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Article

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INTRODUCTION

Thomas Steele pleaded 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.[5] However, neither the sentencing court nor defense counsel in his criminal case was required

1. *See* Steele v. Murphy, 365 F.3d 14, 15 (1st Cir. 2004).

2. Telephone Interview by Peter Chambers with Willie J. Davis, Appellate Counsel for Thomas Steele, in Boston, Mass. (June 13, 2007).

3. *See* MASS. GEN. LAWS ch. 123A (1986), *amended by* 1999 Mass. Acts 265–66.

4. *Steele*, 365 F.3d at 15.

5. *Id.* at 17.

to tell Steele about the potential lifetime involuntary commitment at the time that he entered his guilty plea.[6]

According to the First Circuit, "the possibility of commitment for life as a sexually dangerous person is a *collateral* consequence of pleading guilty."[7] The court reasoned that, even though the charges of aggravated rape, kidnapping and assault to which Steele pleaded 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.[8] As a result, the court rejected Steele's argument that the failure to inform him prior to his guilty plea about the potential for involuntary commitment violated due process.[9]

Direct consequences include the potential jail or prison term, fines, and any other criminal punishment that a trial judge may impose after conviction. Almost everything else is deemed "collateral."[10] Under the collateral-consequences rule, a defendant has no constitutional right to be made aware of such consequences before he pleads guilty.[11] Consequently, he has no right to withdraw his guilty plea if he was unaware of its collateral consequences.[12]

The *Steele* case neatly illustrates the formalistic distinction the lower courts have drawn between direct and collateral consequences. Courts decide which consequences are collateral based on a bright-line rule that focuses on the role of the institutions that impose the consequence.[13] 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

6. *Id.*

7. *Id.* at 17 (emphasis added).

8. *Id.* at 18.

9. *See id.* at 16–17 (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: . . . of any different or additional punishment based upon . . . sexually dangerous persons provisions of the General Laws, if applicable." MASS. R. CRIM. P. 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 18 n.2.

10. *See infra* Part I.A.

11. *See Steele*, 365 F.3d at 17.

12. *See id.* at 16–17.

13. *See id.* at 17–18.

plea, the simpler and more efficient the plea process and the lesser the chance of a successful postconviction attack upon the guilty plea based on a failure to warn.

This approach, however, completely ignores the defendant's right, and need, to know what he is truly getting himself into by waiving his constitutional rights to trial and to remain silent. As the Supreme Court has noted, "a guilty plea is a grave and solemn act to be accepted only with care and discernment . . . ."[14] When someone pleads guilty, he consents to a judgment of conviction without trial that will in most cases remain with him for the rest of his life.[15] This consent "not only must be voluntary but must be [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences."[16]

Institutional concerns, although pervasive throughout the plea bargain jurisprudence and literature, are in tension with these critical constitutional values, which protect an individual's right to know what he is agreeing to when he pleads guilty and his 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.[17] The collateral-consequences rule, however, lags far behind those evolving norms.

The unprincipled, outdated collateral-consequences rule has a far greater negative effect on defendants than it did at its inception and throughout its 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.[18] Many of these consequences

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

15. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969) ("[A] plea of guilty is more than an admission of conduct; it is a conviction.").

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

17. *See* INS v. St. Cyr, 533 U.S. 289, 322 n.48 (2001) (listing nineteen state statutes and noting that "[m]any States . . . require that trial judges advise defendants that immigration consequences may result from accepting a plea agreement").

18. *See infra* notes 155–156 and accompanying text; *see also* 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 11, 14–15 (1996) ("[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. . . . [T]here was an increase in the number of states restricting six rights; voting, holding office, parenting, divorce, firearm ownership, and criminal reg-

now apply to relatively minor criminal convictions, and even to certain noncriminal convictions. For example, two low-level state marijuana possession convictions, even if they are noncriminal "offenses" under that state's penal law, can lead to mandatory deportation.[19] Perversely, because of the explosion of arrests and prosecutions for minor offenses over the last two decades, collateral consequences often far outweigh the direct penal sanction of a conviction.[20] Since the vast majority of criminal defendants plead guilty to resolve the criminal charges against them,[21] and since there are collateral consequences for so many of those convictions, the right to information in the plea process has a broad impact.[22]

It is time to revisit the rule. This Article proposes a reasonableness standard in determining the duty to inform about consequences. Under this standard, courts must require warnings whenever a reasonable person in the defendant's situation would deem knowledge of the consequence, penal or otherwise, to be a significant factor in deciding whether to plead guilty. Whether a consequence is significant depends primarily on the severity of the consequence. If reasonable people would treat as significant a severe consequence when making a decision as serious as a guilty plea, courts should require preplea warnings before concluding that the plea is "knowing." A secondary factor in the "significance" inquiry would be the likelihood that the particular consequence would apply. Even if a consequence is not at the highest end of the severity scale, warnings would still be mandatory when the mere fact of the criminal conviction makes it certain that the consequence would apply. It is

istration increased.").

19. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2000); N.Y. PENAL LAW § 221.05 (McKinney 2000) (making unlawful possession of marijuana a violation, which is a noncriminal offense).

20. *See infra* Part I.C.

21. *See infra* note 59 (discussing guilty plea statistics).

22. *Cf.* 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, 633 (2006) (noting how "[c]ommunities . . . are broadly affected by the influx of returning individuals weighed down by the obstacles imposed by their criminal convictions long after their formal sentences have lapsed" and calling for "a unified voice that consistently articulates collateral consequences and reentry as interwoven and integrated components along the criminal justice continuum"). Although advisement at the guilty plea stage is only one piece of this important effort towards integration, it is a critical beginning to a long, difficult process.

reasonable to require warnings about the limited number of such automatically applicable consequences.

This Article uses the lens of involuntary commitment of "sexually violent predators" to illustrate the flaws with the current collateral-consequences rule and the virtues of applying a reasonableness standard. Laws allowing for involuntary commitment of sex offenders are rapidly proliferating. Since 1990, at least twenty 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.[23] Additionally, 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 involuntary commitment programs for sexually dangerous persons.[24] While the number of individuals confined under an SVPA remains relatively small, the potential reach of such laws is broad.[25] The Federal Bureau of Prisons, for example, is currently conducting a review of all inmates to determine if they merit further consideration for involuntary confinement under the federal SVPA.[26] As one scholar noted, "[c]learly, SVPs are a growth industry."[27]

Involuntary commitment is perhaps the harshest collateral consequence.[28] Nevertheless, the literature addressing the role

23. Adam Deming, *Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics*, 36 J. PSYCHIATRY & L. (forthcoming Winter 2008) (manuscript at 4–5, on file with author). Texas is the only state with an SVPA that is entirely outpatient. *See* TEX. HEALTH & SAFETY CODE ANN. § 841.081 (Vernon 2003).

24. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 301, 120 Stat. 587, 618–19 (to be codified in scattered sections of 18 and 42 U.S.C.).

25. *See infra* Part II.A.

26. *See* Memorandum from Amy Baron-Evans & Sara Noonan to Defenders, CJA Counsel 4 (Sept. 10, 2007, as revised Sept. 25, 2007), *available at* http://www.fd.org/pdf_lib/Adam.Walsh.III.REV.9.24.07.FINAL.pdf.

27. JOHN Q. LA FOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 145 (2005).

28. Despite the severe nature of involuntary commitment, the vast majority of the significant and growing body of literature on collateral consequences examines the particular consequence of immigration, on the theory that "exile" is the harshest consequence. *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) ("[D]eportation is unlike other collateral consequence in its severity and certainty. . . . [Courts] should recognize it as a unique type of consequence."); Bruce Robert Marley, *Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent*

of defense counsel, prosecutors, and the courts involved in the criminal convictions that can lead to collateral consequences largely fails to discuss it.[29] Involuntary commitment is also overlooked in the various court, professional, and ethical rules that govern the guilty plea process.[30]

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 SVPA states are found to have no constitutional right to be told about potential commitment under the SVPA prior to entering a guilty plea.[31] Silence about this significant consequence during the plea bargaining, counseling, and colloquy process is deemed constitutionally permissible.[32]

Residents, 35 SAN DIEGO L. REV. 855, 861–62 (1998). Some commentators have focused on yet other types of consequences. *See, e.g.*, 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, 1755 (2004) (focusing on the consequence of eviction based on a drug conviction).

29. *See, e.g.*, Eric S. Janus, *Closing Pandora's Box: Sexual Predators and the Politics of Sexual Violence*, 34 SETON HALL L. REV. 1233, 1250–51 (2004) (addressing economic and constitutional effects of commitment); Wanda D. Kendall & Monit Cheung, *Sexually Violent Predators and Civil Commitment Laws*, 13 J. CHILD SEXUAL ABUSE 41, 53–55 (2004) (discussing the costs and effectiveness of civil commitment laws); John Q. La Fond, *The Costs of Enacting a Sexual Predator Law*, 4 PSYCHOL. PUB. POL'Y & L. 468, 503 (1998) [hereinafter La Fond, *Costs*] (same); John Q. La Fond, *Outpatient Commitment's Next Frontier*, 9 PSYCHOL. PUB. POL'Y & L. 159, 182 (2003) (arguing for alternatives to SVP commitment); LA FOND, *supra* note 27, at 142–65 (focusing on the costs and constitutionality of commitment). *But see* Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and* Sicherungverwahrung, 30 FORDHAM URB. L.J. 1621, 1623 (2003) (recognizing that commitment "presents the starkest example of a collateral sanction," and urging replacement of the current approach to involuntary commitment in the United States, through SVPAs, with an approach that more closely approximates the German model).

30. *See, e.g.*, FED. R. CRIM. P. 11(b)(1) (requiring no warnings about *any* collateral consequence of pleading guilty); S.D. CODIFIED LAWS § 23A-7-4 (2004) (same); *see also, e.g.*, GA. CODE ANN. § 17-7-93 (2008) (mandating warnings about collateral consequences for immigration, but failing to require warnings about other collateral consequences).

31. *See infra* Part I.B. *But see* State v. Bellamy, 835 A.2d 1231, 1238–39 (N.J. 2003) (finding that warnings were mandated as a matter of fundamental fairness because of the severity of the consequences); *infra* notes 248–259 and accompanying text (discussing *Bellamy*).

32. The constitutional right to advisement must be distinguished from the statutory right to advisement about one or more collateral consequences prior

This approach 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" consequences 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. 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. It is an argument for more complete information and transparency in the plea bargaining process, so that defendants like Thomas Steele can weigh the true 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 examines the two main constitutional rights framing the guilty plea process: due process and effective assistance of counsel. Part I also critiques the doctrinally flawed origins of the collateral-consequences rule. Part II briefly describes the growing trend among states for Sexually Violent Predator Acts and analyzes the collateral-consequences rule in the context of such legislation. Part III introduces the reasonableness standard, and then applies it to the consequence of involuntary commitment of "sexually violent predators." Part III then explains how the reasonableness

to entry of a guilty plea. In a growing number of states, court rules or state criminal procedure requires the court to advise a defendant about the immigration consequences of a criminal conviction, although warnings are almost always limited to that one consequence. *See* INS v. St. Cyr, 533 U.S. 289, 322 n.48 (2001). However, unlike a constitutional violation of an advisement standard, failure to adhere to the statutory norm often offers no remedy for a defendant. *See, e.g.*, N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2007) (Deemed repealed Sept. 1, 2009) (noting how the failure to advise the defendant of the immigration consequences of a felony guilty plea "shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it afford a defendant any rights in a subsequent proceeding relating to such defendant's deportation, exclusion or denial of naturalization"). In addition, most of the SVPA states do not mandate warnings about involuntary commitment. *See, e.g.*, MINN. R. CRIM. P. 15.01. *But see* FL. R. CRIM. P. 3.172(c)(9); MASS. R. CRIM. P. 12(c)(3)(B) (requiring the trial judge to inform defendant on the record "of any different or additional punishment based upon . . . sexually dangerous persons provisions of the General Laws").

standard corrects the current rule's overemphasis on the institutional values of finality and efficiency, and underemphasis on the value of an individual's right to information in the plea bargain process.

I. UNDERSTANDING COLLATERAL CONSEQUENCES

A. THE 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.[33] These terms, however, 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."[34] Rather than appearing in the state or federal statute defining permissible sentences for the particular conviction,[35] collateral consequences are scattered throughout a variety of state and federal statutes and regulations, and increasingly in local laws.[36] Though this Article restricts its definition of collateral consequences to those that result from some law or regulation that takes the fact of conviction into account in deciding whether to impose the particular consequence, there are many collateral consequences that are not codified.[37]

33. This Article uses "collateral" as that is the term that most commonly appears in the cases and professional standards. However, some commentators have noted that there are perhaps better—and more transparent—terms. *See, e.g.*, 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, 493 (2005) (stressing the importance of using the term "invisible," because 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).

34. Pinard, *supra* note 22, at 634.

35. *See, e.g.*, N.Y. PENAL LAW § 70 (McKinney 2007 & Supp. 2008) (sentences of imprisonment).

36. *See, e.g.*, 42 U.S.C. § 1437n(f) (2000) (barring individuals convicted of manufacturing methamphetamine from access to federally subsidized housing); N.Y. REAL PROP. ACTS. LAW § 711(5) (McKinney 2007) (allowing for eviction proceedings following any illegal manufacture or business); N.Y. CITY HOUS. AUTH., GUIDE TO SECTION 8 HOUSING ASSISTANCE PROGRAM 2 (May 2008), *available at* http://www.nyc.gov/html/nycha/downloads/pdf/070213N.pdf (listing local regulations denying assistance to persons with certain convictions).

37. *See* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC.

Direct consequences appear limited to the penal sanction that will be imposed as a result of a plea of guilty.[38] 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.[39] The fact that the defendant will thus serve more prison time on the two cases than he expected when he pleaded guilty is deemed "collateral."[40] In other circuits, it is considered "direct."[41] 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.[42] In

937, 960 (2003) (discussing the employment consequences of having a criminal record). Convictions and incarceration result in social effects 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) (compiling a series of articles outlining the social effects of convictions and incarceration).

