t]he Supreme Court created the rule that the Due Process Clause requires the trial court to explain only the direct consequences of conviction." [53] However, neither *Shelton* nor *Brady* examined a defendant's claim of lack of knowledge of either direct or collateral consequences of a guilty plea. Shelton claimed that promised leniencies, about such things as dismissal of other criminal charges and a specific sentence of imprisonment, led to his involuntary guilty plea.[54] These promises all related to Shelton's criminal case and not to any consequences "collateral to that proceeding. *Shelton*, like *Brady*, focused on whether such promises and inducements could operate to render a plea involuntary.[55]

The Fifth Circuit test stated that a plea taken with awareness of direct consequences "must stand unless induced by," and then proceeded to list threats, misrepresentations or improper promises as the three ways in which a plea may be involuntary. The original Fifth Circuit dissent, from which the *en banc* court later drew its voluntariness definition, described two categories of guilty pleas that would qualify as involuntary. The first related to coercion by physical or psychological pressure or threats. The second related

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[52] *Brady* at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc)) (emphasis added). The en banc Fifth Circuit decision, in turn, quotes from the dissenting judge from the original Fifth Circuit panel in the case. Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc) (quoting Shelton v. United States, 242 F.2d 101 (5th Cir. 1957)).

[53] Chin & Holmes, *supra* note ___, at 706. For an interpretation of the Fifth Circuit voluntariness test that differs in significant ways with respect to the due process analysis in this Article, *see generally id.* at 726-30 (analyzing *Brady*'s adoption of Fifth Circuit voluntariness test as "the Court accept[ing] the collateral-direct distinction in the context of what consequences the trial judge was required to explain to ensure voluntariness").

[54] *Shelton*, 242 F.2d at 101.

[55] In the wake of *Brady*, many lower courts have conflated the requirements of knowledge and voluntariness. *See, e.g.*, United States v. Hernandez, 234 F.3d 252, 255 n.3 (5th Cir. 2000) (noting how "[t]he terms 'voluntary' and 'knowing' are frequently used interchangeably, although, strictly speaking, the terms embody different concepts"); *see also* John L. Barkai, *Accuracy Inquiries For All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 126 U. PA. L. REV. 88, 91 n.16 (1977) (noting how "[i]t is sometimes difficult to discern where the concept of 'voluntariness' ends and that of 'intelligence' begins"). *But see* Hobbs v. Blackburn, 752 F.2d 1079, 1081 (5th Cir. 1985) (noting how the Fifth Circuit has "consistently held that a guilty plea must not only be entered voluntarily, but also knowingly and intelligently: the defendant must be aware of the relevant circumstances and the likely consequences") (internal quotations omitted).

to a defendant's misapprehension of promises that were not or could not be kept. In other words, inducements that might render a plea involuntary.[56] Nowhere in this dissent, in any of the other *Shelton* opinions, or in *Brady* itself, is there any consideration or discussion of the claim that lack of information about a consequence other than a penal sanction might render the guilty plea invalid under the Due Process Clause. These cases are all about coercion by threat or improper inducement, which go to the voluntariness of a guilty plea, not knowledge.

The "direct consequences" language in *Brady* is thus an unexplored definition that comprises one part of a multi-factor voluntariness test. But it could also be characterized as dicta, an undefined precondition to the true voluntariness definition which follows. As the original *Shelton* panel's majority opinion noted: "That [the guilty plea] was understandingly made in this case is not controverted, but the question is, was the guilty plea made voluntarily?"[57] Thus, even if the Fifth Circuit meant to conflate the definition of knowledge into what it clearly termed "the relevant definition of voluntariness,"[58] knowledge was not an issue before that court.

After concluding its voluntariness discussion, the Supreme Court in *Brady* did undertake a short exploration of the knowledge prong:

> The record before us also supports the conclusion that Brady's plea was intelligently made. He was advised by competent counsel, he was made aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties; once his confederate had pleaded guilty and became available to testify, he chose to plead guilty, perhaps to ensure that he would face no more than life imprisonment or a term of years. Brady was aware of precisely what he was doing when he admitted that he had kidnaped [sic] the victim and had not released her unharmed.[59]

The Court addressed this issue in order to reject the argument that Brady's plea was invalid because the Supreme Court, nine years after his plea, invalidated that part of the federal kidnapping statute which allowed for a death sentence by jury verdict only. The Court thus found that "absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."[60] This brief discussion of the knowledge requirement evinces a

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[56] *Shelton*, 242 F.2d at 114-115. The dissent first described this second category as "includ[ing] all the cases in which for one reason or another the defendant was not fully aware of all the consequences of his plea." *Id.* at 114. Although this sounds like "knowledge," the dissenting judge went on to support this statement with citation to cases that all relate to misapprehension by a defendant due to promises that were not or cannot be kept. *Id.*

[57] *Shelton*, 242 F.2d at 112. In rehearing the case *en banc*, the Court found that "[t]he original opinion sufficiently sets out the facts except as to those matters which will be added here," thus accepting the finding that the knowledge requirement was uncontroverted. Shelton v. United States, 246 F.2d 571, 572 (5th Cir. 1957) (en banc).

[58] *Shelton*, 246 U.S. at 572.

[59] *Brady*, 397 U.S. at 756.

[60] *Brady*, 397 U.S. at 757 (citing Von Moltke v. Gillies, 332 U.S. 708 (1948)).

concern with affirmative misrepresentations of direct consequences, but does not address collateral consequences.

It is clear that knowledge stands separately from voluntariness in the due process requirements for guilty pleas. It is also clear that the Supreme Court has never directly examined the constitutionality of a guilty plea taken without knowledge of a collateral consequence. Yet many lower federal and state courts blindly cite *Brady* in fashioning the collateral consequences rule. As one court quite starkly put it, quoting *Brady*'s "direct consequences" language: "We presume that the Supreme Court meant what it said when it used the word '*direct*'; by doing so, it excluded *collateral* consequences."[61] This is an incorrect presumption, and rests on shaky doctrinal ground.

b. Varying Definitions of *Brady's* "Direct Consequences" Language

Although the Court in *Brady* did not define "direct consequences," a long line of (generally sparsely-reasoned) lower federal and state court decisions following *Brady* have crafted a definition by omission. They have done this by labeling particular consequences "collateral," and then rejecting defendants' requests to withdraw guilty pleas due to lack of knowledge of those consequences. Building on the weak foundations of the *Brady* dicta, the lower courts have developed three different, and largely unsatisfactory, definitions of a "direct" consequence: (1) whether the consequence is "definite, immediate and largely automatic"; (2) whether the consequence is within the "control and responsibility" of the sentencing court; and (3) whether the consequence is punitive.

i. "Definite, Immediate and Largely Automatic"

Three years after *Brady*, the Fourth Circuit offered what is probably the most widely-cited definition of a "direct consequence." In *Cuthrell v. Director, Patuxent Institution*, the court noted that "[t]he distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."[62]

Joseph Cuthrell had claimed that his guilty plea was involuntary because he had not been warned that it might result in civil commitment under Maryland's Defective Delinquents Act.[63] At the time, such commitment either replaced or counted towards any term of imprisonment that the sentencing court had imposed,[64] although it was indeterminate in length.[65] Using the "definite, immediate and largely automatic" test, the court rejected Cuthrell's claim. It found that the fact that commitment was not definite,

[61] United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971) (en banc).
[62] 475 F.2d 1364, 1366 (4th Cir. 1973).
[63] *Cuthrell*, 475 F.2d at 1367. The Maryland Defective Delinquent Act resulted from the legislature's adoption of a study "recommending that a separate institution be established for 'criminal mental and emotional defectives' with a diagnostic clinic to determine what persons were susceptible to specialized treatment in the institution." Tippett v. Maryland**,** 436 F.2d 1153, 1155 (4th Cir. 1971).

[64] *See Id.* at 1155-56 (explaining Maryland Defective Delinquent Act).
[65] *Cuthrell*, 475 F.2d at 1367.

and that the Maryland Act mandated a separate civil proceeding, meant that Cuthrell was not entitled to any warnings as a matter of due process.[66]

Many courts cite *Cuthrell*'s "definite, immediate and largely automatic" language in setting out their criteria for determining whether a particular consequence is direct.[67] However, as Texas' highest court for criminal appeals recently noted in a rather scathing critique, with respect to its definition of "direct" the Fourth Circuit offered "no citation to statute or case law or any other legal authority; there is merely the assertion that it is so."[68] The *Cuthrell* court gave only one example of a "direct" consequence: parole eligibility. The court explained that "[t]he reason for this conclusion is that the right to parole has become so engrafted on the criminal sentence that such right is assumed by the average defendant and is directly related *in the defendant's mind* with the length of his sentence."[69] This reason, however, does not coincide with *Cuthrell*'s definition of "direct." Parole may be engrafted, but it is not immediate, as it must come after a term of imprisonment. It is not automatic, but rather is a matter that a parole board must consider. It is not definite, since release is a matter of discretion with the board.

The *Cuthrell* parole dictum is quite important in how it takes into account the defendant's perspective on the consequences of his guilty plea. While it correctly identifies this critical value in the voluntariness inquiry, it completely fails to capture that value in the definition that it crafted, upon which so many state and federal courts now rely.

ii. Punitive v. Non-Punitive Consequences

The same Texas court that eschewed the *Cuthrell* approach came up with its own manner of determining whether a particular consequence merits warnings before a guilty plea. In *Mitschke v. Texas*, the court built upon the direct-collateral dichotomy for warnings, finding that "[e]ven if the consequence is direct, . . . imposition of it without admonishment might still be justified as remedial and civil rather than punitive."[70]

John Mitschke sought to withdraw his guilty plea, arguing that failure to inform him about mandatory sex offender registration based on his conviction violated his due

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[66] *Cuthrell*, 475 F.2d at 1366 (emphases in original).

[67] *See, e.g.*, United States v. United States Currency in the Amount of $228,536.00**,** 895 F.2d 908, 916 (2d Cir. 1990) (noting how, under the *Cuthrell* standard, "civil forfeiture is not a direct consequence of a guilty plea because it does not represent a definite, immediate and largely automatic effect on the range of the defendant's punishment") (internal citation omitted); Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988). A Westlaw "citing references" check of the *Cuthrell* decision on January 24, 2008 shows 177 decisions citing to it, only three of them distinguishing or disagreeing with the Fourth Circuit.

[68] Mitschke v. State, 129 S.W.3d 130, 132 (Tx. Crim. App. 2004). The court in *Mitschke* noted other major flaws in *Cuthrell*. First, "[w]hy is the distinction [between direct and collateral] made on the basis of effect on the *range* of punishment? The range of punishment is set by law. If we require that a plea of guilty affect the *range* of punishment, very few consequences will ever be direct." *Id.*at 133. Second, "[w]hy must the effect be immediate?" The court noted how some consequences, such as the prohibition on possession of a firearm after a felony conviction or sex offender registration, are both definite and automatic. However, they do not flow immediately after punishment, because they apply only after an incarcerated person is released, which could be years after the sentence. *Id.*

[69] *Cuthrell*, 475 F.2d at 1366 (internal quotations omitted) (emphasis added).

[70] *Mitschke*, 129 S.W.3d at 135.

process rights. The court agreed that "the consequence, registration as a sex offender, is definite. It is also completely automatic; if a defendant pleads to an enumerated offense, he must register; there are no exceptions, no wiggle room, no conditions which relieve him of that obligation."[71] It denied Mitschke's claim, however, finding that not all direct consequences merit constitutionally-mandated warnings.

