Anticipatory Repudiation of Plea Agreements: 

Is Contract Law the Correct Model?
Part One

A Brief Review of Relevant Contract Principles
Unilateral vs. Bilateral Contract

• **Unilateral Contract:** A contract in which X makes a promise to which she will be bound when Y accepts by performance.

• **Bilateral Contract:** A contract in which X makes a promise to which she will be bound when Y accepts by making a promise in return.
Contractual Duties

A valid bilateral contract between X and Y obligates X to:

• perform as and when promised; and
• refrain from repudiating prior to the time his performance is due
Anticipatory Repudiation

Elements:

• a definite and unconditional
• manifestation
• of X’s intent not to perform, or inability to perform, as promised
• communicated to Y
• before X’s performance is due
Exceptions

As a general rule, X may not anticipatorily repudiate:

• a **unilateral** contract obligating only X to perform in the future, or

• a **bilateral** contract that has been **fully performed** by Y (effectively transforming it into a unilateral contract)
Y’s Options

Faced with X’s repudiation, Y may suspend her own performance and:

- **do nothing** until X’s performance is due (subject to Y’s duty to mitigate);
- seek **assurances** from X that he will perform when and as required;
- **cancel** the contract; or
- **sue** X immediately for breach
Risk Analysis

Y’s Options
- do nothing
- seek assurances
- cancel
- sue

Possible Consequences
- allows X to retract
- allows X to bind Y by giving assurances
- allows X to sue Y for breach if Y’s acts were unwarranted
Part Two

Are Plea Agreements Contracts?
Plea Agreements as Contracts

Courts routinely treat plea agreements as enforceable contracts, obligating both the defendant and the state to perform as promised.
Courts treat the state’s promise of a reduced sentence or immunity as *consideration* to support the defendant’s promise to testify or otherwise assist the prosecution, and vice versa.
Remedies for Breach

If the **state** breaches, the defendant may
- **withdraw** his plea;
- insist on the **agreed** penalty; **or**
- ask the judge (or appellate court) to **modify** the agreed penalty

If the **defendant** breaches, the state may
- **withdraw** the plea agreement **and**
- seek a **stiffer penalty** than agreed, often based on **more serious charges** (subject to limitations)
Part Three

Anticipatory Repudiation of Plea Agreements
Key Questions

• What **kind** of contract is a plea agreement?
• **How definite and unconditional** must the defendant’s words or deeds be?
• What if the defendant acts in **good faith** based on his understanding of his obligations under the agreement?
• When is the defendant’s **performance due**?
• **Who gets to decide** whether the defendant has repudiated?
Are Plea Agreements Bilateral?

- Only bilateral contracts may be anticipatorily repudiated.
- Alper (NYU ‘97) posits that plea agreements are *unilateral* contracts because the state is bargaining for the defendant’s plea, not the defendant’s promise to plea. 

  Alper’s analysis overlooks the testimonial component -- the state is also bargaining for the defendant’s promise to testify.
Manifesting Intent

- Examples of conduct that courts have found sufficient to constitute a repudiation:
  - refusing to testify at retrial, based on a good faith belief that the defendant had satisfied his duty to testify (*Ricketts* and *Ataya*)
Manifesting Intent

• Examples of conduct that courts have found sufficient to constitute a repudiation:
  
  . equivocating whether the defendant would testify after learning that he had been “tricked” into plea (*Hon*)
  
  . informing the prosecutor that the defendant would testify differently than previously discussed (*Hentz*)
“Good Faith” Disagreement

- Early SCT anticipatory repudiation cases (*Viglas* and *Mobley*) say “no”
- Subsequent non-SCT cases and many commentators say good faith is irrelevant
  - Dissent (Blackmun): no repudiation
  - Majority (White): good faith is irrelevant to the question of breach
Who Shall Judge?

• Most courts rely on prosecutorial discretion
  
  Risk of prosecutorial bias vs. cost of judicial determination

• 7th Cir.: the defendant is entitled to a ruling before the state may void the agreement
Time Performance is Due

• Has a defendant fully performed after he has testified, pleaded guilty, been sentenced, and begun to serve his term?

• Has the state fully performed at that point?

  If so, no anticipatory repudiation in retrial cases like *Ricketts*
Attempted Retraction

• Suppose the defendant decides to testify as promised prior to the time he is obligated to do so.

• At what point does the defendant lose the right to retract?

• What constitutes a material change in position by the prosecution?
Working Within the Construct

• “Repudiations” in *Ricketts* and *Ataya* do not appear to be “definite and unconditional”
• If plea agreements are unilateral, they can’t be anticipatorily repudiated
• In retrial cases, hasn’t the State fully performed? If so, the defendant can’t anticipatorily repudiate
• Why not obligate the State to seek adequate assurances or judicial interpretation?
Part Four

Is Contract Law the Correct Model?
While plea bargain law is “heavily freighted with ... contract law analogies, ... The existence of a constitutional right in the defendant to be treated with ‘fairness’ throughout the process ... presage[s] inevitably the question of the extent to which contract law may be drawn upon to define the limits of this constitutional right.”

_Cooper v. U.S., 594 F.2d 12, 16 (4th Cir. 1979)._
Commercial Contracts vs. Plea Agreements

- Relatively equal (or, at least, not institutionally unequal) bargaining power
- Institutionally unequal bargaining power
- Superior investigative resources
- Criminal sanctions
- Defendant’s own counsel is effectively an agent of the State
Commercial Contracts vs. Plea Agreements

- “Good faith” performance and enforcement
- Adversarial discovery
- Monetary damages
- Duty to mitigate
- Due Process
- State allowed to use information given by Defendant
- Penal sanctions
- ???