38. There is little case law 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. It seems clear, however, 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).

39. *See, e.g.*, United States v. Hernandez, 234 F.3d 252, 256 (5th Cir. 2000).

40. *See, e.g.*, *id.* at 254 (finding that a guilty plea was not invalidated by the fact that all parties had agreed that Hernandez would be allowed to serve his federal sentence concurrent to his state sentence and that, in fact, the state plea was postponed precisely to effectuate this aspect of the bargain); Kincade v. United States, 559 F.2d 906, 909 (3d Cir. 1977) ("[C]onsequences . . . which are not related to the length or nature of the federal sentence cannot be considered direct consequences . . . . The statute did operate to increase the length of Kincade's overall incarceration, but not by modifying his federal punishment.").

41. *See, e.g.*, United States v. Myers, 451 F.2d 402, 404 (9th Cir. 1972), *superseded by statute*, Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified in scattered sections of 18 and 28 U.S.C.) (finding that federal law making the district court powerless to impose a concurrent federal sentence when a defendant also faces state charges impacts that defendant's maximum total imprisonment, and thus is a direct consequence that the defendant must be aware of prior to entry of any guilty plea in the federal case). 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, 18 U.S.C. § 3584 (2000), 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.

42. *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

other circuits, the opposite is true.[43] 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 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.[44]

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.[45] 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 person charged in a criminal case 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.[46] 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 Fifth or Fourteenth Amendment due process standards.[47]

All pleas must be voluntary, knowing, and intelligent.[48] The defendant must enter the plea in front of a judge or magi-

a direct consequence of a guilty plea).

43. *See, e.g.*, Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964), *overruled on other grounds by* Heiden v. United States, 353 F.2d 53, 55 (9th Cir. 1965) ("[O]ne 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.").

44. 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 resentenced him to twenty years in prison. *Id.* at 416; *see also infra* Part III.B.1 (discussing nolo contendere pleas).

45. *See, e.g.*, *Duke*, 292 F.3d at 417 ("[T]he 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)).

46. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969).

47. *See* U.S. CONST. amends. V, VI, XIV.

48. *See* Bousley v. United States, 523 U.S. 614, 618 (1998) ("A plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'"); Brady v. United States, 397 U.S. 742, 748 (1970).

strate who guards, through the plea allocution process, against coerced or unknowing pleas.[49] 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.[50] Due process thus applies to all parties involved in the plea process, while the effective assistance of counsel norm regulates only the behavior of defense counsel.

Given these seemingly robust protections,[51] one might imagine that defendants know what they are getting themselves into when they plead guilty. Yet courts continue to advance the fictions that lawyers are "effective" despite failing to warn about any number of consequences, and that judges who allow guilty pleas in the absence of knowledge of such consequences preside over voluntary, knowing, and intelligent pleas.[52]

This fiction cuts across all types of consequences deemed "collateral," so that a defendant may be surprised to learn that his guilty plea meets accepted constitutional standards even if taken in the absence of knowledge of, among many other things, mandatory sex offender registration;[53] mandatory deportation;[54] loss of the right to vote;[55] loss of public housing for

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

50. *See* Iowa v. Tovar, 541 U.S. 77, 81 (2004) ("The 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." (citations omitted)).

51. 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" even though the defendant was seriously mentally ill or under the influence of drugs at the time he took the plea. *See, e.g.*, Patterson v. Hampton, 355 F.2d 470 (10th Cir. 1966) (describing how the court accepted a guilty plea without holding a hearing on the defendant's mental capacity to plead guilty, despite the court's knowledge of two state hospital psychiatric examinations and reports); *cf.* STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 203–07 (2005) (describing how a judge rejected testimony of three experts, including the director of the psychology department for county courts, that the defendant was too mentally retarded to knowingly waive his *Miranda* rights).

52. *See, e.g.*, *Patterson,* 355 F.2d at 472.

53. *See, e.g.*, Doe v. Weld, 954 F. Supp. 425, 438 (D. Mass. 1996) ("[E]ntering 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.").

54. *See* State v. Paredez, 101 P.3d 799, 803 (N.M. 2004) (citing cases from numerous circuit courts finding deportation to be a collateral consequence).

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

family members, even if the defendant does not live in that housing;[56] revocation of a driver's license;[57] and even, in some jurisdictions, the date on which he becomes eligible for parole.[58] 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.

This Article focuses on the consequences of guilty pleas because more than ninety-five percent of criminal convictions result from a plea.[59] In addition, controversies over the right to information generally arise when a defendant enters a guilty plea without knowledge of a 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 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.[60] For example, a defendant charged with sex abuse as well as endangering the welfare of a child might prefer to plead guilty to the endangering count, even if both are the same level

56. *See* Truman, *supra* note 28, at 1769.

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

58. *See* Meyers v. Gillis, 93 F.3d 1147, 1153 (3d Cir. 1996) ("It is well settled that the Constitution does not require that a defendant be provided with information concerning parole eligibility."); Brown v. Perini, 718 F.2d 784, 788 (6th Cir. 1983) ("This Circuit has expressly declined to consider parole eligibility a direct consequence of a guilty plea."). *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) ("Mandatory 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.'" (citation omitted)); People v. Catu, 825 N.E.2d 1081, 1082–83 (N.Y. 2005) (holding that mandatory postrelease supervision is a direct consequence that requires notification to the defendant).

59. Federal criminal cases against 83,391 defendants were terminated during 2004. Ninety percent of these defendants were convicted. Of those, ninety-six percent pleaded guilty or nolo contendere. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, FEDERAL JUSTICE STATISTICS (2007), http://www.ojp.usdoj.gov/bjs/fed.htm. Approximately 57,497 felony cases were filed in state courts of the nation's seventy-five largest counties during May 2004. Ninety-seven percent of convictions occurring within one year of arrest were by guilty plea. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CRIMINAL CASE PROCESSING STATISTICS (2008), http://www.ojp.usdoj.gov/bjs/cases.htm.

60. *See* Smyth, *supra* note 33, at 484.

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 for endangering convictions. In such a case, a defendant could argue that he would have accepted the offered plea bargain had he known that it would have allowed him to avoid a consequence that he now faces based on conviction after trial.[61] For these reasons, the standard proposed in this Article asks whether the consequence would cause a reasonable person to accept or reject any opportunity to plead guilty.

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.[62] 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.[63] 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.[64]

61. *See generally* Boria v. Keane, 83 F.3d 48, 53 (2d Cir. 1996) (finding ineffective assistance of counsel where Boria's lawyer failed to counsel him to accept a plea bargain despite his "professional judgment that it was almost impossible for a 'buy and bust' defendant to obtain an acquittal" in that jurisdiction). Although a search has uncovered no cases where a defendant has sought to reverse a *jury* verdict (as opposed to a guilty plea) on the grounds that he would have accepted a plea offer to avoid a collateral consequence had his attorney made him aware of that consequence, it is certainly a viable claim in the wake of *Boria*.

62. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.7(a), at 78 (3d ed. 2000).

63. *See* Brady v. United States, 397 U.S. 742, 747 n.4 (1970).

64. For constitutional, ethical, and practical reasons, prosecutors should not 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, 686 F.2d 35, 36 (D.C. Cir. 1982) ("[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) ("Calculations of the

The question is: exactly what information must a defendant possess in order to make his plea valid under the Due Process Clause? The general, current 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 Shaky Doctrinal 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.[65] Lower federal and state courts, however, 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.[66]

The rule rests on 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 voluntary guilty pleas are made "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

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.").

65. *Cf.* Bustos v. White, 521 F.3d 321, 325 (4th Cir. 2008) ("[N]o Supreme Court precedent establishes that parole ineligibility constitutes a direct, rather than a collateral, consequence of a guilty plea."). Nevertheless, at least with respect to parole ineligibility, the Supreme Court has strongly indicated that it would not find a due process right to such information. *See* Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("We have never held that the United States Constitution requires the *State* to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the federal courts." (emphasis added)).

66. Many decisions considering claims of a due process violation based on preplea lack of information about a collateral consequence relate to deportation. As one 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.

State v. Paredez, 101 P.3d 799, 803 (N.M. 2004).

counsel."[67] These brief words in *Brady* did not result from careful reasoning about exactly what type and quantum of information a defendant must have in order to meet the "knowledge" requirement for guilty pleas. Indeed, because 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." 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.[68] 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 pleaded not guilty, but later changed that plea and the judge sentenced him to fifty years in prison.[69] Some years later, Brady filed a petition for habeas corpus.[70] 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."[71] He did not claim that lack of knowledge invalidated his plea.[72]

67. *Brady*, 397 U.S. at 755 (emphasis added) (internal citations and quotation omitted).

68. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 726 (2002) ("The 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.").

69. *Brady*, 397 U.S. at 743–44 (noting that a fifty-year sentence was later reduced to a thirty-year sentence).

70. *Id.* at 744.

71. *Id.*

72. *See* Brief for the Petitioner at 18, Brady v. United States, 397 U.S. 742 (1970) (No. 270), 1969 WL 119963 ("[T]he 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 invo-

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."[73] The bulk of the Court's analysis examined Brady's claim that his guilty plea was coerced, and thus focused on 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)."[74]

In this quotation 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."[75] Neither *Shelton* nor *Brady*, however, examined a defendant's claim of lack of knowledge of either direct or collateral consequences of a guilty plea. J. Paul Shelton claimed that promised leniencies, about such things as dismissal of other criminal charges and a specific sentence of imprisonment,

luntary and in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States.").

73. *Brady*, 397 U.S. at 748. Nevertheless, 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.

74. *Id.* at 755 (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd*, 356 U.S. 26 (1958)). The en banc Fifth Circuit decision, in turn, quotes from the dissenting judge from the original Fifth Circuit panel in the case. *Shelton*, 246 F.2d at 572 n.2 (quoting Shelton v. United States, 242 F.2d 101, 115 (5th Cir. 1957) (Tuttle, J., dissenting), *rev'd en banc*, *Shelton*, 246 F.2d 571).

75. Chin & Holmes, *supra* note 68, 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 *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"). *See also* Virsnieks v. Smith, 521 F.3d 707, 714 (7th Cir. 2008) (quoting *Brady*'s "direct consequences" language, along with several other factors, to determine if a guilty plea was voluntary and intelligent).

led to his involuntary guilty plea.[76] 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.[77]

The Fifth Circuit test stated that a plea taken with awareness of direct consequences must stand *unless* induced by threats, misrepresentations, or improper promises. The original Fifth Circuit dissent, from which the en banc court (and *Brady*) 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 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.[78]

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 all are 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 multifactor voluntariness test. But it could also be characterized as dicta, an undefined precondition to the true voluntariness definition

76. *Shelton*, 242 F.2d at 102.

77. 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, 254 n.3 (5th Cir. 2000) ("The 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, 91–92 n.16 (1977) ("It 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." (quotation marks omitted)).

78. *Shelton*, 242 F.2d at 114–15. 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.*

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?"[79] Thus, even if the Fifth Circuit meant to conflate the definition of knowledge into what it clearly termed "the relevant definition of voluntariness,"[80] 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.[81]

The Court addressed this issue in order to reject Brady's argument that his plea was invalid because the Supreme Court, nine years after the plea, invalidated that part of the federal kidnapping statute which allowed for a death sentence by jury verdict only.[82] 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."[83] This brief discussion of the knowledge requirement evinced a concern with affirmative misrepresentations of direct consequences (and denied the claim that such misrepresentation was present in the case), but did not address collateral consequences.

79. *Id.* 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), *rev'd*, 356 U.S. 26 (1958).

80. *Shelton*, 246 F.2d at 572.

81. Brady v. United States, 397 U.S. 742, 756 (1970).

82. *Id.*

83. *Id.* at 757 (citation omitted) (citing Von Moltke v. Gillies, 332 U.S. 708 (1948)).

Knowledge stands separately from voluntariness in the due process requirements for guilty pleas. Although the Supreme Court has never directly examined the constitutionality of a guilty plea taken without knowledge of a collateral consequence, 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."[84] This is an incorrect presumption, and it 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";[85] (2) whether the consequence is punitive;[86] and (3) whether the consequence is within the "control and responsibility" of the sentencing court.[87]

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."[88]

84. United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971) (en banc).
85. Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973).
86. Mitschke v. State, 129 S.W.3d 130, 135 (Tex. Crim. App. 2004).
87. El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002).
88. *Cuthrell*, 475 F.2d at 1366.

Joseph Cuthrell claimed that his guilty plea was involuntary because he had not been warned that it might result in involuntary commitment under Maryland's Defective Delinquents Act.[89] At the time, such commitment either replaced or counted towards any term of imprisonment that the sentencing court had imposed,[90] although it was indeterminate in length.[91] Using the "definite, immediate and largely automatic" test, the court rejected Cuthrell's claim. It found that because commitment was not definite and because the Maryland Act mandated a separate civil proceeding, Cuthrell was not entitled to any warnings as a matter of due process.[92]

Many courts cite *Cuthrell*'s "definite, immediate and largely automatic" language in setting out their criteria for determining whether a particular consequence is direct.[93] However, as Texas's 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."[94] 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*

89. *Id.* at 1367.

90. *See* Tippett v. Maryland**,** 436 F.2d 1153, 1155–56 (4th Cir. 1971) (explaining the Maryland Defective Delinquent Act).

91. *Cuthrell*, 475 F.2d at 1367.

92. *Id.* at 1366.

93. *E.g.*, United States v. U. S. Currency in the Amount of $228,536, 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'" (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 it, only three of them distinguishing or disagreeing with the Fourth Circuit.