The court found that "[a] statute that can fairly be characterized as remedial, both in its purpose and implementing provisions, does not constitute punishment even though its remedial provisions have some inevitable deterrent affect, and even though it may indirectly and adversely affect, potentially severely, some of those subject to its provisions."[72]

Under this definition, sex offender registration was non-punitive and thus no warnings were required.

iii. "Control and Responsibility"

Immigration law reforms of the mid-1990s took almost all discretion away from immigration authorities to grant relief from deportation for large classes of criminal convictions.[73] Since that time, a number of defendants have argued that deportation based on these convictions is now an automatic, definite consequence that requires pre-plea warnings. A number of courts have rejected such claims by relying on yet a third way to draw the line between consequences that require or do not require warnings, namely by privileging consequences that are under the "control and responsibility" of the sentencing court.

Abdel-Karim El-Nobani was a lawful permanent resident of the United States. Shortly after El-Nobani pled guilty to conspiracy to traffic food stamps and alien-harboring, the Immigration and Naturalization Service began deportation proceedings against him.[74] In seeking to withdraw his guilty plea, El-Nobani argued that he had not been warned about the deportation consequences of that plea. Although the Sixth Circuit ruled against El-Nobani on procedural grounds, it went on to state that "the automatic nature of the deportation proceeding does not necessarily make deportation a direct consequence of the guilty plea. A collateral consequence is one that remains beyond the control and responsibility of the district court in which that conviction was entered."[75]

Although this definition quite neatly allows for denial of claims of due process violations for failure to warn about immigration consequences, and some courts may in fact have chosen it rather than *Cuthrell* for precisely this purpose, the "control and responsibility" language predates the 1996 immigration law amendments. As early as 1974, the Second Circuit used similar language in denying a deportation-based plea withdrawal request, finding that "[d]eportation . . . was not the sentence of the court which accepted the plea but of another agency over which the trial judge has no control

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[71] *Id.*.
[72] *Id.*
[73] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.
[74] El-Nobani v. United States, 287 F.3d 417, 420 (6th Cir. 2002).
[75] *El-Nobani*, 287 F.3d at 421 (internal quotations omitted).

and for which he has no responsibility."[76] The court further explained that the direct-collateral distinction does not depend "upon degree of certainty with which the sanction will be visited upon the defendant." Instead, the trial judge "must assure himself only that the punishment that *he* is meting out is understood."[77]

2. Effective Assistance of Counsel and Collateral Consequences

Defense counsel owes a duty of "effective assistance" to his client.[78] The nature of counsel's relationship with her client is very different than the relationship between a judge, who simply presides over the guilty plea, and a defendant. Despite this, many courts have improperly imported due process standards into decisions analyzing ineffective assistance so that the trial judge and defense counsel are held to the same standard as information-providers in the guilty plea process.

In the years since *Gideon v. Wainwright* made the right to counsel binding upon the states,[79] the courts have cultivated a rather anemic right to the "effective assistance of counsel" under the Sixth Amendment.[80] Under the seminal two-prong test for ineffective assistance, articulated in *Strickland v. Washington* and later applied to guilty pleas, a defendant must establish that: (1) counsel's performance fell below an objective standard of reasonable attorney performance, and (2) there is a reasonable probability that, but-for counsel's incompetent performance, he would not have pled guilty.[81] The standard is highly deferential to the autonomy of defense lawyers, illustrated by the strong presumption in Sixth Amendment jurisprudence that counsel's decisions are "strategic."[82]

In the context of collateral consequences, the right to counsel is virtually non-existent.[83] Courts rely on the same direct-collateral divide as they do in their due process decisions. Federal constitutional law thus says little about what defense counsel must tell her client prior to any plea and quite a bit about what defense counsel need not disclose.

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[76] Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974) (basing holding on Federal Rules of Criminal Procedure and not the Constitution).

[77] *Michel*, 507 F.2d at 466.

[78] U.S. CONST. amend. VI; *see also* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (noting how "[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel").

[79] *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

[80] *See generally* Klein, *supra* note ___; Note, *supra* note ___.

[81] *See* Strickland v. Washington, 466 U.S. 668 (1984); s*ee also* Rompilla v. Beard, 545 U.S. 374, 380 (2005) (re-stating *Strickland's* two-prong test). In Hill v. Lockhart, 474 U.S. 52 (1985), the Court held "that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Id.* at 58.

[82] *See* Strickland, 466 U.S. at 689 (noting that for claims of ineffective assistance of counsel, "[j]udicial scrutiny of counsel's performance must be highly deferential" and that "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy") (internal quotations omitted).

[83] There is one general exception, which is when defense counsel affirmatively misrepresents the collateral consequence. *See, e.g.* Roberti v. Florida, 782 So. 2d 919, 920 (Fla. Dist. Ct. App. 2001) (holding that "[a]ffirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea"). *But see* Commonwealth v. Padilla, No. 2006-SC-000321-DG, 2008 WL 199818 (Ky. Jan. 24, 2008) (holding that defense counsel's mistaken advice to his client about the potential deportation consequences of a guilty plea provided no basis for vacating defendant's sentence).

The South Carolina Supreme Court's recent examination of an ineffective assistance claim starkly illustrates the merger of due process and effective assistance norms.[84] Joseph Page pled guilty to criminal sexual conduct and other charges in exchange for a promise of no more than twenty years in prison. Neither Page's lawyer nor the judge informed him about South Carolina's Sexually Violent Predator Act (SVPA).[85] This Act applies to individuals convicted of a "sexually violent offense" who "suffer[] from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."[86] Such individuals are eligible for involuntary commitment "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large."[87]

As the *Page* Court noted, the criminal conviction is the triggering event for South Carolina's SVPA; it sets in motion a process that includes a separate trial where the state must prove beyond a reasonable doubt that the person qualifies as a "sexually violent predator."[88] Because of this, involuntary commitment did not "flow directly from [Page's] guilty plea," but was instead collateral.[89] The Court held that Page's lawyer had no duty to inform him about the SVPA before he pled guilty.[90]

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[84] Page v. State, 615 S.E.2d 740 (S.C. 2005).

[85] *Id.* at 741. Between the 1998 passage of the South Carolina SVPA and December 2004, the state civilly committed eighty-six people. Fifteen of those people were released in those six years. WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: COMPARING STATE LAWS 4 (Mar. 2005), http://www.wsipp.wa.gov/pub.asp?docid=05-03-1101 [hereinafter, COMPARING STATE LAWS].

[86] S.C. CODE ANN. § 44-48-30.

[87] S.C. CODE ANN. § 44-48-100.

[88] *Page*, 615 S.E.2d at 742; *see also* S.C. CODE ANN. §§ 44-48-10 through 170.

[89] *Page*, 615 S.E.2d at 742.

[90] *Page*, 615 S.E.2d at 742. The South Carolina statute is a typical SVPA; most of the nineteen states that now have such a statute modeled them on the Kansas SVPA, which the United States Supreme Court upheld in 1997. *See* Kansas v. Hendricks, 521 U.S. 346 (1997) (rejecting *ex post facto* and double jeopardy challenges to Kansas' SVPA and finding that Act's procedures comported with due process standards); *see also Page*, 615 S.E.2d at 742 (noting that South Carolina's SVPA is patterned after Kansas').

There are several things to note with respect to the *Page* decision, which is representative of the general approach that most courts take in analyzing defendants' attempts to withdraw guilty pleas due to lack of information about various consequences. First, the South Carolina SVPA is not triggered only by a sex crime conviction. The definitional section for "sexual violent offense" includes "any offense for which the judge makes a specific finding on the record that based on the circumstances of the case, the person's offense should be considered a sexually violent offense." S.C. CODE ANN. § 44-48-30(2)(o). South Carolina is not unique in having such a discretionary, catch-all triggering definition. *See, e.g.*, KAN. STAT. ANN. § 59-29a02(e)(13); *see also supra* at Part ___, discussing non-sexual offense provisions.

Second, the list of other crimes in the definitional section of the South Carolina SVPA is long, and includes such crimes as employing "someone under the age of eighteen years to appear in a state of sexually explicit nudity . . . in a public place," where mistake of age is not a defense to a prosecution," S.C. CODE ANN. § 16-15-387 (amended 2004), as well as a number of obscenity crimes involving minors, many of which are also strict liability crimes. S.C. CODE ANN. § 16-15-305 to 355. It also includes sodomy, *see* § 16-15-120 (criminalizing "Buggery"), although that triggering crime is certainly unconstitutional in the wake of the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003) (holding that a Texas statute outlawing consensual sexual contact between persons of the same gender violates due process). While the crime of "buggery" has been in the South Carolina criminal code since 1712, *see Statutes of South Carolina*, Vol. 2, (Columbia: A.S. Johnston, 1837), pages 465 and 493, enacted Dec. 12, 1712, the

The *Page* decision slips loosely between due process and ineffective assistance of counsel norms. Initially presenting the issue as one of due process,[91] the Court relied on the two-prong *Strickland* test for ineffective assistance to frame its analysis.[92] The decision then discusses two cases stating that due process requires that a defendant be told only of direct consequences of his criminal conviction.[93] While the Court does go on to cite one ineffective assistance case, it follows this with a string citation to four more due process cases. These four, as well as the two cited earlier in the decision, all discuss the collateral-direct distinction in the context of a *judge*'s duty to warn a defendant, during the plea allocution, about consequences of the conviction. Thus, only one of the cases cited in *Page* considers the role of *defense counsel* in warning a client about collateral consequences.

This importation of the due process-based collateral consequences rule into the ineffective assistance realm is highly problematic because it treats the role of defense counsel and the trial judge as identical. In their insightful exploration of the myriad doctrinal weaknesses of the collateral consequences rule, Professor Gabriel Chin and Richard Holmes note that:

> [J]ust as defense counsel and the court have different duties of loyalty, investigation, and legal research as a result of their distinct roles as advocate and decisionmaker, there is no reason to assume that their obligations of advising the accused of the risks and benefits of pleading guilty should be identical. The judge is charged with ensuring that the plea is knowing, voluntary, and intelligent; counsel's job is to assist with the determination that a plea is a good idea, which encompasses a broader range of considerations.[94]

SVPA, which explicitly includes buggery in the definitional section of "sexually violent offenses," was enacted in 1998.

This list demonstrates that *Page* Court meant what it said in reasoning its case on a strict direct-collateral distinction, where there is no duty to warn when the consequence does not flow directly from the conviction. The *Page* decision, and others like it, cannot be explained as limiting the duty to warn to instances of true surprise to a defendant. While one might argue that a person convicted of forcible rape is on fair notice that involuntary commitment under an existing SVPA is possible or even likely, it is hard to make that argument for many crimes that could fall under the catch-all definitional section in South Carolina -- for example a burglary committed against an ex-girlfriend as revenge for her infidelity – or some of the strict liability crimes.

[91] *Page*, 615 S.E.2d at 741 (asking: "Was Petitioner's plea entered knowingly, voluntarily, and intelligently where Petitioner was not informed he would be potentially liable under the Sexually Violent Predator Act after completing his sentence?"). The Court also noted that the trial judge did not discuss the SVPA with Page before his plea. *Id.*

[92] *Id; see also supra* text accompanying notes ___ to ___, discussing two-prong *Strickland* test.

[93] *Page*, 615 S.E.2d at 742-43 (citing Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366-67 (4th Cir. 1973) and Brown v. State, 412 S.E.2d 399 (S.C. 1991)).