94. Mitschke v. State, 129 S.W.3d 130, 132 (Tex. 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?" *Id.* 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.*

defendant's mind with the length of his sentence."[95] 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 took into account the perspective of the "average" (reasonable) defendant about the consequences of his guilty plea. Nevertheless, while it correctly identified this critical value in its inquiry into the validity of the plea under due process principles, it completely failed to capture that value in the definition that it crafted, upon which many state and federal courts now rely.

ii. Punitive v. Nonpunitive 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. State*, 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."[96]

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 process rights.[97] 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."[98] But it denied Mitschke's claim, finding that not all direct consequences merit constitutionally mandated warnings.[99]

The court stated 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

95. *Cuthrell*, 475 F.2d at 1366 (emphasis added) (quotation marks omitted) (quoting Moody v. United States, 469 F.2d 705, 708 (8th Cir. 1972)).

96. *Mitschke*, 129 S.W.3d at 135.

97. *Id.* at 132.

98. *Id.* at 135.

99. *Id.* at 136.

even though it may indirectly and adversely affect, potentially severely, some of those subject to its provisions."[100] Under this definition, sex offender registration was nonpunitive 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.[101] Since that time, a number of defendants have argued that deportation based on these convictions is now an automatic, definite consequence that requires preplea 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.[102] Shortly after El-Nobani pleaded guilty to conspiracy to traffic food stamps and alien harboring, the Immigration and Naturalization Service began deportation proceedings against him.[103] 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."[104]

Although this definition quite neatly allows for denial of claims of due process violations for failure to warn about immi-

100. *Id.* at 135 (quotation marks omitted) (quoting *In re* B.G.M., 929 S.W.2d 604, 606 (Tex. App. 1996)).

101. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-546 to -553 (codified in scattered sections of 8 and 18 U.S.C.).

102. El-Nobani v. United States, 287 F.3d 417, 419 (6th Cir. 2002).

103. *Id.* at 420.

104. *Id.* at 421 (internal quotation marks omitted) (quoting United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000)); *see also Gonzalez*, 202 F.3d at 27 ("However 'automatically' Gonzalez's deportation—or administrative detention—might follow from his conviction, it remains beyond the control and responsibility of the district court in which that conviction was entered and it thus remains a collateral consequence thereof.").

gration 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 and for which he has no responsibility."[105] The court further explained that the direct-collateral distinction does not depend "upon the 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."[106]

2. Effective Assistance of Counsel and Collateral Consequences

Although this Article proposes a reasonableness standard for the due process right to information about consequences, such a standard also has implications for the assessment of claims of ineffective assistance of counsel. This section thus briefly reviews the current state of any right to information about collateral consequences under the Sixth Amendment, with a particular focus on the way in which courts have conflated due process and right to counsel analyses in this area.

Under the Sixth Amendment, defense counsel owes a duty of "effective assistance" to her client.[107] The nature of an attorney's relationship with her client is very different than the relationship between a judge, who simply approves and then 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 low 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,[108] the courts have cultivated a rather anemic right to the "effective assistance of counsel" un-

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

106. *Id.* (emphasis added).

107. *See* U.S. CONST. amend. VI; McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to effective assistance of counsel.").

108. Gideon v. Wainwright, 372 U.S. 335, 341 (1963).

der the Sixth Amendment.[109] Under the well-established 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 pleaded guilty.[110] The standard is highly deferential to the autonomy of defense lawyers (and demonstrates a strong reluctance towards court oversight of criminal defense representation), as illustrated by the strong presumption in Sixth Amendment jurisprudence that counsel's decisions are "strategic."[111]

In the context of collateral consequences, the right to counsel is virtually nonexistent.[112] Courts rely on the same direct-collateral divide in this area as they do in their due process decisions. The South Carolina Supreme Court's recent examination of an ineffective assistance claim starkly illustrates the merger of due process and effective assistance norms. Joseph Page pleaded guilty to criminal sexual conduct and other charges in exchange for a promise of no more than twenty years in prison.[113] Neither Page's lawyer nor the judge informed him

109. *See* 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, 627 (1986) (noting that the right to effective counsel does not necessarily mean the right to quality counsel); Note, Gideon*'s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2062 (2000) ("[T]he states have largely, and often outrageously, failed to meet the Court's constitutional command.").

110. *See* Strickland v. Washington, 466 U.S. 668, 669 (1984); s*ee also* Rompilla v. Beard, 545 U.S. 374, 380 (2005) (restating *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.

111. *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 quotation marks omitted)).

112. There is one general exception: when defense counsel affirmatively misrepresents the collateral consequence. *See, e.g.*, Roberti v. Florida, 782 So. 2d 919, 920 (Fla. Dist. Ct. App. 2001) ("Affirmative 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, 732 S.W.2d 482, 485 (Ky. 2008) (holding that the defense counsel's mistaken advice to his client about the potential deportation consequences of a guilty plea provided no basis for vacating the defendant's sentence).

113. Page v. State, 615 S.E.2d 740, 741 (S.C. 2005).

about South Carolina's Sexually Violent Predator Act.[114] The Act mandates the involuntary, secure confinement of 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."[115] Such individuals must remain confined "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large."[116]

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 at which the state must prove beyond a reasonable doubt that the person qualifies as a "sexually violent predator."[117] Because of this, involuntary commitment did not "flow directly from [Page's] guilty plea," but was instead collateral.[118] The court held that Page's lawyer had no duty to inform him about the SVPA before he pleaded guilty.[119]

The *Page* decision slips loosely between due process and ineffective assistance of counsel norms. Initially presenting the issue as one of due process,[120] the court relied on the two-prong *Strickland* test to frame its analysis of ineffective assistance.[121]

114. *Id*.

115. S.C. CODE ANN. § 44-48-30 (Supp. 2006). Between the 1998 passage of the South Carolina SVPA and December 2004, the state used it to involuntarily commit eighty-six people. Fifteen of those people were released in those six years. WASH. STATE INST. FOR PUB. 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].

116. S.C. CODE ANN. § 44-48-100.

117. *Page*, 615 S.E.2d at 742; *see also* S.C. CODE ANN. §§ 44-48-10 to -170.

118. *Page*, 615 S.E.2d at 742.

119. *Id.* The South Carolina statute is a typical SVPA; most of the states that now have such statutes modeled them on the Kansas SVPA, which the U.S. Supreme Court upheld in 1997. *See* Kansas v. Hendricks, 521 U.S. 346, 346–47 (1997) (rejecting ex post facto and double jeopardy challenges to Kansas's SVPA and finding that the 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's); *see infra* Part II.A. (describing SVPAs and relevant case law).

120. *See Page*, 615 S.E.2d at 741 ("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.*

121. *See id.*; *see also supra* notes 110–111 and accompanying text (discuss-

The decision then discussed two cases stating that due process requires that a defendant be told only of direct consequences of his criminal conviction.[122] While the court did go on to cite one ineffective assistance case, it followed this with a string citation to four more due process cases. These four, as well as the two cited earlier in the decision, all analyzed 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 roles 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.[123]

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.[124]

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ing two-prong *Strickland* test).

122. *Page*, 615 S.E.2d at 742 (citing Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366–67 (4th Cir. 1973) and Brown v. State, 412 S.E.2d 399, 400 (S.C. 1991)).

123. Chin & Holmes, *supra* note 68, 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 described the importation of due process principles into the effective assistance realm as "distort[ing] the jurisprudence upon which it is based." Guy Cohen, Note, *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, 1143–45 (1993).

124. 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, 434–35 (Mo. Ct. App. 2003) (relying on a state statute requiring judges to warn defendants only about direct consequences to support a finding that defense counsel must also warn only about such consequences and noting that, "[f]ollowing a

Certainly, the due process protections surrounding a guilty plea 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.[125] 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.[126] Indeed, the labels of "defendant" or "client" in relation to those roles make the point. While the judge must ensure, on the record, that a plea is entered voluntarily and with the requisite knowledge,[127] she is not charged with the underlying counseling of the defendant before the plea.[128] 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.[129] For example, the judge should ask the defendant if anyone is forcing him to plead guilty,[130] but generally cannot explore with the defendant the wisdom of that plea.[131]

In *State v. Paredez*, the New Mexico Supreme Court recognized the different roles of the judge and defense counsel in the context of the duty to advise defendants about the particularly severe collateral consequence of deportation.[132] 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."[133] In reviewing that warning, the court found that the Due Process Clause

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)).

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

126. *See supra* note 123 and accompanying text.

127. *See* Brady v. United States, 397 U.S. 742, 748 (1970).

128. *See, e.g.*, Salisbury v. Blackburn, 792 F.2d 498, 500 (5th Cir. 1986) (noting that counsel should inform the accused of available options prior to any guilty plea).

129. *See* FED. R. CRIM. P. 11(c)(1) ("The court must not participate in [plea] discussions.").

130. *See, e.g.*, United States v. Lockett, Nos. 94-6249, 94-6251, 1995 WL 133364, at *3 (10th Cir. Mar. 27, 1995) (noting that the judge thoroughly examined whether the defendant "was being forced to plead guilty").

131. *See, e.g.*, *Salisbury*, 792 F.2d at 500.

132. *See* State v. Paredez, 101 P.3d 799, 802–04 (N.M. 2004).

133. *Id.* at 802 (citing N.M. RULES ANN. § 5-303 (West 2007)) (emphasis added).

did not require more, despite the fact that deportation was automatic in Mr. Paredez's case.[134] 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."[135] The court did not stop with its holding that defense counsel must correctly advise her client about the automatic nature of deportation.[136] It went one step further, holding that "an attorney's *nonadvice* to an alien defendant on the immigration consequences of a guilty plea would also be deficient performance."[137]

Paredez represents a significant advance with respect to both the reality about the need for, and the constitutional right to, information about serious consequences in the plea decision-making process. Defense counsel is certainly best situated to explore such areas in the appropriate manner with her client. *Paredez*, however, missed the opportunity to have trial courts ensure, through the mechanism of constitutional due process, that counsel fulfill this critical function.[138] The right to the effective assistance of counsel, inquiry into which is usually undertaken, if at all, on collateral review long after the conviction, has certainly not ameliorated the widely acknowledged and ongoing crisis in the provision of indigent-defense services.[139] Courts, at the time the plea decision-making process is happening rather than years later, can advance the value of knowled-

134. The court went on to state:

> [W]hile 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.

Id. at 803.

135. *Id.* (internal quotation marks omitted).

136. *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.").

137. *Id.* (emphasis added); *see also* State v. Edwards, 157 P.3d 56, 64–65 (N.M. Ct. App. 2007) (applying *Paredez* to the sex offender registration context and finding that defense counsel has a Sixth Amendment duty to advise a defendant about registration and notification consequences of any guilty plea).

138. To be fair, the *Paredez* court did recommend that the legislature consider the adoption of a statute that would codify such oversight. *Paredez*, 101 P.3d at 802. The court did not, however, go so far as to require it as a matter of federal constitutional law. *Id.* at 803.

139. *See infra* note 227 (discussing the crisis).

geable guilty pleas by directly warning, or by ensuring that defense counsel warns, about severe collateral consequences. Courts are already charged with ensuring that a guilty plea is knowing, voluntary, and intelligent.[140] Just as defense counsel are able to ask a few more questions to determine if counseling about one or more collateral consequences is necessary,[141] so too can the courts make minor adjustments to their plea allocution processes to protect such important rights.[142]

Even with respect to imposing an affirmative Sixth Amendment duty on defense lawyers to advise their clients about immigration—or any other consequence—the New Mexico approach is unique.[143] 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. 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.[144]

140. *See* Brady v. United States, 397 U.S. 742, 748 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969).

141. *See* Smyth, *supra* note 33, at 497 (urging defense counsel to incorporate "invisible punishments" into their plea bargaining strategies); *see also* Pinard, *supra* note 22, at 685 ("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.").

142. Indeed, some states already have statutes requiring certain warnings, and some do so by way of court oversight over defense counsel. *See, e.g.*, WASH. REV. CODE § 10.40.200(2) (2002). Section 10.40.200(2) states:

> Prior to acceptance of a plea of guilty . . . the court *shall determine that the defendant has been advised* of the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

Id. (emphasis added); *see also infra* notes 248–257, 342–345 and accompanying text (describing how the New Jersey courts have added SVPA warnings to their plea forms in the wake of a state supreme court decision on the issue).

143. The U.S. Supreme Court has indicated in dicta that it might find that defense counsel's failure to inform about the consequence of deportation prior to a guilty plea satisfies the first prong of the test for ineffective assistance of counsel—attorney competence. *See infra* note 205.

144. *See, e.g.*, United States v. George, 869 F.2d 333, 337 (7th Cir. 1989) ("While the Sixth Amendment assures an accused of effective assistance of counsel in '*criminal prosecutions,*' this assurance does not extend to collateral aspects of the prosecution."); Martin v. Reinstein, 987 P.2d 779, 806 (Ariz. Ct. App. 1999) (denying, on due process grounds, the Petitioners' request to with-

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, families, and 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 on the tasks of negotiation and counseling, with the overwhelming majority of defendants pleading guilty.[145] While plea bargains have long existed,[146] the percentage of cases resolved by guilty pleas has risen sharply in the past few decades.[147] Between 1991 and 2001, for example, the proportion of guilty pleas rose by more than eleven percent.[148] In the last five years of that period, "we have witnessed the rise to a bizarrely high plea rate. In some [federal] districts now, the percentage of convictions attributable to guilty pleas reaches over ninety-nine percent."[149]

Due to such phenomena as "zero-tolerance policing" and "broken windows" theory, misdemeanor and "quality of life" prosecutions have skyrocketed.[150] Under the New York City Po-

draw the plea).

145. *See supra* note 59 (describing how ninety-seven percent of state convictions and ninety-six percent of federal convictions were secured by guilty pleas in 2004).

146. *See generally* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000).

147. *See* Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) ("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.").

148. *Id.*

149. *Id.* (citation omitted).

150. *See* James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29 (introducing the "broken windows" theory); *see also* Peter A. Barta, Note, *Giuliani, Broken Windows, and the Right to Beg*, 6 GEO. J. ON POVERTY L. & POL'Y 165, 168–69 (1999) (summarizing Mayor Giuliani's "zero-tolerance policing" tactics and their ill effects on New York City's homeless population). *But cf.* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 6–7 (2001) (scrutinizing

lice Department's "Clean Halls" program, for example, simple trespass arrests have risen a staggering twenty-five percent since 2002,[151] at a time when crime in New York City is dropping sharply.[152] 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 noncriminal offense,[153] can lead to extremely harsh nonpenal consequences, including deportation and registration as a sex offender.[154]

At the same time, collateral consequences have mushroomed.[155] They are also much more likely to be enforced.[156]

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the evidence and policy behind the "broken windows" theory).

151. M. Chris Fabricant, *Rousting the Cops: One Man Stands Up to the NYPD's Apartheid-like Trespassing Crackdown*, VILLAGE VOICE (New York City), Nov. 6, 2007, at 12.

152. N.Y. STATE DIV. CRIM. JUSTICE SERVS., CRIMINAL JUSTICE STATISTICS, INDEX CRIMES REPORTED TO POLICE BY REGION: 1998-2007, http://criminaljustice.state.ny.us/crimnet/ojsa/indexcrimes/regiontotals.pdf (noting a thirty-eight percent decrease in FBI Index crimes between 1998 and 2007 in New York City). Jarrett Murphy notes the discrepancy in arrests:

> 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 noncriminal 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.

Jarrett Murphy, *Awaiting Justice: The Punishing Price of NYC's Bail System*, CITY LIMITS INVESTIGATES, Fall 2007, at 6–7.

153. *See, e.g.*, N.Y. PENAL LAW § 10.00(3) (McKinney 2004) (defining "violation").

154. *See, e.g.*, KAREN J. TERRY & JOHN S. FURLONG, SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION: A "MEGAN'S LAW" SOURCEBOOK (2d ed. 2006).

155. *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 9 (2003) ("Since 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) ("In 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.").

156. *See, e.g.*, Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1413 & n.6 (2005) (describing how deportations rose

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.[157] The passage of sex offender registry acts (SORAs) was spurred by the Violent Crime Control and Law Enforcement Act of 1994,[158] which linked federal funds to the establishment of registries.[159] In 1996, Congress passed what is commonly known as "Megan's Law" to require public notification of information about certain people registered under SORAs.[160] The most recent development is the involuntary civil commitment of individuals convicted of qualifying sexual offenses, with laws currently in twenty states and others pending.[161] As of 2006, there is also federal money available "for the purpose of establishing, enhancing, or operating effective [state] civil commitment programs for sexually dangerous persons."[162]

The combined effect of these three developments—higher rates of guilty pleas, an era of increasing adjudication of minor offenses, and increasing collateral consequences—creates 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.

from a total of 1,978 noncitizens in 1986 to almost 80,000 in 2003); *see also id.* at 1470 (noting how, since amendments to the federal higher education "law took effect in July 2000, more than 128,000 applicants have acknowledged a drug conviction on the [federal financial aid form] and have been denied aid as a result").

157. *See* TERRY & FURLONG, *supra* note 154, at III-1, III-3 to III-4.

158. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, Pub. L. No. 103-322, 108 Stat. 2038 (codified as amended at 42 U.S.C. § 14071 (2000 & Supp. 2006)).

159. 42 U.S.C. § 14071(g)(2).

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

161. *See* Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at A1 ("About 2,700 pedophiles, rapists and other sexual offenders are already being held indefinitely, mostly in special treatment centers, under so-called civil commitment programs . . . .").

162. 42 U.S.C.A. § 16971 (West 2000 & Supp. 2008).

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

The harsh consequence of involuntary commitment under an SVPA starkly illustrates the problematic nature of the collateral-consequences rule. This Part 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."[163] Many states use the charged term "sexually violent predator" to describe committed individuals,[164] and legislatures continue to enact these laws despite evidence that they are both extremely costly and do not adequately rehabilitate those committed.[165]

In 1990, Washington became the first state to pass a modern law allowing for involuntary commitment of "sexually violent predators."[166] Other states quickly followed suit, and there are currently twenty states with some version of an SVPA.[167] These states now have approximately 2700 individuals committed, with over a thousand more detained while awaiting desig-

163. Davey & Goodnough, *supra* note 161 (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").

164. Adam Deming, *Civil Commitment Demographics and Characteristics,* SEX OFFENDER L. REP., Apr.–May 2007, at 44 (noting that eleven states designate persons committed under the SVPA as a "sexually violent predator," while the others use such terms as "sexually violent person," or "sexually dangerous individual").

165. *See* Janus, *supra* note 29, at 1237 ("[T]he promise of treatment and time-limited confinement is belied by the almost nonexistent treatment graduation rates in SVP programs across the country."); *see also* Abby Goodnough & Monica Davey, *A Record of Failure at Center for Sex Offenders*, N.Y. TIMES, Mar. 5, 2007, at A1 (reporting how a New York sexual offender treatment center "failed to meet a central purpose: treating sex offenders so they would be well enough to return to society").

166. *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).

167. *See* Deming, *supra* note 23.

nation.[168] While the number of people currently confined under SVPAs is relatively low, that could change with a single, highly publicized crime by someone who could have been involuntarily committed but was not.[169]

Involuntary commitment of "sexually violent predators" is an expensive proposition, with more than $446 million budgeted in 2007 for all United States jurisdictions with SVPAs.[170] That number is up significantly from 2006, when total monies budgeted was approximately $276 million.[171] 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.[172] In Minnesota, the cost per resident is "about $130,000 a year, three times what it costs to treat them in a conventional prison."[173]

Historically speaking, the current SVPAs are not unique in singling out people convicted of sex offenses for confinement in the mental health system.[174] For several decades beginning in the late 1930s, well over half of the states had some type of law

168. Deming, *supra* note 164, at 44 (listing survey results finding that, as of May 2006, there were 2627 civilly committed individuals in the seventeen states with SVPAs at that time, and another 1019 civilly detained individuals); *see also* Davey & Goodnough, *supra* note 161 (listing similar numbers for 2008).

169. *See, e.g.*, Larry Oakes, *OK'd for Transfer, but Going Nowhere*, STAR TRIB. (Minneapolis, Minn.), June 11, 2008, at A1 ("[After] a sex offender released from prison murdered 22-year-old Dru Sjodin of Pequot Lakes, . . . Gov. Tim Pawlenty prohibited releases from the [Minnesota sex offender facility] unless required by law or ordered by a court. Pawlenty's order remains in effect."); Jonathan Saltzman, *Push Is On to Keep Sex Criminals Locked Up*, BOSTON GLOBE, Oct. 25, 2005, at A1 (noting that the number of petitions filed under the state's "Sexually Dangerous Persons" act "has risen sharply, from 75 in 2003 to 124 in 2004," with 157 petitions pending as of October 2007 and stating that "[i]n large part, court officials trace the increase to the outcry that followed the murder of 30-year-old Alexandra Zapp, who was killed by a convicted sex offender in a Burger King restroom . . . in 2002").

170. Deming, *supra* note 23, at 6.

171. Deming, *supra* note 164, at 44 (noting that this "figure relates only to money spent on the civil commitment programs and not additional money spent in each state on prosecuting (and defending) these cases at trial, and other overhead the states incur associated with having a civil commitment program"); COMPARING STATE LAWS, *supra* note 115, at 1 (estimating the cost of operating secure facilities for SVPs in the United States to be $224 million per annum).

172. La Fond, *Costs*, *supra* note 29, at 478.

173. Larry Oakes, *Locked in Limbo*, STAR TRIB. (Minneapolis, Minn.), June 8, 2008, at A1.

174. *See* La Fond, *Costs*, *supra* note 29, at 469–70 (discussing 1930s "sexual psychopath statutes").

allowing for the placement of those convicted of sex offenses in psychiatric institutions rather than in prisons.[175] 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.[176]

The United States Supreme Court upheld the constitutionality of modern SVPAs in *Kansas v. Hendricks*.[177] 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.[178] The law had sufficient procedural and evidentiary safeguards for what the Court recognized as "the core of the liberty protected by the Due Process Clause," namely, freedom from physical restraint.[179] 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.[180] Confinement under a properly tailored SVPA is thus a civil action, and not criminal punishment.[181] This is despite the fact that, as Justice Kennedy put it in his *Hendricks* concurrence, "[n]otwithstanding its civil attributes,

175. *Id*.

176. *Id.* at 470–71. *Compare* Butler v. Burke, 360 F.2d 118, 120 (7th Cir. 1966) (describing how the 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 ten-year sentence).

177. 521 U.S. at 357 (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").

178. *Id.* at 357–58.

179. *Id.* at 356–57.

180. *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"). 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 the state need not prove absolute lack of ability to control behavior).

181. *Hendricks*, 521 U.S. at 361 (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 361–69.

the practical effect of the Kansas law may be to impose confinement for life."[182]

The Kansas SVPA is typical of such statutes.[183] 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 "repeat acts of sexual violence."[184] Only those convicted of or charged with a "sexually violent offense" qualify as sexually violent predators.[185] The list of qualifying crimes is extensive, ranging from rape to attempted aggravated indecent liberties with a child.[186] 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."[187] 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 widens considerably the potential pool of candidates for involuntary commitment.[188]

The rate of release for those committed under an SVPA is very low. Every SVPA allows for indefinite confinement with periodic review.[189] In December 2004, seventeen states had SVPAs and almost all of them had been in effect since 1999 or earlier.[190] In these states at that time, 3493 people had been committed or held for evaluation as sexually violent predators; only 427 had ever been discharged or released for outpatient treatment.[191] Four of the SVPA states have never released a

182. *Id*. at 372 (Kennedy, J., concurring).

183. *See* KAN. STAT. ANN. § 59-29a01 to -29a22 (2005 & Supp. 2007); *see also* La Fond, *Costs*, *supra* note 29, at 469 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").

184. § 59-29a01.

185. § 59-29a02(a) (defining "sexually violent predator").

186. § 59-29a02(e).

187. § 59-29a02(e)(13).

188. *See infra* Part III.B.2 (discussing nonsexual offenses).

189. *See* Kendall & Cheung, *supra* note 29, at 49–52 tbl.2 (listing the length of commitment for each state).

190. *See* KATHY GOOKIN, COMPARISON OF STATE LAWS AUTHORIZING INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: 2006 UPDATE, REVISED, 3 (2007), http://www.wsipp.wa.gov/rptfiles/07-08-1101.pdf.

191. *See* COMPARING STATE LAWS, *supra* note 115, at 1–2 ("[The 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 applica-

single person.[192] 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.[193] In short, "[c]ivil commitment for sexual dangerousness is, as a practical matter, a life sentence."[194]

Even sex offenders who are not involuntarily committed face their own form of banishment.[195] They are subject to zon-

tion. In many states, individuals are sent to the treatment facility for evaluation and may choose to wait some time before proceeding with the commitment hearing."). The numbers reported in a 2007 *New York Times* investigation into SVPAs were even more stark:

> Nearly 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.

Davey & Goodnough, *supra* note 161; *see also* Oakes, *supra* note 169 (noting how Minnesota had a political appointee making release decisions, how the SVP population ballooned, and how "[b]ecause no one can guarantee an offender won't rape or molest again, the safest course . . . has been to keep offenders locked up regardless of how their treatment has progressed").

192. Oakes, *supra* note 169; *see also* Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 206 (1996) (noting how, under Minnesota's precursor statute to its modern SVPA, not a single person convicted of a sex offense and then civilly committed was ever released).

193. COMPARING STATE LAWS, *supra* note 115, at 3 tbl.1. Although *Comparing State Laws* does not detail the basis for these fourteen remands back into secure confinement, most SVPAs are quite permissive in this respect. In Kansas, for example:

> At any time during which the person is in the transitional release program and the treatment staff determines that the person has violated any rule, regulation or directive associated with the transitional release program, the treatment staff may remove the person from the transitional release program and return the person to the secure commitment facility.

KAN. STAT. ANN. § 59-29a08(f) (2005 & Supp. 2007). At the hearing that occurs shortly after remand, "[t]he attorney general shall have the burden of proof to show probable cause that the person violated conditions of transitional release." § 59-29a08(g).

194. Baron-Evans & Noonan, *supra* note 26, at 1. *But see* Carty v. Nelson, 426 F.3d 1064, 1066 (9th Cir. 2005) (noting that, after the state had won civil commitment of Carty for two consecutive two-year periods after he completed his criminal sentence, "a jury found that Carty should no longer be civilly committed under the SVP Act").

195. *See generally* Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101 (2007) (discussing the growing movement by municipalities to create zones excluding convicted sex offenders).

ing rules about where they may or may not live,[196] registration rules that can include internet postings of their photographs and addresses even for juvenile convictions,[197] and numerous bars on employment.[198] Perhaps more than any other type of conviction, a sexual-offense conviction (even for some misdemeanors), follows a person for life.[199]

Involuntary commitment is both incarceration and exile. Although the Supreme Court has deemed the commitment of "sexually violent predators" to be nonpunitive in nature,[200] in some of the SVPA states, commitment takes place in a state prison or in a facility managed by the state's department of corrections.[201] The person who finds himself securely locked up

196. *See, e.g.*, *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*, UTICA OBSERVER-DISPATCH, Oct. 10, 2007, (discussing local law that prohibits convicted sex offenders from being within 1500 feet of a county park, playground, school, or child-care center); Aimee Harris, *Newton Considering Sex Offender Ban*, N.Y. TIMES, Oct. 7, 2007, New Jersey and the Region, 2 (discussing proposal to ban "high risk" sex offenders from living anywhere within city limits).

197. *See, e.g.*, Delaware Sex Offender Central Registry, http://sexoffender.dsp.delaware.gov/cgi-bin/sexoff.cgi/d?opt=00002826 (last visited Nov. 7, 2008) (posting photograph, address, and place of employment, among other information, for an individual who was convicted of a sexual offense shortly after his fourteenth birthday).