[94] Chin & Holmes**,** *supra* note __ at 727; *see also id.* at 724-36 (setting out five categories of cases which suggest that the collateral consequences rule is invalid when applied to effective assistance of counsel). In an early and comprehensive critique of the collateral consequences rule, Guy Cohen describes the importation of due process principles into the effective assistance realm as "distort[ing] the jurisprudence upon which it is based." Note, Guy Cohen, *Weakness of The Collateral Consequences Doctrine: Counsel's Duty to Inform Aliens of the Deportation Consequences of Guilty Pleas*, 16 FORDHAM INT'L L. J. 1094 (1993).

Yet most of the courts examining defendants' claims of lack of knowledge, like *Page*, fail to make any distinction between defense counsel and the trial judge when discussing responsibility to warn about collateral consequences.[95]

Certainly, the due process protections surrounding guilty pleas and the right to counsel for that plea are not mutually exclusive. If a defendant receives ineffective assistance of counsel leading up to a guilty plea, then that plea cannot be made knowingly, voluntarily and intelligently.[96] But the fact that ineffective assistance means that a plea also violates due process does not mean that there is ineffective assistance *only* when the plea violates due process. The judge and defense counsel play very different roles with respect to a person pleading guilty in a criminal case. Indeed, the labels of "defendant" or "client" in relation to those roles make the point. While the judge must ensure, on the record, that any plea entered is done voluntarily and with the requisite knowledge, she is not charged with the underlying counseling of the defendant required before the plea. The judge's role is much more limited, both in terms of time spent with a defendant and the extremely limited scope of permissible inquiry. For example, the judge can ask the defendant if anyone is forcing him to plead guilty, but generally cannot explore with the defendant the wisdom of that plea.[97]

In *State v. Paredez*, the New Mexico Supreme Court recognized the different roles of judge and defense counsel in the context of the duty to advise defendants about the particularly severe collateral consequence of deportation. The trial judge had followed a state statute requiring judges only to advise defendants that a conviction "*may* have an effect upon the[ir] . . . immigration or naturalization status."[98] In reviewing that warning, the Court found that the Due Process Clause did not require more, despite the fact that deportation was automatic in Mr. Paredez's case.[99] The Court did not, however, treat defense counsel's responsibilities as identical to the judge's: "counsel is in a much better position to ascertain the personal circumstances of his or her client so as to determine what indirect consequences the guilty plea may trigger."[100] The Court did not stop with its holding that defense counsel must correctly advise her client about the automatic

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[95] Indeed, some courts insist that there is no such distinction, at least in the guilty plea context. *See, e.g.*, Morales v. State, 104 S.W.3d 432, 434 (Mo. Ct. App. 2003) (relying on state statute requiring judges to warn defendants only about direct consequences in support of finding that defense counsel must also warn only about such consequences and noting that, "[f]ollowing a guilty plea, the effectiveness of counsel is relevant only to the extent that it affected whether or not the plea was made voluntarily and knowingly") (citation omitted).

[96] *See* United States v. Couto, 311 F.3d 179, 187 (2d Cir. 2002); *see also* Downs-Morgan v. United States, 765 F.2d 1534, 1538 (11th Cir. 1985).

[97] Such a conversation would not be protected by attorney-client confidentiality rules and could of course lead to incriminating statements on the record in violation of the defendant's Fifth Amendment rights.

[98] State v. Paredez, 101 P.3d 799, 801 (N.M. 2004) (citing N.M. RULES ANN. § 5-303 (West 2007)) (emphasis added).

[99] *Id.* at 803 (stating that "while it certainly would have been prudent for the district court to have been more specific in its admonition to Defendant or to inquire into Defendant's understanding of the deportation consequences of his plea, we hold that the district court was not constitutionally required to advise Defendant that his guilty plea to criminal sexual contact of a minor almost certainly would result in his deportation").

[100] *Id.* at 803 (internal quotations omitted).

nature of deportation.[101] It went one step further, holding that "an attorney's *non-advice* to an alien defendant on the immigration consequences of a guilty plea would also be deficient performance."[102]

The New Mexico approach, however, is unique in imposing an affirmative duty on defense lawyers to advise their clients about immigration, or any other consequence, under the Sixth Amendment. The *Page* case is representative of the generally flawed analysis of the Sixth Amendment collateral consequences line of cases because it imports the due process analysis into the effective assistance context without any reasoning. That critique aside, the current rule in almost all jurisdictions is that a defendant has no right, under either due process or effective assistance, to information about the collateral consequences of a guilty plea.

C. The Outdated Landscape of Collateral Consequences

The *Brady* decision came well before the current reality of widespread, harsh collateral consequences. The problem is not only the flawed doctrinal origins of the collateral consequences rule. It is also the development of that rule in a context that is now radically different, with myriad collateral consequences that affect individuals, their families and their communities. The collateral consequences rule is outdated for three interrelated reasons: (1) the rise in the percentage of criminal prosecutions that are resolved by guilty plea; (2) increased prosecution of minor offenses; and (3) the rise in the number and severity of collateral consequences of criminal convictions.

This country's adversarial system of criminal justice centers around the tasks of negotiation and counseling, with the overwhelming majority of defendants pleading guilty.[103] While plea bargains have long existed,[104] the percentage of cases resolved by guilty pleas has risen sharply in the past few decades:

> The proportion of guilty pleas has been moving steadily upward for over thirty years, and has seen a dramatic increase of over eleven percentage points just in the past ten years, from 85.4% in 1991. Indeed, the aggregate national guilty plea rate in federal cases remained under 92% until 1997, in line with the rough national norm for all criminal systems of about 90%; it is only in the past five years that we have witnessed the rise to a bizarrely high plea rate. In some districts now, the percentage of convictions attributable to guilty pleas reaches over 99%.[105]

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[101] *Id.* at 804 ("when a defendant's guilty plea almost certainly will result in deportation, an attorney's advice to the client that he or she 'could' or 'might' be deported would be misleading and thus deficient").
[102] *Id* at 804 (emphasis added); *see also* State v. Edwards**,** 157 P.3d 56 (N.M. Ct. App. 2007) (applying *Paredez* to sex offender registration context and finding that defense counsel has Sixth Amendment duty to advise defendant about registration and notification consequences of any guilty plea).
[103] *See supra* note ___, describing how 95 percent of state convictions and 96 percent of federal convictions were secured by guilty plea in certain years.
[104] *See generally* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000).
[105] Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) (citation omitted).

There are also more minor cases in the criminal justice system than ever before. Due to such phenomena as "zero-tolerance policing" and "broken windows" theory,[106] misdemeanor and "quality of life" prosecutions have skyrocketed. Under the New York City Police Department's "Clean Halls" program, for example, simple trespass arrests have risen a staggering twenty-five percent since 2002,[107] at a time when crime in New York City is dropping sharply.[108] For many of these low-level prosecutions, the penal consequences are relatively minor, including time already served in jail, a fine or community service. Yet a misdemeanor conviction, or even a conviction for a non-criminal offense,[109] can lead to extremely harsh non-penal consequences, including deportation and registration as a sex offender.

At the same time that the percentage of guilty pleas and prosecution of minor offenses has risen, collateral consequences have mushroomed. Individuals convicted of crimes face both more numerous and harsher collateral consequences of those convictions.[110] This trend is particularly true for sex offenders. All fifty states and the District of Columbia now require people convicted of certain sex offenses to register with their local police departments.[111] The passage of sex offender registry acts (SORAs) was spurred by the Violent Crime Control and Law Enforcement Act of 1994,[112] which linked federal funds to the establishment of sex offender registries.[113] In 1996, Congress passed what is commonly known as "Megan's Law," to require public notification of

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[106] *See* Peter A. Barta, Note, *Giuliani, Broken Windows, and the Right to Beg*, 6 GEO. J. ON POVERTY L. & POL'Y 165(1999) (summarizing Mayor Giuliani's "zero-tolerance policing" tactics and their ill-effects on New York City's homeless population); George L. Kelling & James Q. Wilson, *Broken Windows*, THE ATLANTIC MONTHLY, Mar. 1982, at 29. *But cf.* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001).

[107] M. Chris Fabricant, *Rousting the Cops: One Man Stands Up to the NYPD's Apartheid-like Trespassing Crackdown*, THE VILLAGE VOICE, NOV. 6, 2007.

[108] "In an era of falling felony crime rates but rising arrest numbers, New York City's courts are increasingly dealing with low-level misdemeanor offenses that years ago might never have led to arrest, arraignment and bail. And at the same time, a growing litany of life consequences – the loss of housing, ineligibility for some jobs, disqualification for government assistance – have been arrayed to target people found guilty even of petty crimes and non-criminal violations like disorderly conduct. People who get arrested today are likely to be accused of more minor crimes but face penalties for a conviction that go well beyond prison or probation." Jarret Murphy, *Awaiting Justice: The Punishing Price of NYC's Bail System*, CITY LIMITS INVESTIGATES, Fall 2007 (Vol. 31 No. 03) at 6-7 (on file with author).

[109] *See, e.g.*, N.Y. PENAL LAW § 10.00(3) (McKinney 2007).

[110] *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME 9 (2003) (noting how "[s]ince 1980, the United States has passed dozens of laws restricting the kinds of jobs for which ex-prisoners can be hired, easing the requirements for their parental rights to be terminated, restricting their access to public welfare and housing subsidies, and limiting their right to vote."); *see also* Nora V. Demleitner, *Preventing Internal Exile: The Need For Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) (noting how, "[i]n conjunction with the exponential increase in the number and length of incarcerative sentences during the last two decades, collateral sentencing consequences have contributed to exiling ex-offenders within their country, even after expiration of their maximum sentences") [hereinafter, *Preventing Internal Exile*]. These collateral consequences are not limited to people who have spent time in prison; many apply to misdemeanor convictions, and a few even to non-criminal convictions. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i)(1); Higher Education Act of 1965, *as amended*, 20 U.S.C. § 1091(r).

[111] KAREN J. TERRY ET AL., SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION: A "MEGAN'S LAW" SOURCEBOOK III-1 (2003).

[112] Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, Pub. L. No. 103-322, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (2004)).

[113] 42 U.S.C. § 14071(g)(2).

information about certain people registered under SORAs.[114] The most recent development is involuntary civil commitment of individuals convicted of qualifying sexual offenses, with laws currently in nineteen states and others pending.[115]

The combined effect of these three developments -- higher rates of guilty pleas, an era of increasing adjudication of minor offenses, and increasing collateral consequences -- suggests a need for greater transparency in the plea bargain process. Defendants should be made aware of the myriad consequences of any guilty plea and, in particular, of the most serious consequences. The collateral consequences rule is particularly problematic when a defendant faces a relatively minor penal consequence yet also faces, and is unaware, of an overwhelmingly more serious "collateral" consequence.

II. APPLYING THE COLLATERAL CONSEQUENCES RULE TO SEXUALLY VIOLENT PREDATOR ACTS

The problematic nature of the collateral consequences rule is illustrated when applied to the harsh consequence of involuntary commitment under a SVPA. This section briefly explains the typical modern statute allowing for commitment of "sexually violent predators." It then describes how most courts that have examined the duty to warn about an SVPA have applied the collateral consequences rule.

A. A Growing Trend: Involuntary Commitment of "Sexually Violent Predators"

Involuntary commitment of people convicted of certain sex offenses has been described as "a growing national movement that is popular with politicians and voters."[116] Many states include the charged term "sexually violent predator" in the title of their laws, and legislatures continue to enact them despite evidence that they are both extremely costly and do not adequately rehabilitate those committed.[117]

In 1990, Washington became the first state to pass a modern law allowing for involuntary commitment of "sexually violent predators."[118] Other states quickly followed suit, and as of mid-2007 there were nineteen states with some version of a

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[114] Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (amending 42 U.S.C. . § 14071(d) (1994).

[115] *See* Davey & Goodnough, *Doubts Rise*, *supra* note ___.