198. *See* Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 75 tbl.2 (2005) (noting how at least one-quarter of registrants reported receiving harassing or 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 or threatened in person, and losing at least one friend); Richard Tewksbury, *Experiences and Attitudes of Registered Female Sex Offenders*, 68 FED. PROBATION 30, 32 tbl.3, 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 forty-five percent of surveyed women who had been on registry for thirty-two months or more reported having lost a job due to registration). For further examples of the myriad consequences that individuals convicted of sex offenses face, see Richard Gonzales, *Iris Scanning Tracks Sex Offenders*, NPR LEGAL AFFAIRS, Dec. 3, 2007, http://www.npr.org/templates/story/story.php?storyId=16827587.

199. *See generally* Yung, *supra* note 195 (discussing meanings of exile, banishment, and commitment).

200. Kansas v. Hendricks, 521 U.S. 346, 361–62 (1997) ("[C]ommitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence.").

201. *See, e.g.*, KAN. STAT. ANN. § 59-29a07(c) (2005 & Supp. 2007) (describing how people subject to SVPA can be confined by the secretary of corrections so long as they are "housed and managed separately from offenders in the cus-

and designated as a sexual violent predator will experience it as quite similar to incarceration, and therefore punishment.[202]

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 respective states. 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. This section thus considers the constitutional analysis for guilty pleas, set out more generally in Part I, in the particular context of courts' reasoning and the outcomes in cases involving the right to preplea knowledge about an SVPA.

The United States Supreme Court has never addressed the issue of whether the Constitution requires that a defendant be told that his guilty plea might lead to involuntary commitment.[203] Some state courts, however, have treated the civil-

tody of the secretary of corrections, and except for occasional instances of supervised incidental contact, shall be segregated from such offenders"); Davey & Goodnough, *supra* note 161 ("Most of the centers tend to look and feel like prisons, with clanking double doors, guard stations, fluorescent lighting, cinderblock 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."); Deming, *supra* note 23, at 8 (noting that states take varying approaches to the facilities they use for SVP commitment).

202. *See* Davey & Goodnough, *supra* note 161.

203. Steele v. Murphy, 365 F.3d 14, 16 (1st Cir. 2004) ("The 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 any lower court finding that a defendant had no constitutional right to be warned of a "collateral" consequence of his criminal conviction. *See supra* note

criminal distinction from *Kansas v. Hendricks* as analogous to the direct-collateral distinction set out in the collateral-consequences rule and have thus found no duty to warn about involuntary commitment.[204] If the Supreme Court ever adopted this approach, presumably it would also find no duty to warn.[205]

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.[206] A

65 and accompanying text.

204. *See supra* Part I.B.1.b.ii (describing how Texas's 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); *see also* Collie v. State, 710 So. 2d 1000, 1008 (Fla. Dist. Ct. App. 1998) (holding that "designating an offender to be a sexual predator after he or she has entered a plea bargain does not constitute a breach of contract because the sexual predator designation is not a form of punishment"); *In re* Detention of Bailey, 740 N.E.2d 1146, 1153 (Ill. App. Ct. 2000); Bussell v. State, 963 P.2d 1250, 1254 (Kan. Ct. App. 1998).

205. This is likely, at the very least, on due process grounds. 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. *See supra* Part I.B.2. Indeed, the Supreme Court indicated as much in *INS v. St. Cyr* by assuming that "alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." 533 U.S. 289, 322 (2001). 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. Still, the Court might not apply this same analysis to involuntary commitment as an SVP. This is because deportation, in the wake of amendments in and after 1996, is basically mandatory for a large list of convictions, with very little if any room for discretionary relief. *See infra* note 224. In that way, deportation is distinguishable from commitment under any SVPA, which all have a separate process that gives the judge or jury the power to determine if commitment is necessary. *See supra* notes 183–188 and accompanying text (describing the SVPA process).

206. *See* State v. Paredez, 101 P.3d 799, 803 (N.M. 2004) (citing cases from numerous circuit courts finding deportation to be a collateral consequence). *But see Steele*, 365 F.3d at 17 (considering the Massachusetts SVPA). The dearth of federal cases examining the right to warning about an SVPA 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 many SVPAs are relatively new, and since many confinements are also fairly recent, it could simply be that these cases have not yet arrived in great numbers in the federal courts. Nevertheless, defendants who challenge their convictions in federal court through writs of habeas corpus face increasingly complex procedural hurdles. In the Antiterrorism and Effective Death Penalty Act of 1996,

number of state courts, however, have addressed the issue, reaching the same conclusion as the *Steele v. Murphy* court (discussed in the Introduction): a plea is valid even though the person pleading guilty did not know that the conviction for a sexual offense could lead to involuntary commitment after completion of the criminal sentence.[207] 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;[208] some reject claims that counsel offered ineffective assistance in violation of the Sixth Amendment by failing to warn;[209] and still others incorporate a traditional contract analysis in rejecting the claim that failure to inform about involuntary commitment is a breach of the plea bargain agreement.[210]

State v. Myers illustrates the general approach to due process and knowledge of an SVPA during the guilty plea

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) (2000). 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.

207. *See* Martin v. Reinstein, 987 P.2d 779, 804–05 (Ariz. Ct. App. 1999); State v. Harris, 881 So. 2d 1079, 1082–85 (Fla. 2004); Matter of Hay, 953 P.2d 666, 676 (Kan. 1998); Morales v. State, 104 S.W.3d 432, 437 (Mo. Ct. App. 2003); Ames v. Johnson, No. CL04-413, 2005 WL 820305 (Va. Cir. Ct. Mar. 28, 2005); *In re* Detention of Campbell, 986 P.2d 771, 780–81 (Wash. 1999) (en banc).

208. *See, e.g.*, *Martin*, 987 P.2d at 806 ("The rationale is that 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." (citation omitted)).

209. *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).

210. *See, e.g.*, *Harris*, 881 So. 2d at 1082–85 (rejecting respondent's 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 (quoting Murray v. Regier, 872 So. 2d 217, 224 (Fla. 2002))).

process.[211] Robert Myers pleaded 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.[212] The court noted that involuntary commitment would not automatically flow from the fact of Myers's conviction. Instead, "Myers will have the full benefit of the [commitment law's] procedures, due process, and an independent trial."[213] 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.[214]

With respect to ineffective assistance of counsel, a Kansas Court of Appeals case demonstrates the typical outcome. Richard Bussell pleaded guilty to a sexual offense in exchange for a sentence of six to fifteen years.[215] 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.[216] The court first noted the two-prong test for ineffective assistance of counsel, which looks at both attorney competence and prejudice to the defendant.[217] With respect to the first prong, the court emphasized the "highly deferential" nature of judicial scrutiny of defense counsel's performance.[218] 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.[219] On the second prong, the court found that because Bussell did not "flatly state that his decision to plead guilty would have changed had he known of the KSVPA," he failed to

211. 544 N.W.2d 609 (Wis. Ct. App. 1996).

212. *Id.* at 610.

213. *Id.* at 610–11.

214. *Id.* at 611.

215. Bussell v. State, 963 P.2d 1250, 1252 (Kan. Ct. App. 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.*

216. *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 the collateral-consequences rule to Kansas's Sexually Violent Predators Act and noting that, because commitment under the SVPA did not flow immediately, definitely, and automatically from the guilty plea, the trial court had no duty to warn defendant about it).

217. *Id.* at 1252–53; *see supra* note 110 and accompanying text (describing the test).

218. *Bussell*, 963 P.2d at 1253–54.

219. *Id.* at 1254.

show that the failure to warn about the SVPA prejudiced him.[220]

Also noteworthy to the court was the fact that Bussell's plea allowed him to avoid a substantially longer sentence.[221] The court was "not willing to assume that [the] defendant [was] so lacking in judgment that he would have risked a much longer sentence by going to trial if he had known that sometime in the distant future the KSVPA might have been applied to him."[222] In other words, the court came to the somewhat surprising conclusion that the risk of potential lifelong involuntary commitment would not deter Bussell from pleading guilty, even though he rationally exercised that same judgment to avoid a longer prison sentence by pleading guilty.

The *Myers* approach utterly fails to consider the perspective of a reasonable person, charged with a crime, 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 decision making about whether to plead guilty or go to trial. Both cases evidence a formalistic approach where the line between "direct" and "collateral" is divorced from the need for transparency in the plea process.

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

A. PROPOSAL: RULE OF REASONABLENESS FOR WARNINGS, WITH SEVERITY OF CONSEQUENCE AS TOUCHSTONE

This section proposes a reasonableness standard in determining whether there should be a due process 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 wheth-

220. *Id.* at 1254. The court also noted that because the Kansas SVPA allowed for confinement of even those simply *charged* with crimes, the guilty plea "did not change that status and, from that point of view, it is difficult to see where defendant can show any prejudice in the trial court's failure to advise him of the consequences of the KSVPA." *Id.* at 1253.

221. *Id.* at 1254.

222. *Id.*

er to plead guilty. 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 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 touchstone for gauging the significance of a particular consequence to the plea decision-making process would be the severity of that consequence. If a consequence is severe, then it is something that any reasonable defendant would use as a significant factor in deciding whether to plead guilty. This is true even if it is not certain that the consequence will come to pass.[223] As a secondary factor in determining the reasonableness of warning about a particular consequence, courts should consider if the consequence is highly likely to apply in deciding if it too merits advisement. Likelihood is high when the fact of conviction serves as the sole and nondiscretionary predicate for imposition of the consequence.[224] This might result in warnings about some collateral consequences that are not at the highest end of the spectrum of severity. However, it is not onerous to warn about these since they will be limited in number, and defense counsel and the court should, due to their automatic nature, be aware of them.[225]

This proposed standard involves an objective, rather than a subjective, inquiry. This avoids the difficulties of administration that a subjective standard would present, and it also more closely tracks the ways in which courts have approached such inquiries in other areas of constitutional criminal procedure.

223. *See supra* text accompanying notes 221–222 (discussing the *Bussell* court's failure to recognize this reality).

224. The term "highly likely to apply" is more appropriate here than "certain." While some consequences are 100 percent likely to result from the fact of conviction, others have a likelihood of application that is still quite high, but somewhat below certainty. An example would be deportation, where there are still some extremely limited exceptions to the 1996 federal immigration law, which states that any person convicted of a crime that qualifies an as "aggravated felony" is mandatorily deportable. *See* 8 U.S.C. § 1229b(a)(3) (2006) (stating that there is no discretionary relief from exclusion for those convicted of aggravated felonies); INS v. St. Cyr, 533 U.S. 289, 326 (2001) (holding that the 1996 immigration law does not apply retroactively to all cases, and that discretionary relief from deportation "remains available for aliens, like respondent, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for [statutory] relief at the time of their plea under the law then in effect").

225. *See infra* Part III.A.2 (describing likelihood factor in more detail).

This reasonableness proposal reenvisions the current due process approach to information in the plea-bargain process. A more rigorous due process standard for warnings would apply to both the courts and defense counsel, with the goal of having courts ensure that defendants receive information about severe or certain consequences. It thus has implications for the right to effective assistance of counsel as well as due process. This is not to say that defense counsel, who must also deliver effective assistance under the Sixth Amendment, has an obligation to disclose information identical to that of the judge under the due process standard. As a number of courts and commentators have noted, counsel is best situated to offer defendants information on collateral consequences.[226] Although effective assistance standards might require warnings in a particular case above and beyond those of a due process reasonableness approach, a broader conception of due process in guilty pleas would also apply to defense counsel and would require that courts ensure defense counsel's compliance with the critical need for information about certain collateral consequences.[227] Thus, a reasonableness approach to due process standards governing a person's right to information would be a floor above which the norm for effective assistance in this same area should rest.

A reasonableness approach injects the perspective of the individual charged with the crime, and facing the constitutionally protected plea decision, into a standard from which it is otherwise completely absent, having been eclipsed by the collateral-consequences rule's singular concern with the finality of guilty pleas and the efficiency of the system that accepts so many. Professor Kit Kinports, in a thorough exploration of the different perspectives from which the 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."[228] If the central

226. *See, e.g.*, Chin & Holmes, *supra* note 68; *see also supra* notes 125–137 and accompanying text.

227. Such judicial oversight is particularly important given the ongoing crisis in indigent defense. *See generally* ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf; Klein, *supra* note 109; Note, *supra* note 109.

228. Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRI-

purpose of a particular constitutional rule "is to preserve a criminal defendant's right to make a free and unconstrained choice," Kinports would apply what she terms a "consent model."[229] Under this model:

> [T]he 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.[230]

Following Kinports's framework, a consent model would apply to the duty to warn about collateral consequences. This is because the purposes behind the constitutional norms relevant to the plea process relate to a defendant's right to awareness of the ramifications of the criminal conviction. A core purpose of due process 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—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.

As the "reasonableness standard" language makes clear, the significance of the consequence would be viewed from the (objective) perspective of the person facing the plea decision-making process. In numerous areas of constitutional criminal procedure, courts analyze issues from the perspective of the defendant.[231] 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, a due process analysis of the voluntariness of a defendant's confession considers the surrounding facts and circumstances, including the length and location of the interrogation

MINOLOGY 71, 71 (2007).

229. *Id.* at 72, 76.

230. *Id.* at 76 (quoting Michigan v. Chesternut, 486 U.S. 567, 574 (1988)).

231. *See, e.g.*, Kinports, *supra* note 228, at 73–74 (examining search and seizure as well as confession cases, and noting 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").

and the defendant's access to friends and family.[232] The particular defendant's situation can also be relevant, and courts have factored things such as physical injury and mental illness into the voluntariness calculus.[233] Both confessions and guilty pleas involve the waiver of the right against self-incrimination, and both should be analyzed similarly, on the basis of the totality of the surrounding circumstances.

The Supreme Court also looks at the facts and circumstances in other areas. For example, in 2007 the 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 is thus entitled to challenge the constitutionality of the car stop.[234] 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."[235] 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.[236] This avoids the

232. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 513–14 (1963) (considering the length of detention and Haynes' inability to contact his wife in determining that confession violated due process); *see also* Dickerson v. United States, 530 U.S. 428, 434 (2000) (noting how, although the Court's focus in examining the admissibility of suspects' incriminating statements has shifted to the Fifth Amendment with the decisions in *Malloy* and *Miranda*, "[w]e have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily"). The Court has applied the same type of standard for consent-to-search cases. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 233 (1973) (noting how "it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced," and characterizing the inquiry as a "careful sifting of the unique facts and circumstances of each case").

233. *See* LAFAVE ET AL., *supra* note 62, at 321; *cf.* Colorado v. Connelly, 479 U.S. 157, 165 (1986) ("[W]hile 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.").

234. Brendlin v. California, 127 S. Ct. 2400, 2402 (2007).

235. *Id.* at 2406 (quoting Florida v. Bostick, 501 U.S. 429, 436 (1991)). In examining the concept of reasonableness more generally, in the context of the Fourth Amendment, the Court noted that it has "measured in objective terms by examining the totality of the circumstances. In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." Ohio v. Robinette, 519 U.S. 33, 39 (1996) (rejecting argument that lawfully seized person must be warned that he is "free to go" before his consent to search can be voluntary).

236. *Brendlin*, 127 S. Ct. at 2407 n.4 ("The test is not what Brendlin felt but what a reasonable passenger would have understood."); *see also id.* at 2408

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."[237] Similarly, what counts in the plea decision-making process is the significance of the information—or lack thereof—that has been conveyed to the person who must make the decision, and who must do it voluntarily, with knowledge and with the assistance of effective counsel.

Even *Miranda,* with its bright-line, prophylactic rule requiring a specific set of warnings prior to any custodial interrogation, uses a fact-specific inquiry.[238] And it does so, at least for part of the test, from a defendant's perspective. Thus, the custody prerequisite to *Miranda* warnings is satisfied if a reasonable person in the defendant's position would not feel free to leave.[239] This objective 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.[240] 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.

(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 228 (offering various instances where the Supreme Court used "subjective" elements in purportedly "objective" analysis).

237. *Brendlin*, 127 S. Ct. at 2409 (internal quotation marks omitted).

238. Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

239. *Id.* at 444, 469.

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

In some respects, 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 . . . ."[241] In recognizing the need for special scrutiny of guilty pleas taken when a defendant is unrepresented by counsel, *Brady* observed that "*an intelligent assessment of the relative advantages of pleading guilty* is frequently impossible without the assistance of an attorney . . . ."[242] 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."[243] 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 current 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.[244] 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.

1. Severity of Consequence

Consequences that fit squarely into the high end of the severity spectrum would be those that infringe upon the defendant's life, liberty, or such fundamental rights as parenting[245]

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

242. *Id.* at 748 n.6 (emphasis added).

243. *Id.* at 749; *see also* Virsnieks v. Smith, 521 F.3d 707, 714 (7th Cir. 2008) ("Whether a plea was entered knowingly and voluntarily is determined from 'all of the relevant circumstances surrounding it.'" (quoting *Brady*, 397 U.S. at 749)).

244. *See supra* Part I.B.1.b (discussing various definitions of "direct consequences").

245. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) (recognizing the "fundamental right of parents to make decisions concerning the care, custody, and

or the ability to travel.[246] Taking severity into account is critical, as any reasonable person facing a guilty plea decision would treat as a significant factor any consequence that might lead, for example, to potential lifelong involuntary commitment or deportation to a country where he faced likely incarceration or even execution.[247] Under this inquiry, such consequences would qualify for warnings.

There is precedent in the use of severity as a central factor in determining constitutional criminal procedural rights. Indeed, one state high court has treated severity as a touchstone in determining the duty to warn about consequences.[248] Jerry L. Bellamy was convicted of fourth-degree criminal sexual contact after accepting a plea bargain in which more serious charges were dismissed and the government recommended an eighteen-month jail sentence.[249] At the time of his sentencing, he had slightly more than two months left to serve.[250] One week before his release, the government sought to commit Bellamy under New Jersey's Sexually Violent Predator Act (SVPA), using the sexual misconduct conviction as the required "sexually violent offense" under the Act.[251] This petition was ultimately successful, and Bellamy was involuntarily committed.[252] He then sought to withdraw his guilty plea on due process and ineffective assistance grounds, arguing that neither the trial court nor defense counsel warned him about the SVPA prior to his plea.[253]

control of their children").

246. *See* Saenz v. Roe, 526 U.S. 489, 498 (1999) (recognizing the fundamental right of citizens to travel within the United States).

247. There may be limits on some such deportations. Refugee and asylum law principles prohibit the United States government from deporting someone to a country if that person can demonstrate persecution or a well-founded fear of persecution if returned to that county, and if the persecution is due to "race, religion, nationality, membership in a particular social group or political opinion . . . ." Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(42)(A) (2000).

248. State v. Bellamy, 835 A.2d 1231, 1238 (N.J. 2003).

249. *Id.* at 1234.

250. *Id.* ("Defendant received 365 days of jail credit and 74 days of gap time credit. Thus, at his sentencing on June 23, 2000, defendant's final date for his eighteen-month sentence was September 1, 2000.").

251. *Id.* at 1234–35. *See also* New Jersey Sexually Violent Predator Act, N.J. STAT. ANN. §§ 30:4-27.24 to .38 (1999).

252. *Bellamy*, 835 A.2d at 1234–35 (noting that Bellamy had previously been convicted of one other sexual offense and that another was reduced and later dismissed).

253. *See id.* at 1238.

In *State v. Bellamy*, the New Jersey Supreme Court held that there is a duty to warn about a possible civil commitment under the state's SVPA because of the severity of its consequences.[254] The decision recognized 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."[255] The court "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."[256] However, it then made a significant departure from this analysis and held that "when the consequence of a plea may be so *severe* that a defendant may be confined for the remainder of his or her life, fundamental fairness demands that the trial court inform defendant of that possible consequence."[257]

The *Bellamy* court's approach evidenced a critical move away from the formalistic distinction between "collateral" and "direct" consequences.[258] Although based on state constitutional grounds,[259] and thus of limited precedential effect, the *Bellamy* decision is significant in its recognition that lack of knowledge about serious consequences undermines the basic fairness and legitimacy of a guilty plea. It is difficult to maintain that a plea without such knowledge is truly a voluntary, knowing, and intelligent act.

In a recent decision interpreting its state constitutional right to a jury trial, the Arizona Supreme Court also considered the severity of a "collateral" consequence as the controlling factor.[260] The state charged Dale Joseph Fushek with various misdemeanors and also sought a trial court ruling mandating lifetime sex offender registration on the grounds that the charges

254. *Id.*

255. *Id.* (quoting *In re* Civil Commitment of D.L., 797 A.2d 166, 173 (N.J. Super. Ct. App. Div. 2002)).

256. *Id.*

257. *Id.* (emphasis added).

258. *Id.* ("[I]t matters little if the consequences are called indirect or collateral when in fact their impact is devastating." (quoting State v. Heitzman, 527 A.2d 439, 441 (N.J. 1987) (Wilentz, C.J., dissenting))).

259. *See* N.J. CONST. art. I, § 10 ("In all criminal prosecutions the accused shall have the right . . . to be informed of the nature and cause of the accusation.").

260. Fushek v. State, 183 P.3d 536 (Ariz. 2008).

were "sexually motivated" even though they were not otherwise qualifying crimes for the registry.[261] Construing the Arizona Constitution as consistent with the federal constitutional guarantee of a jury trial only for "serious"—as opposed to "petty"—crimes, the court first found that, given their relatively low potential jail sentences, the crimes charged were "presumptively not jury-trial eligible."[262] Next, the court noted the United States Supreme Court's view that "seriousness" is reflected in the legislature's decisions about the nonpenal as well as penal consequences of the crime.[263] Under that authority, the court considered whether sex offender registration moved Fushek's case into the category of jury eligibility.[264]

The court clarified that the issue was not whether registration constituted criminal punishment for ex post facto purposes, which the court had decided in the negative in an earlier decision,[265] "but rather whether it is a statutory consequence reflecting a legislative determination that Fushek's alleged offenses are 'serious.'"[266] Because the test determining if a sanction is criminal or civil "does not measure whether a sanction is sufficiently severe to trigger the right to jury trial under the Sixth Amendment," the court undertook an independent inquiry into severity.[267] It found that "sex offender registration is a lifelong obligation," with stringent requirements governing obligations to provide notice to the authorities about place of residence, work and education, "widespread publicity" in the community about those on the register, and felony criminal penalties for those who fail to comply. The court "conclude[d] that

261. *Id.* at 538; *see also* ARIZ. REV. STAT. ANN. § 13-118(A) (2001) ("In each criminal case involving an offense other than a sexual offense, the prosecutor may file a special allegation of sexual motivation if sufficient admissible evidence exists that would justify a finding of sexual motivation by a reasonable and objective finder of fact."); *id.* § 13-3821(C) ("[T]he judge who sentences a defendant . . . for *an offense for which there was a finding of sexual motivation* pursuant to § 13-118 may require the person who committed the offense to register [as a sex offender].") (emphasis added).

262. *Fushek*, 183 P.3d at 539–40.

263. *Id.* at 540 (citing Blanton v. City of N. Las Vegas, 489 U.S. 538, 542 (1989)).

264. *See id.* at 538.

265. *Id.* at 541 (citing State v. Noble, 829 P.2d 1217, 1224 (Ariz. 1992)).

266. *Id.*

267. *See id.* at 542 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)). The relevant question was whether the legislatively enacted consequence of registration as a sex offender, together with the codified penal sanction, indicated a legislative determination that the crimes charged were "serious." *Id.* at 541–43.

the potential of sex offender registration reflects a legislative determination that Fushek has been charged with serious crimes" and thus conferred upon him the right to a jury trial.[268]

In these two examples, as well as in other settings,[269] courts have taken the severity of a collateral consequence into account in fashioning constitutional procedural rules. *Bellamy* and *Fushek*, either explicitly or implicitly, both recognize that the "direct" penal sanction is not the end of the matter for a defendant facing criminal charges. "Collateral" sanctions can loom large and indeed can completely overshadow the criminal penalties. Severity of consequence is a critical factor in a principled rule of the right to information in the plea process.

2. Likelihood That a Consequence Will Apply

This factor should be judged along the spectrum of the chance that the particular consequence would apply to the defendant should he be convicted of the underlying crime. It thus considers the process by which the consequence would apply. When the fact of the underlying conviction serves as the sole and nondiscretionary predicate for imposition of the consequence, there is no way for the defendant to rebut the conviction; it is there, and the collateral consequence flows as a matter of law or regulation. Other consequences are less likely to apply, often because they are discretionary or require a procedure separate and apart from the criminal proceeding.

This factor would come into play when a consequence is close but perhaps not quite at the level of severity that would significantly affect a plea decision. Here, a high likelihood of application, combined with an increased level of "severity," would mandate warnings as a matter of due process.

The "likelihood" factor of the reasonableness proposal has some similarities, at least semantically, to the Fourth Circuit's "definite, immediate and largely automatic" *Cuthrell* test.[270] The underlying concern of the Fourth Circuit's approach, though, was action, or lack thereof, by the sentencing judge.

268. *Id*. Fushek's jury trial was set for October 27, 2008. Jim Walsh, *Suspended Priest's Trial Set for October*, ARIZ. REPUBLIC, June 13, 2008, at B1.

269. Although not directly implicating constitutional rules of criminal procedure, "[t]he severity of sex offender commitment causes those selected for such confinement to be granted protections tantamount to those in the criminal process. This differs from many other collateral sanctions, which are imposed automatically upon the conviction of a specific type of offense." Demleitner, *supra* note 29, at 1638.

270. See *supra* Part I.B.1.b.i for a critique of the *Cuthrell* test.

The *Cuthrell* test reflects the desire to safeguard the values of efficiency and finality in the plea bargaining process. The key to the likelihood-of-application consideration, by contrast, is how the defendant *experiences* the consequence, regardless of which body imposes the consequence.

When a consequence of a conviction flows directly from the fact of that conviction, the defendant has no opportunity to contest its application. From his perspective, then, it is as much a part of the punishment as any penal sanction he received. In agreeing to plead guilty when there is no mention of such a likely consequence, a person does not get the benefit he thought he bargained for; the plea, in short, does not meet his reasonable expectations.

In addition, from the standpoint of administrative inconvenience, there is no good argument against warnings about such likely consequences. A limited number of nonpenal consequences flow directly from the fact of the conviction, and it is not onerous for judges and defense lawyers to learn these and inform their clients and defendants who plead guilty in their courts.[271] While it is the severity factor which accomplishes, most directly, the goal of injecting a defendant's perspective into the right to preplea information, the likelihood of application operates as an important second level of protection that broadens the scope of what qualifies for warnings as a matter of due process.

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 SORA.[272] 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.[273] As the Texas high court has noted in considering that state's SORA, "the consequence, registration as a sex offender, is definite. It is also completely automatic; if a defen-

271. *See infra* notes 340–346 and accompanying text (discussing how counsel and judges might handle the additional task of limited warnings); *see also supra* note 32 and accompanying text (pointing out that courts already have a statutory duty to warn about immigration consequences in some states).

272. *See* N.Y. CORRECT. LAW § 168-a(2)(a)(i) (McKinney 2007); *see also* N.Y. PENAL LAW § 130.20 (McKinney 2004) (defining the misdemeanor of "sexual misconduct").

273. *See* N.Y. CORRECT. LAW § 168-d(1)(a) (McKinney 2007).

dant pleads to an enumerated offense, he must register; there are no exceptions, no wiggle room, no conditions which relieve him of that obligation."[274] The penal sanction for the low-level misdemeanor conviction, which may be as minimal as the night already served in jail, is completely overshadowed by the prospect of automatic SORA registration, which is often lifelong and often with community-notification requirements.