[116] Davey & Goodnough, *Doubts Rise*, *supra* note ___ at A1 (noting that, despite their popularity, "such programs have almost never met a stated purpose of treating the worst criminals until they no longer pose a threat").

[117] *See* Eric S. Janus, *Closing Pandora's Box: Sexual Predators and The Politics of Sexual Violence*, 34 SETON HALL L. REV. 1233, 1237 (2004) (stating that "the promise of treatment and time-limited confinement is belied by the almost non-existent treatment graduation rates in SVP programs across the country") [hereinafter Janus, *Pandora's Box*]; *see also* WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, COMPARING STATE LAWS, *supra* note ___ at 1 (estimating cost of operating secure facilities for SVPs in the United States to be $224 million per annum); Monica Davey & Abby Goodnough, *A Record of Failure at Center for Sex Offenders*, N.Y. TIMES, Mar. 5, 2007, at A1 [hereinafter *Record of Failure*].

[118] *See* Deborah L. Morris, Note, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators: A Due Process Analysis*, 82 CORNELL L. REV. 594, 611-15 (1997) (describing the passage of Washington's law).

SVPA. These nineteen states now detain approximately 2,700 individuals.[119] While the number of men currently confined under an SVPA is relatively low, that could change with a single, highly-publicized crime by someone who could have been involuntarily committed but was not. As one scholar noted, "[c]learly, SVPs are a growth industry."[120]

Involuntary commitment of "sexually violent predators" is an expensive proposition. In Washington State, the cost of commitment some six years after the SVPA took effect was more than $93,000 per person per year, at a total cost of more than $3.5 million per year.[121] The current SVPAs are not unique, historically speaking, in singling out people convicted of sex offenses for confinement in the mental health system. For several decades beginning in the late 1930s, well over half of the states had some type of law allowing for the placement of those convicted of sex offenses in psychiatric institutions rather than in prisons.[122] These early statutes differed in at least one significant respect, however, from the current crop of SVPAs: they substituted treatment for imprisonment, rather than tacking on involuntary commitment *after* prison.[123]

The United States Supreme Court upheld the constitutionality of modern SVPAs in *Kansas v. Hendricks*.[124] It found that, because the Kansas SVPA required findings of both dangerousness and mental abnormality, it was similar to non-sex offense-based civil commitment statutes in the narrowness of its scope.[125] The law had sufficient procedural and evidentiary safeguards to allow for what the Court recognized as "the core of the liberty protected by the Due Process Clause," namely, freedom from physical restraint.[126] The Court also rejected Hendricks' arguments that the law violated both *ex post facto* and double jeopardy prohibitions, finding that involuntary commitment was intended to incapacitate and treat those who are committed, not punish them.[127] Confinement under a properly tailored SVPA is thus a civil action, and not criminal punishment. This is despite the fact that, as Justice Kennedy put it in his *Hendricks* concurrence, "[n]otwithstanding its civil attributes, the practical effect of the Kansas law may be to impose confinement for life."[128]

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[119] Davey & Goodnough, *Doubts Rise*, *supra* note ___ at A1.
[120] LA FOND, PREVENTING SEXUAL VIOLENCE, *supra* note ___ at 145.
[121] John Q. La Fond, *The Costs of Enacting a Sexual Predator Law*, 4 PSYCHOL. PUB. POL'Y & L. 468, 476-480 (1998) [hereinafter *Cost*].
[122] *Id.* at 469-470.
[123] *Id.* at 470-71. *Compare* Butler v. Burke, 360 F.2d 188, 120 (7th Cir. 1966) (describing how defendant was committed for treatment shortly after entering a guilty plea) *with* Kansas v. Hendricks, 521 U.S. 346, 353-54 (1997) (describing how Hendricks was committed after serving his 10-year sentence).
[124] 521 U.S. 346, 357 (1997) (finding that it "cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty").
[125] *Id.* at 357-58.
[126] *Id* at 356-57.
[127] *Id.* at 360-71; *see also* Seling v. Young, 531 U.S. 250, 263 (2001) (holding that "respondent cannot obtain release through an 'as-applied' challenge to the Washington [SVPA] on double jeopardy and *ex post facto* grounds" and "agree[ing] with petitioner that an 'as-applied' analysis would prove unworkable"). In 2002, the Court revisited SVPAs, holding that the state must show "proof of serious difficulty in controlling behavior" for those it seeks to civilly commit. Kansas v. Crane, 534 U.S. 407, 413 (2002) (noting, however, that state need not show proof of absolute lack of ability to control behavior).
[128] *Hendricks*, 521 U.S. at 372 (Kennedy, J., concurring).

The Kansas SVPA is typical of such statutes.[129] Under the Act, the state must make two showings in order to commit an individual. It must show that the individual (1) has a "mental abnormality" or suffers from a "personality disorder," and (2) is likely to engage in "predatory acts of sexual violence."[130] Only those convicted of or charged with a "sexually violent offense" qualify as sexually violent predators.[131] The list of qualifying crimes is extensive, ranging from rape to attempted aggravated indecent liberties with a child. There is also a category for any *non*-sexual offense "which either at the time of sentencing for the offense or subsequently during involuntary commitment proceedings pursuant to this act, has been determined beyond a reasonable doubt to have been sexually motivated."[132] In other words, a person can be deemed a sexually violent predator even if the underlying charge or conviction is *not* a sexual offense. This is significant, as it widens considerably the potential pool of candidates for involuntary commitment.[133]

The rate of release for those committed under an SVPA is very low. Of the 129 people committed under the Kansas SVPA between its 1994 passage and 2004, only eighteen have been discharged or released from confinement into a less-restrictive environment. Of these, fourteen were sent back.[134] In Minnesota, which had a precursor to its modern SVPA, not a single person convicted of a sex offense and then civilly committed was ever released.[135] Every SVPA allows for indefinite confinement of the individual, with periodic review.[136] In December 2004, seventeen states had SVPAs and almost all of them had been in effect since 1999 or earlier. In these states, 3,493 people had been held for evaluation as sexually violent predators or committed; only 427 had ever been discharged or released for outpatient treatment.[137]

While there is some recent legal scholarship on SVPAs, it focuses largely on the cost, effectiveness and constitutionality of treating sex offenders though the mechanism of

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[129] *See* KAN. STAT. ANN. § 59-29a01 *et seq.* (1994); *see also* La Fond, *Cost, supra* note __ at n.8 (stating that the *Hendricks* Court's explanation of the Kansas SVPA "is a useful description that accurately describes in general terms how these laws work").

[130] KAN. STAT. ANN. § 59-29a01 *et seq.* (1994).

[131] KAN. STAT. ANN. § 59-29a02(a) (defining "sexually violent predator").

[132] KAN. STAT. ANN. § 59-29a02(e)(13).

[133] *See infra* Part ___, discussing "Non-sexual offenses."

[134] *See* WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, COMPARING STATE LAWS, *supra* note ___ at 3.

[135] Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 206 (1996).

[136] *See* Wanda Kendall & Monit Cheung, *Sexually Violent Predators and Involuntary Commitment Laws*, 13 JOURNAL OF CHILD SEXUAL ABUSE 41, 49-52 tbl.2 (2004).

[137] *See* WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, COMPARING STATE LAWS, *supra* note ___ at 2 (noting that report "use[s] the term 'held since the law went into effect,' rather than 'committed,' because it provides a more accurate reflection of the scope of the law's application. In many states, individuals are sent to the treatment facility for evaluation and may choose to wait for some time before proceeding with the commitment hearing."). The numbers reported in a 2007 New York Times investigation into SVPAs was even more stark. *See* Davey & Goodnough, *Doubts Rise, supra* note ___ at A1 (noting how "[n]early 3,000 sex offenders have been committed since the first law passed in 1990. In 18 of the 19 states, about 50 have been released completely from commitment because clinicians or state-appointed evaluators deemed them ready. Some 115 other people have been sent home because of legal technicalities, court rulings, terminal illness or old age.").

commitment.[138] The literature does not address the role of defense counsel, prosecutors or courts involved in the criminal convictions that can lead to involuntary commitment. A notable exception is Professor Nora Demleitner, who has recognized that confinement of those committed under SVPAs "presents the starkest example of a collateral sanction."[139] Professor Demleitner has consistently argued for more transparency in the imposition of collateral consequences, stating that the process "should be public and should be part of the sentencing process."[140] However, there is a general lack of commentary on the constitutional dimensions of warnings about SVPAs during the plea process.

There is a significant body of literature on collateral consequences generally. The vast majority of it considers the particular consequence of immigration, on the theory that "exile" is the harshest consequence.[141] Yet even sex offenders who are not involuntarily committed face their own form of "exile." They are subject to zoning rules about where they may or may not live, registration rules that can include Internet postings of their photographs and addresses, and numerous bars on employment.[142]

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[138] *See, e.g.*, La Fond, *Cost*, supra note __; John Q. La Fond, *Outpatient Commitment's Next Frontier*, 9 PSYCHOL. PUB. POL'Y & L. 159 (2003); Janus, *Pandora's Box, supra* note ____; Kendall and Cheung, *supra* note ___.

[139] Demleitner, *Abusing State Power, supra* note ___ at 1621. Although Professor Demleitner has written broadly about collateral consequences of all types, *Abusing State Power* focuses on the particular consequence of commitment under an SVPA. In the article, Demleitner urges replacement of the current approach to involuntary commitment in United States, through SVPAs, with an approach that more closely approximates the German model. *Id.* at 1641.

[140] Demleitner, *Preventing Internal Exile, supra* note ___ at 162; *see also* Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment With Targeted Nonprison Sentences And Collateral Sanctions*, 58 STAN. L. REV. 339, 359 (2005) (arguing, in article critiquing federal sentencing guidelines, that "[a]ll substantial collateral sanctions should be imposed at sentencing"); Demleitner, *Abusing State Power* at 1654 (noting how her "proposed model relies heavily on the idea that all sanctions should be imposed at sentencing to provide the offender and the public with a clear sense of the penalty assessed").

[141] *See, e.g.*, John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 36 U. MICH. J.L. REFORM 691, 734 (2003) (stating that, "[u]nder the INA of 1996, non-citizens convicted of even minor criminal offenses can face dire consequences, often far worse than the statutory sentence for the crime"); Bruce Robert Marley, *Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, 35 SAN DIEGO L. REV. 855 (1998). Some commentators have focused on other types of consequences. *See, e.g.*, Nora V. Demleitner, *"Collateral Damage": No Re-Entry For Drug Offenders*, 47 VILL. L. REV. 1027, 1022 (2002) (noting how, "[n]ext to sex offenders, drug felons and drug misdemeanants have borne the brunt of civil sanctions"); Truman, *supra* note ___ (focusing on consequence of eviction based on drug conviction). Involuntary commitment is also overlooked in the various court, professional and ethical rules that govern the guilty plea process. Many ignore collateral consequences completely, *see, e.g.*, S.D. CODIFIED LAWS § 23A-7-4 (requiring no warnings about *any* collateral consequence of pleading guilty); others mandate warnings only about immigration consequences. *See, e.g.,* GA. CODE ANN. § 17-7-93.

[142] For some examples of the myriad consequences that individuals convicted of sex offenses face, *see* http://www.npr.org/templates/story/story.php?storyId=16827587; *see also* Richard Gonzales, *Iris Scanning Tracks Sex Offenders*, Dec. 3, 2007, *available at* http://www.npr.org/templates/story/story.php?storyId=16827587; Richard Tewksbury, *Experiences and Attitudes of Registered Female Sex Offenders*, 68-DEC FED. PROBATION 30, 32-33 (2004) (describing research that makes it "clear that registered female sex offenders frequently experience collateral consequences that may have serious deleterious effects on their social, economic, and physical well-being" and specifically noting that 45% of surveyed women who had been on registry for 32 months or more reported having lost a job due to registration); Richard Tewksbury, *Collateral Consequences of Sex*

Involuntary commitment is both incarceration and exile. The Supreme Court has deemed the involuntary commitment of "sexually violent predators" to be non-punitive in nature.[143] Still, the person who finds himself securely locked up as a civilly committed former sex offender will experience it as quite similar to incarceration and thus punishment. Indeed, in many of the nineteen SVPA states, commitment takes place in a state prison or in a facility managed by the state's department of corrections.[144]

B. No Duty to Warn About Commitment as a "Sexually Violent Predator"

Although the number of people confined as sexually violent predators remains small, many of them will never be released. In addition to the criminal sanctions that these individuals served, they face potential lifetime commitment under the SVPA in their state. This poses the central issue explored in this Article: should these individuals have the right to be informed about the possibility of lifelong involuntary commitment during the plea process? The answer provided by the current collateral consequences paradigm is an unsettling "no." This is true when courts have considered both due process and ineffective assistance challenges.

The United States Supreme Court has never addressed the issue of whether the Constitution requires, as a matter of either due process or the right to counsel, that a defendant be told that his guilty plea might lead to involuntary commitment.[145]

Offender Registration, 21 J. CONTEMP. CRIM. JUST. 67 (2005) (noting how "at least one-quarter of registrants reported having received harassing/threatening mail and telephone calls, losing a job, being denied a promotion at work, losing (or being unable to obtain) a place to live, being treated rudely in public, being harassed/threatened in person, and losing at least one friend"); *Sex Offenders Living Under Miami Bridge*, N.Y. TIMES, Apr. 8, 2007, at A22 (describing how local laws restricting where convicted sex offenders may live have forced five men to live under a bridge); Jennifer Fusco, *Stricter Rules for Sex Offenders Approved*, THE UTICA OBSERVER-DISPATCH, Oct. 10, 2007 (discussing local law which prohibits convicted sex offenders from being within 1,500 feet of a county park, playground, school or child-care center); Aimee Harris, *Newton Considering Sex Offender Ban*, N. Y. TIMES, Oct. 7, 2007 (discussing proposal to ban "high risk" sex offenders from living anywhere within city limits).

[143] Kansas v. Hendricks, 521 U.S. 346, 347 (1997) (finding that "[c]ommitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence").

[144] *See, e.g.*, KAN. STAT. ANN. § 59-29a07(c) (describing how people subject to the Kansas Sexually Violent Predators Act can be confined by the secretary of corrections so long as they are "housed and managed separately from offenders in the custody of the secretary of corrections, and except for occasional instances of supervised incidental contact, shall be segregated from such offenders"); Davey & Goodnough, *Doubts Rise*, *supra* note ___ at A1 (reporting that "[m]ost of the centers tend to look and feel like prisons, with clanking double doors, guard stations, fluorescent lighting, cinder-block walls, overcrowded conditions and tall fences with razor wire around the perimeters. Bedroom doors are often locked at night, and mail is searched by the staff for pornography or retail catalogs with pictures of women or children. Most states put their centers in isolated areas."). *But see id.* ("Yet soothing artwork hangs at some centers, and cheerful fliers announce movie nights and other activities. The residents can wander the grounds and often spend their time as they please in an effort to encourage their cooperation, including sunbathing in courtyards and sometimes even ordering pizza for delivery. The new center in California will have a 20,000-book library, badminton courts and room for music and art therapy.")

[145] Steele v. Murphy, 365 F.3d 14, 16 (1st Cir. 2004) (noting how "[t]he Supreme Court has not addressed whether a defendant has a constitutional right to be informed, before pleading guilty, of the possibility of being deemed a sexually dangerous person"). Indeed, the Supreme Court has yet to undertake review of

However, in *Kansas v. Hendricks* the Supreme Court did find that commitment under an SVPA was properly categorized as civil confinement and not criminal punishment.[146] Some state courts have treated this civil-criminal distinction as analogous to the direct-collateral distinction set out in the collateral consequences rule, and have thus found no duty to warn about civil commitment.[147] If the Supreme Court ever adopted this approach, presumably it would find that there is no duty to warn a defendant that his plea to a qualifying sex offense could lead to lifelong involuntary commitment as a sexually violent predator.[148]

Unlike deportation, the duty to warn about involuntary commitment as a consequence of sex offense convictions has not been extensively litigated in the lower federal courts.[149] The dearth of federal cases examining this issue is likely due to the fact that the vast majority of crimes are prosecuted in state courts and would be reviewed in federal court only on writs of *habeas corpus*. This requires exhaustion of both the direct appeal and the state collateral review processes and so comes years after the state court conviction. Since SVPAs in many of the nineteen states that now have them are relatively new, it could simply be that these cases have not yet arrived in great numbers in the federal courts. Surely, the validity of guilty pleas without knowledge of an SVPA will be litigated up into the federal courts, since the defendant will in many cases face potential lifetime commitment and thus the stakes are high.[150]

However, a number of state courts have addressed the issue. They come to the same conclusion as the *Steele* court, discussed in the Introduction: a plea is valid even though

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any lower court finding that a defendant had no constitutional right to be warned of a "collateral" consequence of his criminal conviction.

[146] Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (stating that the Court was "unpersuaded by Hendricks' argument that Kansas has established criminal proceedings"). The Court noted that the Kansas legislature labeled its SVPA as civil, situating it within its civil probate code. *Id*. In addition, the Court found that the Act's purpose was neither retribution nor deterrence, and it was not punitive even though its primary purpose may have been to incapacitate rather than treat sex offenders. *Id.* at 362-69.

[147] *See supra* Part ___, describing how Texas' highest court for criminal appeals required that a consequence must be both "direct" and "punitive" in order to warrant warnings under the Due Process Clause.

[148] This is likely, at the very least, on due process grounds. As set out in Part ___, *supra,* there is a compelling argument that defense counsel should be treated differently from the trial court and thus ineffective assistance claims should be treated differently from due process claims in the failure to warn context. Indeed, the Supreme Court indicated as much in dicta in a 2001 decision. In *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, (2001), the Court assumed that "alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *Id.* at 322. It noted, however, that "[e]ven if the defendant were not initially aware of [the federal statute governing relief from deportation], competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision's importance." *Id.* at 323 n.50.

[149] *See supra* note __ and accompanying text, listing decisions in the various circuits involving deportation as a consequence of a guilty plea. *But see* Steele v. Murphy, 365 F.3d 14 (1st Cir. 2004).

[150] However, defendants who challenge their convictions through writs of *habeas corpus* face increasingly complex procedural hurdles. In the Antiterrorism and Effective Death Penalty Act of 1996, Congress withdrew from federal judges the power to grant writs unless a state-court adjudication on the merits was made, *inter alia*, "contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1). The practical – indeed, intended – effect of this law has been to reduce the likelihood that defendants who are convicted in the state-court system will be able to have their cases heard in Article III courts.

the person pleading guilty did not know that the conviction for a sexual offense could lead to involuntary commitment after he served his sentence.[151] These cases generally arise when a defendant seeks to withdraw his guilty plea on the grounds that neither the judge nor defense counsel told him about the SVPA. Almost all of the decisions deny, on various grounds, the request to withdraw the plea. Some courts base their holdings on due process grounds;[152] some reject claims that counsel offered ineffective assistance in violation of the Sixth Amendment by failing to warn;[153] others rely on a traditional contract analysis in rejecting the claim that failure to inform about involuntary commitment is a breach of the plea bargain agreement;[154] a few reason that the failure does not meet state statutory or common law rules governing the withdrawal of guilty pleas.[155]

The case of *State v. Myers* illustrates the general approach to due process and knowledge of an SVPA during the guilty plea process.[156] Robert Myers pled guilty to sexual assault of a child. He later moved to withdraw his plea on the grounds that it was not knowing, voluntary and intelligent because the trial court had failed to inform him about Wisconsin's "Sexually Violent Persons Commitment" law.[157] The court noted that involuntary commitment would not automatically flow from the fact of Myers' conviction. Instead, "Myers will have the full benefit of the [commitment law's] procedures, due process, and an independent trial."[158] Since commitment was thus only a *potential* future consequence of his plea, Myers had no due process right to know about it prior to entering his plea.

With respect to ineffective assistance of counsel, the other major constitutional basis for challenging failure to warn about involuntary commitment, a Kansas Court of

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[151] *See, e.g.*, Martin v. Reinstein, 987 P.2d 779 (Ariz. Ct. App. 1999); Morales v. State, 104 S.W.3d 432, 437 (Mo. Ct. App. 2003); State v. Harris, 881 So.2d 1079, 1082-85 (Fla. 2004); Bussell v. State, 963 P.2d 1250 (Kan. Ct. App. 1998); Ames v. Johnson, No. CL04-413, 2005 WL 820305 (Va. Cir. Ct. Mar. 28, 2005).

[152] *See, e.g.*, Martin, 987 P.2d at 806 (noting how "one who pleads guilty should be informed of the punishment that must be imposed so that he can make an intelligent and knowing plea. Here, confinement for treatment under the [Sexually Violent Persons] Act is not 'punishment,' nor must it be imposed. Therefore, there was no requirement that Petitioners be told of the Act's terms before they pled guilty.") (internal citation omitted). The best that can be said of some decisions in this area is that they "appear" to base their decisions on due process grounds. Many courts confuse the due process and effective assistance of counsel analyses, often making it difficult to determine which constitutional provision underlies the decision. *See infra* at __ , critiquing courts' tendency to treat defense counsel's and judges' obligations with respect to plea bargaining as identical.

[153] *See, e.g.*, Morales, 104 S.W.3d at 437 (finding that "counsel did not render ineffective assistance of counsel by failing to inform movant of the collateral consequence of involuntary commitment" under the state's SVPA).

[154] *See, e.g.*, Harris, 881 So.2d at 1082-85 (rejecting respondents' breach of contract argument by concluding that "any bargain that a defendant may strike in a plea agreement in a criminal case would have no bearing on a subsequent involuntary commitment for control, care, and treatment" and also holding that the doctrine of equitable estoppel does not prohibit the government from initiating involuntary commitment proceedings even where there was no mention of this in the plea agreement).

[155] *See, e.g.*, Bussell, 963 P.2d at 1253 (confirming trial court's finding that defendant did not meet state statutory plea withdrawal standard of "manifest injustice" when both court and counsel failed to warn him about SVPA prior to his guilty plea).

[156] 544 N.W.2d 609 (Wis. Ct. App. 1996).

[157] *Id.* at 610.

[158] *Id.* at 610-11.

Appeals case demonstrates the typical outcome. Richard Bussell pleaded guilty to a sexual offense in exchange for a sentence of six to fifteen years.[159] In *Bussell v. State*, the court found that Bussell was not entitled to withdraw his guilty plea despite the fact that his attorney had failed to advise him about potential confinement under the Kansas SVPA.[160] The court first noted the two-prong test for ineffective assistance of counsel, which looks at both attorney competence and prejudice to the defendant. With respect to the first prong, the court emphasized the "highly deferential" nature of judicial scrutiny of defense counsel's performance.[161] It went on to apply the circular reasoning that, because defense counsel must warn only about possible criminal penalties, there was no duty to warn about the Kansas SVPA. In addition, the court noted:

> [I]t is unclear now and will remain so in the future whether the KSVPA will ever apply to defendant because he has not yet finished his criminal sentence. The uncertainty inherent in predicting whether the KSVPA will ever be invoked against defendant is such that the failure of his counsel to advise him of potential consequences cannot be said to be constitutionally deficient.[162]

The court also found that Bussell failed to show that the lack of warning about the SVPA prejudiced him. It reasoned that Bussell did not "flatly state that his decision to plead guilty would have changed had he known of the KSVPA" and also that the guilty plea allowed him to avoid a substantially longer sentence. The court was thus "not willing to assume that defendant is so lacking in judgment that he would have risked a much longer sentence by going to trial if he had known that sometimes in the distant future the KSVPA might have been applied to him."[163] In other words, the court came to the somewhat surprising conclusion that the risk of potential lifelong involuntary commitment under the state's SVPA would not deter Bussell from pleading guilty when the plea saved him from a longer prison sentence.