Another example of a highly likely consequence is deportation of a person convicted of an "aggravated felony" under federal immigration law.[275] Amendments to federal immigration law in 1996 retroactively "amplifie[d] the previous definition [of aggravated felony] to encompass offenses that are properly neither felonies nor 'aggravated.'"[276] Since that time, individuals convicted even of such minor crimes as shoplifting or subway turnstile jumping can (and indeed have, in documented cases) become "aggravated felons."[277] Almost all aggravated felony convictions lead to automatic deportation; neither an immigration court nor even the Attorney General has the discretion to waive this consequence.[278] Although immigration officials do not find and deport every person convicted of an "aggravated felony," the likelihood-of-application 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."

274. Mitschke v. State, 129 S.W.3d 130, 135 (Tex. Crim. App. 2004). *But see id.* at 136 (holding that failure to warn does not violate due process or render a plea involuntary, since the sex offender registration requirement is a nonpunitive, though direct, measure).

275. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *id.* § 1101(a)(43) (describing the numerous offenses categorized as "aggravated felonies").

276. Marley, *supra* note 28, at 859.

277. *See, e.g.*, Nina Bernstein, *When a MetroCard Led Far Out of Town*, N.Y. TIMES, Oct. 11, 2004 at B1 (reporting on a permanent legal resident from Madagascar who faced deportation for the "'crimes involving moral turpitude' . . . [of] three convictions for MetroCard offenses"); Patrick J. McDonnell, *Criminal Past Comes Back to Haunt Some Immigrants*, L.A. TIMES, Jan. 20, 1997, at A1 (describing deportation proceedings to send a twenty-year U.S. resident back to Nigeria based on her two shoplifting convictions).

278. Marley, *supra* note 28, at 874 ("[A] lawful permanent resident who falls within the 1996 definition of aggravated felon . . . . [r]egardless 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 . . . ."). *But see supra* note 224 (noting very limited class of cases where discretionary relief from deportation is still available).

On the other end of the likelihood spectrum are such things as difficulty finding work when saddled with a criminal record, at least for those jobs that do not deny a professional license or clearance based on convictions.[279] 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. Even if there is no law or regulation barring people convicted of drug felonies from working in such jobs, many employers now ask applicants to submit to a criminal background check.[280] The best practice, particularly given the fact that such background requests are increasingly common in both employment and housing, is to warn the individual facing a plea decision even if not under a constitutional obligation to do so. Alternatively, even if such warnings were not mandated under the "likelihood of application" factor, they might be under the more heavily weighted severity inquiry.

B. THE RULE OF REASONABLENESS APPLIED TO SVPAS

Involuntary commitment under an SVPA is a clear-cut case in which due process would require a preplea warning under this Article's proposed reasonableness test. Due to its highly severe nature, any reasonable defendant would place significant weight on the possibility of lifelong involuntary commitment as a sexually violent predator in the decision-making process leading up to a 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 to plead guilty to a qualifying offense in the states with SVPAs.[281]

Although the severity of involuntary commitment makes it an obvious candidate for warnings, it is not a consequence

279. Joseph P. Fried, *When 'Help Wanted' Comes with a Catch*, N.Y. TIMES, Sept. 17, 2006, § 10, at 1.

280. *Cf.* Adam Liptak, *Criminal Records Erased by Courts Live to Tell Tales*, N.Y. TIMES, Oct. 17, 2006, at A1 (discussing increased use of background checks among employers and the inaccuracy of criminal records provided to them by for-profit database companies).

281. Although the same would hold true in states with pending involuntary commitment legislation, the right to information about consequences which do not yet exist at the time of the plea further complicates the constitutional equation. This situation 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.

which is high on the likelihood scale. Under the Kansas SVPA, which is the model for most states' legislation, the commitment process includes an initial probable cause determination, followed by confinement if cause exists.[282] At trial, the state must prove beyond a reasonable doubt that the person is a "sexually violent predator."[283] The individual on trial has 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) to a jury trial.[284] Finally, the individual has a right to 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.[285]

This process, which is completely separate from the criminal proceeding that sets the SVPA wheels in motion,[286] is the

282. KAN. STAT. ANN. § 59-29a05 (2005).

283. *Id.* § 59-29a07(a) (2005). This high standard of proof is not the case in the federal system, where the standard is "clear and convincing evidence." *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 301, 120 Stat. 587 (codified at, but later omitted from, 18 U.S.C. § 4248(d)). *But see* United States v. Tom, 558 F. Supp. 2d 931 (D. Minn. 2008) (holding 18 U.S.C. § 4248(d) unconstitutional). Also, as one source noted, only half of the states with SVPAs similar to the federal law use the "beyond a reasonable doubt" standard. *See* Baron-Evans & Noonan, *supra* note 26, at 5.

284. § 59-29a06.

285. § 59-29a08.

286. 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.*, *id.* § 59-29a02(a). 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" under section 22-3221 of the Kansas Statutes, or who were found incompetent to stand trial. *See id.* § 59-29a03; *see also id.* § 22-3221 (2007). Nevertheless, anecdotal 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. *Cf.* Kansas v. Crane, 534 U.S. 407, 411 (2002) (describing Crane as "a previously convicted sexual offender"); Kansas v. Hendricks, 521 U.S. 346, 350 (1997) (describing Hendricks as "an inmate who had a long history of sexually molesting children"); Davey & Goodnough, *supra* note 161 (describing various committed offenders); Monica Davey & Abby Goodnough, *For Sex Offenders, a Dispute on Therapy's Benefits*, N.Y. TIMES, Mar. 6, 2007, at A1; Goodnough & Davey, *supra* note 165. Although this limited review only considered reported decisions and cases described in the press, it seems fair to say that actual conviction has been a central element of most if not all commitments under SVPAs. In terms of involuntary commitment under the federal SVPA, "everyone facing [an SVPA] cer-

reason that involuntary commitment ranks relatively low on the likelihood of application spectrum. Indeed, courts have focused on the SVPA process to justify labeling it "collateral."[287] 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 the independence of this process from the sentencing proceeding and on the uncertainty of its outcome ignores its severity. Due to the extremely harsh nature of involuntary commitment, any reasonable defendant would consider it a significant factor in the plea decision-making process, even though it is not automatically imposed upon conviction, and the state may never in fact seek or secure commitment.

Relying on the separate process to excuse advisement also ignores the real potential for a defendant's postplea surprise about the possibility of such a severe, additional consequence. 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 the many crimes that meet the definition of a "sexually violent crime" under some SVPAs. In South Carolina, for example, the long list of qualifying crimes includes such offenses as employing "a person 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.[288] It also includes a number of obscenity crimes involving minors, including possession of obscene materials, some of which are also strict liability crimes.[289] South Carolina also in-

tification does have at least one sex-related conviction . . . ." Baron-Evans & Noonan, *supra* note 26, at 3.

287. *See supra* Part II.B (discussing how most courts have found no duty to warn about an SVPA).

288. *See* S.C. CODE ANN. § 44-48-30(2)(*l*) (Supp. 2007) (defining sexually violent offenses as "violations of Article 3, Chapter 15 of Title 16 involving a minor when the violations are felonies"); *see also id.* § 16-15-387 (2003 & Supp. 2007) (locating the crime of employing a minor to appear in public in a state of sexually explicit nudity within Article 3, Chapter 15 of Title 16, and defining the substantive crime). Under the criminal statute, "sexually explicit nudity" is defined as: "(a) uncovered, or less than opaquely covered human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast; or (b) covered human male genitals in a discernibly turgid state." *Id.* § 16-15-375(6) (2003).

289. *See id.* § 44-48-30(2)(*l*) (Supp. 2007).

cludes sodomy on its SVPA list,[290] although that triggering crime is certainly unconstitutional in the wake of the Supreme Court's decision in *Lawrence v. Texas*.[291] As one expert noted, "[a]lthough atypical, qualifying offenses *can* include sexual behavior in which the offender does not physically touch the victim (e.g., voyeurism or exhibitionism) and does not 'stalk' or 'groom' their victim as the term predator would imply."[292]

Three situations specific to involuntary commitment highlight 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 nonsexual offenses can be qualifying convictions for the purpose of involuntary commitment. All three situations, because they can so easily lead a reasonable person to assume that the SVPA would *not* apply to them, illustrate and emphasize the need for transparency in the plea-bargain process.[293]

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

290. *Id.* § 44-48-30(2)(j) (listing the crime of "buggery" in SVPA); *see also id.* § 16-15-120 (2003 & Supp. 2007) (making "buggery" a felony with a mandatory sentence of five years in prison, a fine of $500, or both).

291. 539 U.S. 558 (2003) (holding that a Texas statute outlawing consensual sexual contact between persons of the same gender violates due process); *see also id.* at 574–75 (declining to rule on petitioners' alternative argument "that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause" because under such a ruling "some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants" (citing Romer v. Evans, 517 U.S. 620 (1996))). While "buggery" has been in the South Carolina criminal code since 1712, 2 THOMAS COOPER, STATUTES OF SOUTH CAROLINA 465, 493 (1837), the state legislature enacted the SVPA which lists buggery as a qualifying crime in 1998. *See* 1998 S.C. Acts No. A321 (codified as amended at S.C. CODE ANN. § 44-48-30 (Supp. 2007)).

292. Deming, *supra* note 23, at 7.

293. The case for warnings also applies to the more typical situation, where, for example, a person enters a regular guilty plea and accepts a sentence of five years in prison without any knowledge that these five years may turn into a lifelong involuntary confinement.

purposes of the case to treat him as if he were guilty."[294] 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.[295] 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 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.[296]

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.[297]

The basic premise behind both nolo contendere 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."[298] 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,[299] and nolo contendere pleas are permitted with the court's (and sometimes also the prosecution's) consent.[300]

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."[301] In other states, the SVPA might broadly refer to a "conviction" for a qualifying offense more generally, which

294. North Carolina v. Alford, 400 U.S. 25, 35 (1970).

295. *Id.* at 28.

296. *Id.* at 29 n.2.

297. *Id.* at 37.

298. *Id.*

299. *See* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 381 (2d ed. 2005) ("[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.").

300. *See* LAFAVE ET AL., *supra* note 62, § 21.4(a), at 1006.

301. *See* FLA. STAT. § 394.912(2)(c) (1999).

would include the conviction that results from any nolo contendere or *Alford* plea.

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 nolo contendere and *Alford* pleas. For example, Jimmie Dale Otto pleaded no contest to felony child molestation.[302] Although Otto did not make detailed admissions to the charged conduct during his plea, the trial court found the requisite factual basis for his conviction in the police report detailing the incidents.[303] The court later sentenced Otto to twelve years in prison.[304] Prior to his release on parole, the state sought to commit Otto under California's SVPA. During the ensuing SVPA proceeding, the State relied on the complaining witnesses' hearsay statements in the police report to help meet its burden of proving that Otto was a "sexually violent predator" as defined in the Act.[305]

The California Supreme Court rejected Otto's argument "that because he pleaded no contest . . . he had little motivation to challenge the accuracy of the victims' statements at the time of sentencing for the underlying crimes."[306] In holding that the complaining witnesses' statements were admissible and that reliance on them did not violate Otto's right to due process in the SVPA proceeding,[307] the Court emphasized that the fact of Otto's no contest plea "admitted the truth of the victims' statements."[308] Otto's involuntary commitment, for an initial period of two years and indefinitely renewable under the statute, thus stood.[309]

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 under a state mental health proceeding, based on his sex offense conviction.[310] Joseph George Jr. originally pleaded not guilty and

302. People v. Otto, 26 P.3d 1061, 1063 (Cal. 2001).
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.* at 1069.
307. *Id.* at 1066–70.
308. *Id.* at 1068.
309. *Id.* at 1063–64; *see also* CAL. WELF. & INST. CODE § 6604 (West 2008) (mandating indeterminate term of confinement if individual is found to be a "sexually violent predator").
310. 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.[311] Despite these facts, the Eighth Circuit found that commitment was collateral and thus no warnings were required.[312]

A case from the D.C. Circuit provides a more appropriate understanding of the defendant's calculus in making an *Alford* plea. The court examined the claim that it was abuse of discretion to deny a defendant the right, under the Federal Rule of Criminal Procedure that allows postsentence plea withdrawal upon a showing of "manifest injustice," to withdraw his *Alford* plea when he was unaware that the conviction would lead to deportation.[313] The court stated:

> As the Supreme Court recognized in *Alford*, there are situations in which a defendant 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. When such a defendant learns that his plea will have additional consequences of an unquestionably serious nature, and rapidly changes his calculations about the costs and benefits of standing trial, it may be manifestly unjust to hold the defendant to his earlier bargain unless the district court identifies offsetting elements of the administration of justice.[314]

These cases all highlight the reasonable expectations of a person entering a nolo contendere or *Alford* plea. Such pleas presumably arise when the prosecution or court has tried, unsuccessfully, to secure 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

311. *See id.* at 109.

312. *Id.* at 111. A number of courts have found an *Alford* plea valid despite failure to warn about an SVPA. *See, e.g.*, *In re* 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 SVPA proceedings); Ames v. Johnson, No. CL04-413, 2005 WL 820305, at *3 (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).

313. United States v. Russell, 686 F.2d 35, 39–40 (D.C. Cir. 1982) (analyzing FED. R. CRIM. P. 32(d)).

314. *Id.* (internal quotation marks and citation omitted).

same analysis holds true—and is perhaps even more apt—when a defendant enters an *Alford* plea and protests his innocence.

With these types of pleas, knowledge of a certain or severe collateral consequence may well have caused the scales 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 nolo contendere and *Alford* pleas taken without knowledge of certain collateral consequences 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.