The *Myers* approach utterly fails to consider the defendant's perspective in determining the need for knowledge before pleading guilty. The *Bussell* decision is naïve at best, and perhaps disingenuous, about the importance that involuntary commitment as a sexually violent predator plays in the plea bargain process. Both cases evidence a formalistic approach where the line between "direct" and "collateral" is divorced from the need for transparency in the plea bargain process.

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[159] Bussell v. State, 963 P.2d 1250, 1252 (1998). The actual sentence was two to five years on each count, to be served consecutively on three counts and concurrently on the others. *Id.*

[160] *Id.* at 1254. The court also denied Bussell's claim that the trial court's failure to warn about the SVPA violated due process. *Id.* at 1252-53 (applying collateral consequences rule to Kansas' Sexually Violent Predators Act and noting that, because the SVPA did not flow immediately, definitely and automatically from the guilty plea, the trial court had no duty to warn defendant about it).

[161] *Bussell*, 963 P.2d at 1253-54.

[162] Id. at 1254. Bussell is currently on parole in Linn County, Kansas. See Kansas Adult Supervised Population Electronic Repositor, Kansas Criminal Justice Information System, http://165.201.143.205/kasper2/offender.asp?id=31334 (last visited Feb. 20, 2008).

[163] *Bussell*, 963 P.2d at 1254.

III. INTRODUCING A REASONABLENESS STANDARD FOR THE DUTY TO WARN: CONSIDERING CONSEQUENCES FROM THE DEFENDANT'S PERSPECTIVE

A. Proposal: Rule of Reasonableness for Warnings

This section proposes a reasonableness standard in determining whether there should be a duty to warn a defendant about a particular consequence prior to a guilty plea. Under this standard, warnings must be given whenever a reasonable person in the defendant's situation would deem knowledge of the consequence a significant factor in deciding whether or not to plead guilty.

To gauge the "significance" of a particular consequence to the plea decision-making process, courts should consider two main factors: 1) the consequence's severity and 2) the likelihood that the consequence will apply. Any consequence that ranks highly on either spectrum would qualify for a warning. If a consequence is severe, then it is something that any reasonable defendant would use as a significant factor in deciding whether or not to plead guilty even if it is not certain that it will apply. If a consequence is highly likely to apply, it too should merit a warning. This would result in warnings about even some collateral consequences that are not highly severe. However, it is not onerous to warn about these since they will be limited in number and should, due to their automatic nature, be quite familiar to defense counsel and the court.

1. Severity of Consequence

Consequences on the high end of the severity spectrum would be those that infringe upon the defendant's life, liberty or such fundamental rights as parenting or the ability to travel.[164] Taking severity into account is critical, as any person facing a guilty plea decision would treat as a significant factor any consequence that might lead, for example, to potential lifelong civil commitment or deportation to a country where he faced likely incarceration or even execution.

The New Jersey Supreme Court recognized that there is a duty to warn about the state's SVPA because it is so severe. In *State v. Bellamy*, the Court stated that commitment "is theoretically without end. In that sense, it constitutes a greater liberty deprivation than that imposed upon a criminal defendant who, in all but a handful of cases, is given a maximum release date. A more onerous impairment of a person's liberty interest is difficult to imagine."[165]

The Court noted that it "continue[d] to stress the necessity of determining whether a consequence is direct or penal when analyzing whether a defendant must be informed of a particular consequence."[166] However, it then made a significant departure and found that "when the consequence of a plea may be so severe that a defendant may be confined

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[164] *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) (recognizing "fundamental right of parents to make decisions concerning the care, custody, and control of their children"); Saenz v. Roe, 526 U.S. 489, 502 n.14 (1999) (recognizing fundamental right of citizens to travel within the United States).

[165] State v. Bellamy, 835 A.2d 1231, 1238 (N.J. 2003) (internal quotations omitted) (noting that, while direct-penal distinction remains relevant, severity of consequence is central to inquiry into whether fundamental fairness requires that trial court inform defendant of a particular consequence).

[166] *Id.* at 1238.

for the remainder of his or her life, fundamental fairness demands that the trial court inform defendant of that possible consequence."[167]

Deportation is another severe consequence, particularly when it happens to a non-citizen who has lived legally in the United States for many years and has family and other connections here. Ivania Maria Couto entered the United States on a tourist visa from Brazil in 1991.[168] She married an American citizen, who died, and later married another citizen. Couto's son was born in the United States. She applied for legal permanent resident status around 1994. Five years later, a man claiming to be an attorney offered to help Couto with the pending application. She eventually traveled with him and a group of others seeking immigration assistance to Albany, New York, where they met with a man claiming to be an immigration official. This man, and the others on the trip, all spoke Spanish. Couto spoke Portuguese and had the ability to communicate, with difficulty, in Spanish or English. The purported immigration official stamped Couto's passport and she returned home. The man, however, was actually an undercover immigration agent posing as a corrupt immigration official and Couto was later arrested.[169]

Couto eventually pled guilty to bribery of a public official.[170] Although the court that ultimately allowed Couto to withdraw her guilty plea did so on the grounds that her defense lawyer misled her into believing she could avoid deportation, the decision shows concern with the severe nature of the consequence with respect to Couto's situation. The court noted how "the whole scenario – a single mother of a citizen child, who had lived for almost a decade in this county, hiring a person that she believed to be an attorney to help normalize her immigration status – suggests that avoiding deportation was Couto's central goal."[171]

Despite the *Bellamy* Court's protestations to the contrary, its approach evidenced a critical move away from the formalistic distinction between "collateral" and "direct" consequences. Most courts continue to follow the bright line, even in the context of warning about an SVPA. The *Bellamy* decision is significant in its recognition that severity of the consequence is central to any credible rationale for a knowing and voluntary guilty plea.

2. Likelihood That a Consequence Will Apply

This factor should be judged along the spectrum of the chance there is that the particular consequence would apply to the defendant should he be convicted. It considers the process by which the consequence would apply. Likelihood is high when the fact of conviction serves as the sole and non-discretionary predicate for imposition of the consequence. In such cases, there is no way for the defendant to rebut the conviction; it is there and the collateral consequence flows automatically from the fact of the conviction. Other consequences are less likely to apply, often because they are discretionary or require a procedure separate and apart from the criminal proceeding.

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[167] *Id.*
[168] *See* United States. v. Couto, 311 F.3d 179, 182 (2d Cir. 2002).
[169] *Id.* at 182.
[170] *Id.* at 184.
[171] *Id.* at 188.

Part I of this Article critiqued the most-commonly used definition of direct consequence, namely the Fourth Circuit's "definite, immediate and largely automatic" test.[172] The "likelihood" factor of the reasonableness proposal has some similarities, at least semantically, to that test. However, the key concern of the Fourth Circuit's approach was action, or lack thereof, by the sentencing judge. The test reflects the desire to safeguard the values of efficiency and finality in the plea bargaining process. The key to the likelihood of application factor, by contrast, is how the defendant experiences the consequence, regardless of which body imposes the consequence. In addition, the Fourth Circuit test failed to consider severity at all.

Sex offender registration acts (SORAs) illustrate a consequence that is high on the likelihood spectrum. Under most SORAs, individuals convicted of certain sexual offenses *must* register with local authorities. For example, a person convicted of misdemeanor sexual misconduct under New York's penal law is subject to the state's Sexual Offender Registration Act (SORA).[173] Neither the judge nor the Board of Examiners of Sex Offenders may waive this requirement; the duty to register flows automatically from the fact of conviction. As Texas' highest court for criminal cases noted with respect to its registration act: "the consequence, registration as a sex offender, is definite. It is also completely automatic; if a defendant pleads to an enumerated offense, he must register; there are no exceptions, no wiggle room, no conditions which relieve him of that obligation."[174] The penal sanction for the misdemeanor conviction, which may be as minimal as the night already served in jail, is completely overshadowed by the prospect of automatic SORA registration.

On the other end of this factor's spectrum would be the difficulty of finding work, at least for those jobs that do not deny a professional license or clearance based on criminal convictions. For example, a person convicted of a drug felony might seek employment in a non-regulated area such as general business office work or construction. Although there is no law or regulation barring people convicted of drug felonies from working in such jobs, the employer might ask applicants to submit to a criminal background

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[172] *See supra* Part ___, discussing *Cuthrell* test.

[173] N.Y. CORRECT. LAW §168-a(2)(a)(i) (McKinney 2007). Another example would be deportation for a person convicted of forcible rape, which qualifies as an "aggravated felony" under federal immigration law. An aggravated felony conviction leads to automatic deportation; neither an immigration court nor even the Attorney General has the discretion to waive this consequence. *See* 8 U.S.C.A. § 1182(h) (2006); *see also* Marley, *supra* note ___ at 874 (noting how, under current immigration law, "a lawful permanent resident who falls within the 1996 definition of aggravated felon . . . regardless of the pettiness of his crime, regardless of how unfair it may be to exile him from his adopted country and his family, and regardless of the punishment, including death, he may receive at his country of origin, . . . is no longer eligible for discretionary relief"). Although immigration officials do not find and deport every person convicted of an "aggravated felony," this factor does not ask whether the consequence will actually be executed, but rather whether it applies. The fact that someone may, by chance, escape deportation does not make this consequence any less "likely."

[174] Mitschke v. State, 129 S.W.3d 130, 135 (Tx. Crim. App. 2004). The *Mitschke* court's determination that the registration act was "direct" did not, however, lead to the constitutional right to know about it prior to pleading guilty. The court took the unusual approach of finding that while the direct-collateral divide may be instructive, not all direct consequences merited warnings prior to a guilty plea as a matter of constitutional due process. It held that "although the sex- offender registration requirement is a direct consequence of appellant's plea, it is a non-punitive measure, and failure to admonish does not necessarily render a plea involuntary." *Id.* at 136; *see also supra* Part ____, discussing *Mitschke* court's approach.

check.[175] The best practice, particularly given the fact that such background requests are increasingly common in both employment and housing, is to warn the defendant. However, warnings would be not constitutionally mandated under the likelihood of application factor.

B. Rule of Reasonableness Applied to SVPAs

Any reasonable defendant would place significant weight on the possibility of lifelong civil commitment as a sexual violent predator in the decision-making process leading up to any guilty plea. Not every defendant will ultimately decide, due to the potential for commitment, to reject all plea offers. However, this is information that reasonable defendants will rely upon in making knowledgeable, voluntary decisions about whether or not to plead guilty to a qualifying offense in the nineteen states with SVPAs.[176] Involuntary commitment is thus a clear-cut case, where due process should require a pre-plea warning under this Article's proposed reasonableness test.

Under the Kansas SVPA that is the model for most states' legislation, the state may begin the procedure that will determine whether or not that person should be involuntarily confined when a person meets the definition of a "sexually violent predator."[177] The Act sets forth the procedures that the state must follow in seeking commitment. These include: an initial probable cause determination, followed by confinement if cause exists;[178] a trial at which the state must prove beyond a reasonable doubt that the person is a "sexually violent predator" and at which there is a right to counsel, to a mental health examination, to present and cross examine witnesses, to some discovery and (if either the individual, the prosecutor or the judge demands it) a jury trial;[179] and yearly reviews of the individual's mental condition to determine if continued confinement is justified or if the individual is ready to move to the next level of treatment.[180]

This process, which is completely separate from the criminal proceeding which sets the SVPA's wheels in motion, [181] is the reason that civil commitment ranks relatively

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[175] *See generally* Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES, Oct. 16, 2006 (discussing increased use of background checks among employers and the inaccuracy of criminal records provided to them by for-profit database companies).

[176] The same would hold true in states with pending civil commitment legislation. This situation, which further complicates the constitutional equation, is beyond the scope of this Article. Suffice it to say that at the very least, a defendant might have a colorable claim for ineffective assistance of counsel if his lawyer failed to inform him that he was pleading guilty to a qualifying offense in a state with an SVPA under consideration.

[177] KAN. STAT. ANN. § 59-29a04(a).

[178] KAN. STAT. ANN. § 59-29a05.

[179] KAN. STAT. ANN. § 59-29a06.

[180] KAN. STAT. ANN. § 59-29a08.

[181] Although a criminal conviction is certainly an integral part of most commitment proceedings, some SVPAs do not require an actual conviction as a predicate for commitment. Instead, they might also define "sexually violent predator" to include individuals who were merely *charged* with a qualifying crime. *See, e.g.*, KAN. STAT. ANN. § 59-29a02(a) (1994). The intent here appears to be inclusion of individuals who were charged yet found not guilty by reason of insanity, who were acquitted because the defendant "offered substantial evidence of a mental disease or defect excluding the mental state required as an element of the offense charged," or who were found incompetent to stand trial. *Id.* at § 59-29a03. However, anecdotal

low on the likelihood of application spectrum. Indeed, courts have focused on the SVPA process to justify the labeling of it as collateral.[182] Certainly, the fact that there is a separate process is relevant to a defendant, and it may mean that he will decide to plead guilty and then take advantage of that process, if need be, to argue that commitment is not appropriate.

Yet relying solely on this process ignores severity. Due to the extremely harsh nature of civil commitment, any reasonable defendant would take it into account despite the fact that it will not automatically come to pass after conviction and despite the fact that the state may never meet its procedural burden to secure commitment.

Three situations specific to civil commitment demonstrate why lack of knowledge about an SVPA can lead to pleas that are not knowing and voluntary, and why it is so critical to take the defendant's perspective into account in determining requisite knowledge. Two involve types of pleas, namely "no contest" and *Alford* pleas, which result in convictions without any admission of guilt or with a protestation of innocence, respectively. The third situation is the fact that under some SVPAs even non-sexual offenses can be qualifying convictions for the purpose of involuntary commitment. All three, because they can lead a reasonable person to assume that the SVPA would *not* apply to them, emphasize need for transparency in the plea bargain process.

1. "No Contest" and *Alford* Pleas

A plea of *nolo contendere* or "no contest" is "a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty."[183] *Nolo contendere* means "I do not wish to contend,"[184] and during such pleas a defendant is agreeing to refrain from contesting, rather than affirmatively voicing his guilt to, the charge or charges.

A defendant enters an *Alford* plea when he pleads guilty despite asserting his innocence. In *North Carolina v. Alford*, the trial court had heard evidence from various prosecution witnesses before accepting Alford's plea.[185] Alford then stated:

> I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other

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review of the cases and news articles reveals SVPA commitments only of individuals *convicted* of sex offenses, and often convicted of multiple sex offenses on different occasions. *See, e.g.*, Davey & Goodnough, *Doubts Rise*, *supra* note ___ at A1 (describing various committed offenders); Davey & Goodnough, *Record of Failure*, *supra* note ___ at A1 (same); Monica Davey & Abby Goodnough, *For Sex Offenders, A Dispute Over Therapy's Benefits*, N.Y. TIMES, Mar. 6, 2007, at A1 (same); Kansas v. Hendricks, 521 U.S. 346, 350 (1997) (describing Hendricks as "an inmate who had a long history of sexually molesting children"); Kansas v. Crane, 534 U.S. 407, 410 (2002) (describing Crane as "a previously convicted sexual offender"). Although this research was limited to reported decisions and cases described in the press, it seems fair to say that conviction has been a central element of most if not all commitments under SVPAs.

[182] *See supra* Part ___ , discussing how most courts find no duty to warn about an SVPA.

[183] North Carolina v. Alford, 400 U.S. 25, 35 (1970).

[184] BLACK'S LAW DICTIONARY 1074 (8th ed. 2004).

[185] *Alford*, 400 U.S. at 28.

> man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all.[186]

The Supreme Court found such pleas to be constitutionally permissible, so long as the trial court determined a strong factual basis for the underlying offense.[187]

The basic premise behind both "no contest" and *Alford* pleas is that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."[188] Such pleas have the same force and effect as a guilty plea for the purpose of giving the defendant a conviction and allowing a judge to impose a sentence. Most state criminal procedure codes allow *Alford* pleas,[189] and "no contest" pleas are permitted with the court's (and sometimes also the prosecution's) consent.[190]

These pleas can lead to any number of collateral consequences, including involuntary commitment under an SVPA. For example, Florida's SVPA specifically includes *nolo contendere* pleas in its definition of "convicted of a sexually violent offense."[191] In other states, the SVPA might only refer to a "conviction" for a qualifying offense more generally, which would include conviction following a "no contest" or *Alford* plea.

Yet the problems resulting from the current lack of a duty to warn defendants about collateral consequences, most prominently the failure to account for the defendant's perspective in the guilty plea process, are exacerbated in the context of "no contest" and *Alford* pleas. For example, Jimmie Dale Otto pled no contest to felony child molestation.[192] The trial court found a factual basis for his plea in the police report detailing the incidents, and sentenced Otto to twelve years in prison. Prior to his release on parole, the state sought to commit Otto under California's SVPA. Because Otto pleaded no contest, he did not make detailed admissions to the charged conduct during his guilty plea. Despite this, the state was able to meet its burden of proving that Otto was a sexually violent predator as defined in the act, relying in part on the victims' statements.[193] The California Supreme Court rejected Otto's argument "that because he pled no contest in 1991, he had little motivation to challenge the accuracy of the victims' statements at the time of sentencing for the underlying crimes."[194]

In *George v. Black*, the defendant challenged the voluntariness of his guilty plea on the grounds that the trial judge failed to inform him that he could be civilly committed based on his sex offense conviction.[195] Joseph George originally pled not guilty and

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[186] *Id.* at 29.
[187] *Id.* at 37.
[188] *Id.*
[189] *See* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 1049 (2d ed. 2003) (noting how a "substantial majority of states follow the lead of the U.S. Supreme Court [in *North Carolina v. Alford*] and allow a defendant to plead guilty, despite claims of innocence, so long as the prosecution establishes a strong factual basis to support the conviction. Fewer than a half dozen states prevent trial judges from accepting *Alford* pleas.").
[190] LAFAVE, *supra* note ___ at § 21.4(a).
[191] *See* FLA. STAT. § 394.912(2).
[192] People v. Otto, 26 P.3d 1061, 1063 (Cal. 2001).
[193] *Id.* at 1063.
[194] *Id.* at 1069.
[195] 732 F.2d 108, 110 (8th Cir. 1984).

went to trial on sexual assault charges. Only after an appellate court reversed his conviction did he plead *nolo contendere* to lower charges.[196] Despite these facts, the Eight Circuit found that commitment was collateral and thus no warnings were required.[197]

Both of these cases highlight the reasonable expectations of a person pleading no contest. No contest or *Alford* pleas presumably arise in cases where the prosecution or court has tried, and has been unsuccessful, at securing a guilty plea with an admission. The result is a compromise, one that allows a defendant to avoid a detailed admission of guilt to the underlying facts of the crime charged. When a defendant enters such a plea, he is likely to assume that collateral consequences would not flow from the conviction, since the court (and perhaps also the prosecution) have agreed that he does not have to *say* that he committed the crime but instead only state that he is pleading guilty. This same analysis holds true – and is perhaps even more apt – when a defendant enters an *Alford* plea.

In these cases, knowledge of a certain or severe collateral consequence may well have caused the scale to tip away from a defendant's willingness or desire to accept a conviction. In other words, a reasonable defendant in such a situation is even more likely than a reasonable defendant entering a standard guilty plea to make the collateral consequence a significant factor in the plea decision-making process. The result is that no contest and *Alford* pleas are even less likely to be knowing, voluntary and intelligent waivers of the relevant constitutional rights. These examples underscore the need to impose a duty to inform a defendant if an applicable consequence is severe, or is highly likely to apply.

2. Non-Sexual Offenses

Six of the nineteen SVPA states either include non-sexual offenses in their list of qualifying convictions or have definitions of "sexually violent predator" broad enough to include non-sexual offenses.[198] For example, under the Kansas SVPA the prosecutor is required to file a "special allegation of sexual motivation" in "every criminal case other than sexual offenses" where there is evidence to justify a finding of sexual motivation. The court with jurisdiction over the criminal case must then make a finding of whether or not sexual motivation was present or, if there is a jury trial, the jury must make that determination through a special verdict on the issue.[199] Such provisions cast a very broad net, and could include such situations as a person pleading guilty to burglarizing an ex-girlfriend's apartment.

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[196] *Id.* at 109.

[197] *Id.* at 111. A number of courts have held that an *Alford* plea is valid despite failure to warn about an SVPA. *See, e.g.*, In the Matter of the Care and Treatment of Ronald Gibson, 168 S.W.3d 72, 73-75 (Mo. Ct. App. 2004) (holding that sexually violent predator proceedings following defendant's *Alford* plea did not violate agreement which allowed plea yet did not mention predator proceedings); Ames v. Johnson, No. CL04-413, 2005 WL 820305 (Va. Cir. Ct. Mar. 28, 2005) (rejecting Ames's attempt to withdraw his plea of *nolo contendere* on the grounds that his lawyer was ineffective for failing to warn him about Virginia's SVPA).

[198] *See* KAN. STAT. ANN. § 59-29a14(a); N.J. STAT. ANN. § 30:4-27.26; IOWA CODE ANN. § 229A.2(10)(g); FL. STAT. ANN. § 394.912 (h); MINN. STAT. ANN. § 253B.02.7a(b); S.C. CODE ANN. § 44-48-30(2)(o).

[199] KAN. STAT. ANN. § 59-29a14(a).

To any reasonable defendant considering a guilty plea to a non-sexual offense, potential lifelong involuntary commitment *as a sexual predator* would be a significant factor in deciding whether to proceed with the plea. In this respect, the duty to warn becomes critical to protecting the central norms of due process in the guilty plea context.

In addition, due to "special allegation"-type requirements during the criminal case, the trial judge, prosecutor and defense counsel are integral to the SVPA process for non-sexual offenses. Because of their roles and consequent full awareness of the possibility that the consequence may apply, it is difficult to excuse a duty to warn on the grounds that it would slow down the process or somehow overwhelm overburdened actors in the criminal justice system.

C. Collateral Consequences Rule Emphasizes Institutional Values Over Individual Defendant's Right to Information

The collateral consequences rule, which allows and sanctions defendant ignorance, is singularly concerned with the effect of a right to knowledge of collateral consequences on the system, and not concerned with its effect on the defendant. It is protective only of such systemic values as finality and efficiency in the administration of criminal justice. This ignores the constitutional protections surrounding guilty pleas, with their underlying purpose of ensuring that defendants know what they are getting themselves into when they plead guilty. A reasonableness standard reflects those purposes.