2. Nonsexual Offenses

Six of the twenty SVPA states either explicitly include nonsexual offenses in their list of qualifying convictions or define "sexually violent predator" broadly enough to include nonsexual offenses.[315] For example, under the Kansas SVPA the prosecutor is required to file a "special allegation of sexual motivation" in "every criminal case *other than sex offenses*" where there is sufficient evidence to justify a finding of sexual motivation.[316] The court with jurisdiction over the criminal case must then make a finding of whether sexual motivation was present or, if there is a jury trial, the jury must make that determination through a special verdict on the issue.[317] Under the federal SVPA, inmates in Bureau of Prisons (BOP) custody are statutorily subject to the legislation even if they are not in "custody for anything to do with a sex crime and need not have ever been convicted of a sex crime."[318] These provisions cast a very broad net, and could include such situations as a person pleading guilty to burglarizing an ex-girlfriend's apartment. In the case of the federal statute, if a person in federal custody "has *anything* in his past that suggests prior sexual misconduct, if he

315. *See* FL. STAT. § 394.912 (h) (1999); IOWA CODE ANN. § 229A.2(10)(g) (2002); KAN. STAT. ANN. § 59-29a14(a) (2005); MINN. STAT. § 253B.02.7a(b) (2006); N.J. STAT. ANN. § 30:4-27.26 (2008); S.C. CODE ANN. § 44-48-30(2)(o) (Supp. 2007).

316. KAN. STAT. ANN. § 59-29a14(a) (2005) (emphasis added).

317. *Id.* § 59-29a14(b).

318. *See* Baron-Evans & Noonan, *supra* note 26, at 3.

admits to prior misconduct or deviant desires or fantasies in 'treatment,' or if he is likely to fabricate sexual deviance for amusement, attention or to please his interrogators in 'treatment,' he is in jeopardy."[319]

Currently, there is no evidence of a widespread use of such broad, catch-all provisions. For example, under the federal SVPA "everyone currently facing a certification does have at least one sex-related conviction."[320] Cases reported in the media involving SVPA commitments, certainly, have detailed one or more often truly violent sexual offense convictions.[321] However, as one commentator noted with respect to the federal BOP but equally applicable to state authorities, "while BOP may have exhibited some restraint in the initial round of 'test case' certifications, it may not continue to do so going forward."[322] Indeed, the potential for expansion to the full reach of any statute regulating sex offenses has been demonstrated in the sex offender registry context. The state of Arizona, for example, sought mandatory registration for a person charged only with misdemeanors that were not explicitly listed in the registration law; instead, the state used the catch-all provision allowing for registration for nonsexual offenses that the criminal trial court found to be "sexually motivated."[323]

The point, however, is not the current state of SVPA confinements, or the lack thereof, for nonsexual offenses. It is that, to any reasonable defendant considering a guilty plea to a nonsexual but potentially "sexually motivated" offense, the possibility of 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 proceedings during the criminal case for nonsexual offenses in states

319. *Id.* at 17; *see also id.* at 3 (noting how the Bureau of Prisons "recently confirmed that it will consider all 'evidence' of sexually violent conduct or child molestation from any source, 'whether or not a conviction resulted, and whether or not the person's present custody is based on the conduct in question'") (quoting 72 Fed. Reg. 43,207 (July 13, 2007)).

320. *Id.* at 3.

321. *See supra* note 286 and accompanying text ("[A]necdotal 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.").

322. *See* Baron-Evans & Noonan, *supra* note 26, at 11.

323. *See supra* notes 260–264 and accompanying text (discussing *Fushek v. State*).

like Kansas, the roles of the trial judge, prosecutor, and defense counsel at that juncture are integral to the later SVPA process.[324] Because of their full, preconviction awareness of the possibility that the SVPA may apply in such cases, an argument that a duty to warn would slow down the process or somehow overwhelm overburdened actors in the criminal justice system should not excuse a duty to warn.

C. EFFICIENCY AND FINALITY VS. THE CONSTITUTIONAL 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 criminal justice system, and is myopic about its effect on the defendant. It is protective only of such institutional values as finality and efficiency in the administration of criminal justice, built upon a system of high levels of guilty pleas. This undermines 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, by contrast, furthers that important purpose.

As the Supreme Court has noted, "[t]he State to some degree encourages pleas of guilty at every important step in the criminal process."[325] Indeed, guilty pleas in the past several decades have risen even from their previously high levels, now constituting upwards of ninety-nine percent of convictions in some jurisdictions.[326] The courts, and many commentators, have opined that the criminal justice system would grind to a halt, or even crumble, without plea bargaining.[327]

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324. *See, e.g.*, S.C. CODE ANN. § 44-48-30(2)(o) (Supp. 2006) (defining "sexually violent offense" to include "any offense for which the [criminal trial] *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" (emphasis added)).

325. Brady v. United States, 397 U.S. 742, 750 (1970).

326. *See supra* notes 59, 149 and accompanying text (discussing guilty plea statistics).

327. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons."); MILTON HEUMANN, PLEA BARGAINING 32 (1978) ("[P]lea bargaining is integrally and inextricably bound to the 'trial' court.").

Whether or not that is true,[328] one court's statement would draw little disagreement: "The chief virtues of plea agreements are speed, economy, and finality."[329] Or, as the Supreme Court put it, "[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system," and the advantages of guilty pleas can only be secured if they "are accorded a great measure of finality."[330]

Unfortunately, the Supreme Court has shown its "willingness to sacrifice important [constitutional] principles at the altar of . . . efficiency and finality."[331] Driven by this "fundamental interest in the finality of guilty pleas,"[332] the collateral-consequences rule is fiercely protective of pleas, once they have been entered. It strictly limits the quantum of preplea information that must flow to a defendant in order to avoid what courts perceive as a strong, multifaceted 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.[333]

Finality may be a legitimate policy concern, but it is not as fragile a concept as is so often put forth. As Professor Gabriel J. Chin and Richard W. Holmes, Jr. noted, in arguing that requiring lawyers to warn clients about certain collateral consequences would not open the floodgates to postconviction chal-

328. *See* Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1037 (1984) ("[E]ffective containment of plea bargaining is realistically possible for American criminal courts."); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

329. United States v. Rutan, 956 F.2d 827, 829 (8th Cir. 1992).

330. Blackledge v. Allison, 431 U.S. 63, 71 (1977).

331. Roger Fairfax, *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2030 (2008) (critiquing the Court's failure to include jury trial rights in the exception to harmless error law for "structural" problems).

332. 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").

333. United States v. Timmreck, 441 U.S. 780, 784 (1979) (quoting United States v. Smith, 440 F.2d 521, 528–29 (7th Cir. 1971) (Stevens, J., dissenting)).

lenges, it would be "an unusual case that would satisfy the[] stringent requirements" for proving ineffective assistance of counsel.[334]

This observation applies equally in the due process context. In the first instance, a more rigorous rule of reasonableness would ensure better front-end warnings, leading to knowing pleas and thus avoiding postconviction attacks on those pleas. Even when the reasonableness standard requires withdrawal of a guilty plea, dismissal of the case does not follow. Instead, the court would reinstate the original charges.[335] While there is a concern that some defendants will move to withdraw pleas, based on violation of the reasonableness rule, solely to seek a better offer when the case is somewhat older (and thus more challenging and risky for prosecutors to bring to trial), such gaming is impossible to predict and should not outweigh the rights of other defendants to enforcement of their constitutional protections. Most defendants who pleaded guilty based on their determination that the plea was the preferable option would seek to withdraw that plea only if the fact of the collateral consequence tipped the scale away from that earlier decision.[336] The scales 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.

Courts are institutionally competent to administer a reasonableness approach to preplea warnings. In a statement that epitomizes the judiciary's often hostile attitude towards the idea of more court involvement with a defendant's right to information, one court insisted that judges cannot be expected to

334. Chin & Holmes, *supra* note 68, at 739. Under the two-prong test for establishing ineffective assistance, see *supra* notes 110–111 and accompanying text (describing *Strickland*), 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." Chin & Holmes, *supra* note 68, at 739–40.

335. *See, e.g.*, State v. Bellamy, 835 A.2d 1231, 1239 (N.J. 2003) (noting, after holding that Bellamy was entitled as a matter of fundamental fairness to be warned about the state SVPA, that the proper remedy "[i]f the trial court is satisfied that defendant did not understand the consequences of his plea," was plea withdrawal and reinstatement of the original charges).

336. As criminal defense trial and appellate practitioners know, many defendants seek to withdraw their pleas, for a variety of reasons, once they have been sentenced. A reasonableness rule, which would allow meritorious claims in those small percentage of cases where they arose, is not likely to open the withdrawal gates further in any significant way.

"anticipate the multifarious peripheral contingencies which may affect the defendant"s civil liabilities, his eligibility for a variety of societal benefits, his civil rights or his right to remain in this country."[337] The same decision did go on, after denying the defendant's motion to withdraw his guilty plea due to the trial judge's failure to inform him about deportation consequences, to suggest that defense counsel was best positioned to provide such information.[338] While this observation about defense counsel may be true, courts have almost uniformly rejected a right to information about collateral consequences as a matter of effective assistance of counsel.[339] In addition, although many courts handle high numbers of criminal cases, the unfortunate reality should not drive the constitutional norm.

Requiring judges to ensure that a defendant knows about any consequence that is either highly likely to apply or so severe that it would be a significant factor in the plea decision-making process is unlikely to incapacitate courts from administering criminal justice. The number of highly likely consequences is limited and judges presiding over criminal cases should be aware of them. As for severity, in some cases judges could quite easily add the requisite warning. For example, many states now require immigration consequences warnings under state statute or court rule.[340] In other, more nuanced, cases, courts could fulfill their due process duty by inquiring whether defense counsel had fulfilled their effective assistance duty.[341]

The experience in New Jersey belies the claim that courts cannot handle additional warnings. The New Jersey Supreme Court's recent holding that its state constitution requires SVPA warnings[342] resulted in the creation of new plea forms that disclose the possibility of civil commitment as a sexually violent

337. Michel v. United States, 507 F.2d 461, 466 (2d Cir. 1974).

338. *Id.* (analyzing defendant's claim as a violation of rule 11 of the Federal Rules of Criminal Procedure and not as a matter of constitutional law).

339. *See supra* Part I.B.2.

340. *See supra* note 32.

341. *See, e.g.*, AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY 14-1.4(c) (3d ed. 1999) (setting forth standards under which the judge would advise a defendant directly about certain collateral consequences and would suggest that defendant "consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea").

342. *See supra* notes 248–253 and accompanying text (discussing *Bellamy*).

predator.[343] The New Jersey courts had already required defendants to fill out plea forms which advised them of various consequences of their pleas, including the potential penal sentences, any mandatory parole disqualifiers, and any potential fines or penalties. The defendant fills out those plea forms in consultation with his attorney, and the prosecutor then signs them. As one New Jersey practitioner noted, "[t]hose plea forms have been continually expanded over the years so that now in sexual assault cases the defendant is also advised of the Megan's Law consequences (lifetime reporting), parole supervision for life, and possible future commitment as a sexually violent offender."[344] The trial courts generally review these forms with the defendant during the guilty plea, to ensure "that the defendant clearly understands what he is getting into."[345]

The myriad other issues of implementation that such a constitutionally based, judicial oversight function raises are beyond the scope of this Article. Suffice it to say that the criminal justice system, which has proven its capacity to absorb and adapt to many new rules of constitutional criminal procedure, would similarly adapt over time to a rule of reasonable warnings about certain or severe consequences of criminal convictions.[346]

343. E-mail from James K. Smith, Jr., Assistant Deputy Public Defender, New Jersey State Office of the Public Defender, Appellate Section, to Author (June 12, 2008 2:16 PM) (on file with author).

344. *Id.*; *see also* RICHARD J. WILLIAMS, ADMINISTRATIVE DIRECTOR OF THE COURTS, CRIMINAL—PLEA FORMS AND JUDGMENTS OF CONVICTION, N.J. DIRECTIVE #4-02 (2002), *available at* http://www.judiciary.state.nj.us/directive/criminal/dir_04_02.pdf (describing various plea forms, including "Supplemental Plea Form for Sexual Offenses"); RICHARD J. WILLIAMS, ADMINISTRATIVE DIRECTOR OF THE COURTS, CRIMINAL – REVISED AND NEW PLEA FORMS, N.J. DIRECTIVE #15-01 (2001), *available at* http://www.judiciary.state.nj.us/notices/directive15.pdf (describing a New Jersey Administrative Office of the Courts directive that, in the wake of state supreme court decisions, courts modify their plea forms to advise defendants of No Early Release Act ramifications of their guilty plea).

345. Smith, *supra* note 343 ("There are still a few cases where defendants may have a valid claim that they were not validly warned of the consequences of their plea, but not many.").

346. *See* Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1090 (2004). ("Adding collateral consequences to [the] mix [of a defense attorney's counseling functions] is not likely to pose significant additional burdens, particularly as attorneys would soon develop an internal database of these consequences, which would allow them to quickly summon those consequences that are relevant to the particular case."). This same general concept would apply to judges, albeit in a somewhat different

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.

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 nonsexual) 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 nonpenal 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 preplea warnings offers this, and brings the defendant's missing perspective back into the guilty plea process. This would begin a move towards more transparency and rationality in the guilty plea process.

manner given their differing relationship with a defendant. *But see* Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863 (2004). Cook observes:

> Given the high degree of dependency on the part of the judiciary, prosecutors, and defense attorneys upon the current plea structure, there exists a strong disincentive to permit any substantive changes to the system that might diminish its efficiency. Underlying this refrain is a need by each of the principal participants to maximize scarce resources and/or achieve certain economic benefits. Private defense attorneys, compromised by low compensation for indigent representation, and public defenders, pressured by excessive caseloads, inadequate resources, and internal office concerns, benefit from a system that encourages out-of-court dispositions. Prosecutors and the judiciary are similarly subjected to excessive caseloads and therefore also benefit under a structure that mitigates such pressures.

Id. at 899–900.