1. Overemphasis on Institutional Values of Finality and Efficiency

The collateral consequences rule focuses only on the trial court's role in accepting guilty pleas, and more broadly on what the Supreme Court has described as "the fundamental interest in the finality of guilty pleas."[200] The rule strictly limits the quantum of information that must flow to a defendant prior to any guilty plea in order to avoid what courts perceive as a strong, multi-faceted threat to the criminal justice system:

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas.[201]

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[200] Hill v. Lockhart, 474 U.S. 52, 58 (1985); *see also* United States v. Hyde, 520 U.S. 670, 670 (1997) (noting how a permissive plea withdrawal interpretation would "debase the judicial proceeding at which a defendant pleads and the court accepts his plea by allowing him to withdraw his plea simply on a lark").

[201] United States v. Timmreck, 441 U.S. 780, 784 (1979) (quoting United States v. Smith, 440 F.2d 521, 528-29 (Stevens, J., dissenting) (7th Cir. 1971)); *see also* Michel v. United States, 507 F.2d 461, 466 (2d Cir.1974) (stating that judges cannot be expected to "anticipate the multifarious peripheral contingencies which may affect the defendant's civil liabilities").

Finality may be a legitimate policy concern, but it is not as fragile a concept as is so often put forth. As Professor Gabriel Chin and Richard Holmes noted, in arguing that requiring lawyers to warn clients about certain collateral consequences would not open the floodgates to post-conviction challenges, it would be "an unusual case that would satisfy the[] stringent requirements" for proving ineffective assistance. [202] This is because a defendant would have to show that a consequence is well-established, so that the failure to warn would be incompetent lawyering. In addition, in order to establish prejudice, a defendant would have to show that the collateral consequence was serious as compared to the direct consequence, so that "knowledge of the collateral consequences might have made a difference.[203]

This observation applies equally in the due process context. In the first instance, a more rigorous rule of reasonableness would hopefully ensure front-end warnings, leading to knowing pleas and thus avoiding post-conviction attacks on those pleas. Even if a court permitted withdrawal of a guilty plea, that would not mean the case was dismissed, but instead would result in reinstatement of the original charges. Because of this, defendants who pleaded guilty based on a determination that the plea was the preferable option would only seek to withdraw the plea if the fact of the collateral consequence tipped the scale away from that earlier decision. The scale would tip only if the collateral consequence really mattered, which is exactly the type of consequence that a defendant should know about *before* pleading guilty.

In short, the practical effect of a rule requiring reasonable warnings would hardly cause the entire plea bargaining system to crumble under post-conviction attacks on the underlying validity of pleas taken in absence of required warnings. Rather, it would be the relatively rare case where a defendant seeks, after the fact, to undo the plea bargain he accepted – with its penal benefits – based on lack of knowledge about a collateral consequence.

2. Under Emphasis of a Defendant's Right to Information

The Due Process Clause and the right to effective assistance of counsel are intended to protect individual defendants, not the smooth operation of the system that accepts so many guilty pleas. Even if finality and efficiency are legitimate concerns in the criminal justice system, they are not of constitutional dimension. These values cannot trump the protections for guilty pleas, which speak to individual rights.

As one commentator noted, the guilty plea process is "inequitable but efficient."[204] A reasonableness standard is a more principled approach to the duty to warn about collateral consequences. It takes the defendant's perspective into account by looking at the facts and circumstances of the particular case, meaning both the underlying criminal charges and the potential collateral consequences.

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[202] Chin & Holmes, *supra* note __ at 739.
[203] *Id.* at 739-40.
[204] Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863, 868 (2004).

In numerous areas of constitutional criminal procedure, courts analyze issues from the perspective of the defendant.[205] Often, this manifests itself as a "totality of the circumstances" test that views matters as a reasonable defendant (or even as the particular defendant) would view them. For example, an analysis of the voluntariness of a defendant's confession considers the surrounding facts and circumstances, including the length and location of the interrogation and the defendant's access to friends and family.[206] The particular defendant's situation is also relevant, and courts have factored things such as physical injury and mental illness into the voluntariness calculus.[207] Both confessions and guilty pleas involve the waiver of the right against self-incrimination, and both should be analyzed similarly, on the basis of surrounding circumstances.

Other areas also look at the facts and circumstances rather than adhering to a bright-line rule. In 2007, the Supreme Court announced a "reasonable passenger" standard in holding that someone in a car that the police have stopped is "seized" for Fourth Amendment purposes and thus entitled to challenge the constitutionality of the car stop.[208] In *Brendlin v. California* the Court "ask[ed] whether a reasonable person in [the defendant's] position when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself."[209] While this is an objective test in that it considers the beliefs of a *reasonable* defendant rather than the *particular* defendant, it takes the objective facts and circumstances of the particular defendant's situation into account.[210] This avoids the difficulties of administering a subjective standard yet retains a fact-sensitive (rather than a bright-line) inquiry. Indeed, in rejecting the state's argument that the police officers did not intend to seize the passenger, the *Brendlin* Court noted that "[t]he intent that counts under the Fourth Amendment is the intent that has been conveyed to the person confronted, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized."[211]

Even *Miranda*, with its bright-line, prophylactic rule requiring a specific set of warnings prior to any custodial interrogation, uses a fact-specific inquiry.[212] And it does so, at least for part of the test, from a defendant's perspective. Thus, the custody

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[205] Professor Kit Kinports, examining search and seizures as well as confession cases, notes how the Court's "criminal procedure jurisprudence . . . tends to shift opportunistically from case to case between subjective and objective standards, and between whose point of view – the police officer's or the defendant's – it considers controlling." Kit Kinports, *Criminal Procedure in Perspective*, J. OF CRIM. L. & CRIMINOLOGY (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010441 at 3.

[206] *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Dickerson v. United States, 530 U.S. 428 (2000).

[207] LAFAVE, *supra* note ___, at 321. *But see* Colorado v. Connelly, 479 U.S. 157, 165 (1986) (stating that, "while mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry").

[208] Brendlin v. California, 127 S. Ct. 2400, 2402 (2007).

[209] *Id.* at 2406 (quoting Florida v. Bostick, 501 U.S. 429, 436 (1991)).

[210] *Id.* at 2407 n.4 (stating that "the test is not what Brendlin felt but what a reasonable passenger would have understood"); *see also id.* at 2408 (critiquing the California Supreme Court's "view of the facts [as] ignor[ing] the objective *Mendenhall* test of what a reasonable passenger would understand"). However, it is difficult to apply a purely objective standard, as subjective elements often creep into this analysis. *See generally* Kinports, *supra* note ___ (offering various instances where the Supreme Court used "subjective" elements in purportedly "objective" analysis).

[211] Brendlin, 127 S. Ct. at 2409 (internal quotations omitted).

[212] Miranda v. Arizona, 384 U.S. 436, 478-79 (1996).

prerequisite to *Miranda* warnings is satisfied if a reasonable person in the defendant's position would not feel free to leave.[213] While not subjective, the inquiry considers the particular (external) facts and circumstances of the defendant's situation, including the place and length of detention, any physical restraints on the defendant's person, and the number of police officers present.[214] In theory, these warnings are designed so that a person in custody knows that he can refuse to speak with the authorities, or can request a lawyer before doing so. In the same way, an appropriate rule governing warnings about consequences would allow defendants to plead guilty or not, based on full information about the true meaning of the resulting conviction.

The constitutional doctrine surrounding guilty pleas already takes the defendant's perspective, as well as the circumstances surrounding the plea, into account. In *Brady v. United States*, the Supreme Court noted how guilty pleas are a "grave and solemn act to be accepted only with care and discernment."[215] In recognizing the need for special scrutiny of guilty pleas taken when a defendant is unrepresented by counsel, *Brady* recognized that "*an intelligent assessment of the relative advantages of pleading guilty* is frequently impossible without the assistance of an attorney."[216] This acknowledges that a defendant's understanding of the pros and cons of any guilty plea is a value deserving of constitutional protection. The Court later stated that "[t]he voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it."[217] This explicitly relies on a fact-sensitive analysis, and should extend to the duty to warn.

Yet contrary to all of these analogous areas, the constitutional law of warnings about collateral consequences considers only whether a particular consequence flows "directly and automatically" from the conviction, is penal in nature, or is under the "control and responsibility" of the trial court.[218] It is difficult to envision how this advances the value of ensuring that defendants have knowledge of the relative advantages and disadvantages of pleading guilty. Instead, it is a rule separated from its underlying purpose, and works only to place strict limits on the constitutionally-mandated amount of information that must go to a defendant who pleads guilty, in a focused yet misguided attempt to protect the finality and efficiency of guilty pleas.

Professor Kit Kinports, in a thorough exploration of the different perspectives from which the United States Supreme Court views constitutional rules of criminal procedure, argues that "the Court should adopt a principled, consistent approach to the question of perspective, based on the interests a particular constitutional protection is designed to further."[219] If the central purpose of a particular constitutional rule "is to

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[213] *Id.* at 444.

[214] *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492, 495-96 (1977) (finding that burglarly suspect was not "in custody" after considering place and length of detention, as well as fact that police informed suspect that he was not under arrest); Berkermer v. McCarty, 468 U.S. 420, 441-42 (1984) (rejecting categorical rule for car stops in favor of rule considering particular circumstances to determine if person stopped is "in custody").

[215] Brady v. United States, 397 U.S. 742, 748 (1970).

[216] *Id.* (emphasis added).

[217] *Id.* at 749.

[218] *See supra* Part ___, discussing various definitions of "direct" consequence.

[219] Kinports, *supra* note ___ at 5.

preserve a criminal defendant's right to make a free and unconstrained choice, Kinports would apply what she terms a "consent model." Under this model,

> the Court should focus on the defendant's perspective, applying a subjective standard and examining the decision made by the particular defendant to ensure that it was truly voluntary. The Court may prefer an objective 'reasonable defendant' standard in some cases, in the interest of ensuring that the reach of constitutional rights 'does not vary with the state of mind of the particular individual,' but the emphasis should remain on the defendant's point of view.[220]

Following this framework, a consent model would apply to the duty to warn about collateral consequences. A core purpose of the due process clause is to ensure that the defendant *knows* what he is doing when he enters a guilty plea. The core purpose of the right to counsel is to ensure that each person charged with a crime and facing potential jail time has a skilled advocate to guide him through the complex criminal justice system. Looking at these two interrelated purposes from the perspective of the defendant (who is, after all, the intended beneficiary of these two constitutional rights), and in the context of today's harsh world of collateral consequences, it is difficult to justify the collateral consequences rule.

CONCLUSION

The current collateral consequences rule rests on doctrinally-flawed ground, is outdated and is simply bad theory and policy. The fact that a defendant can plead guilty to a sexual (or even, in some states, a non-sexual) offense without knowing that the resulting conviction is a critical step toward involuntary commitment under an SVPA starkly illustrates the problems with the current rule.

In an era where many non-penal consequences are anything but "collateral" to a defendant, and where they may in fact dwarf the criminal sanction, it is time to debunk the myth of the direct-collateral divide and revisit a defendant's right to information in the guilty plea process. A rule of reasonableness for pre-plea warnings offers this, and brings the defendant's missing perspective back into the guilty plea process. While there are a number of issues that such a reasonableness standard raises, this Article does not address all of the details of application of the rule. Instead, it is intended to begin a move towards more transparency and rationality in the guilty plea process.

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[220] *Id.* at 6-7 (quoting Michigan v. Chesternut, 486 U.S. 567, 574 (1988)).