

# THE COST OF AN ARREST: RETHINKING SENTENCE ENHANCEMENTS IN NEW YORK

Jared S. Park<sup>†</sup>

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<sup>†</sup> J.D. Candidate, Syracuse University College of Law, 2026. I am deeply honored to use my writing as a platform to advocate for stronger protections for criminal defendants and meaningful reform of the criminal justice system. I owe special thanks to Professor Aliza Milner, whose thoughtful feedback and mentorship have profoundly shaped my growth as a writer. I am also grateful for my time at the Hiscock Legal Aid Society, where I had the privilege of working on criminal appeals alongside Sara Goldfarb and Kristen McDermott. My work with them inspired me to write on this topic. I hope this piece contributes, in some small way, to the broader effort to make the American criminal justice system more just and humane.

## ABSTRACT

This Note critically examines the “legitimate basis” standard established in *People v. Outley* for enhancing sentences in New York when a defendant is rearrested between a guilty plea and sentencing. Unlike the standard required for conviction—proof beyond a reasonable doubt—the legitimate basis threshold permits sentence enhancements based on arrests that may never lead to convictions, undermining defendants’ constitutional rights and the integrity of plea agreements. This Note argues that the legitimate basis standard violates the Sixth Amendment right to a jury trial, the Fifth and Fourteenth Amendments’ due process protections, and the Fifth Amendment’s protection against double jeopardy. Additionally, the legitimate basis standard breaches fundamental contract law principles, rendering plea agreements unconscionable by allowing the state to impose harsher sentences based on minimal evidence.

Sentence enhancement practices across other jurisdictions reveal that New York’s standard is among the least protective of defendants’ rights. While some states rely on judicial discretion or a probable cause standard, a plurality employs the more rigorous “preponderance of the evidence” standard, better safeguarding defendants from unjust sentence enhancements. This Note concludes by advocating for New York to adopt at least a probable cause standard—if not preponderance of the evidence—to uphold constitutional protections, maintain the fairness of plea agreements, and ensure a more equitable justice system.

## INTRODUCTION

In New York, the rights of defendants face a unique and often challenging test in the period between a guilty plea and sentencing. During this period, a defendant’s behavior is scrutinized closely, and a single arrest can have serious consequences, including the risk of a harsher sentence than initially agreed upon in a plea deal. If a defendant is arrested after entering a guilty plea but before sentencing, an Outley hearing is triggered, named after the landmark Court of Appeals case *People v. Outley*.<sup>1</sup> The purpose of an Outley hearing is to determine whether there was a legitimate basis for the new arrest.<sup>2</sup> If the court finds that such a basis exists, it has the discretion to enhance the defendant’s sentence beyond the agreed-upon terms of the plea.<sup>3</sup>

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1. See generally *People v. Outley*, 610 N.E.2d 356 (N.Y. 1993).

2. See *id.* at 361.

3. See *id.*

This “legitimate basis” standard, however, is significantly lower than the standard required to secure a conviction—proof of guilt beyond a reasonable doubt. As a result, defendants can face enhanced sentences due to arrests that do not lead to convictions, as the prosecution may lack the evidence to meet the higher burden of proof required for a conviction. Instead, an Outley hearing requires only that the court be satisfied there was a reasonable basis for the arrest itself, not that the defendant is guilty of the new charge. This discrepancy creates a troubling situation where defendants may be penalized for unproven allegations, which undermines the fairness of sentencing, and, in many cases, disregards the principles that form the foundation of both constitutional rights and contract law.

At an Outley hearing, a defendant has the opportunity to argue that no legitimate basis for the arrest existed.<sup>4</sup> However, because the standard is so low, the defendant faces an uphill battle. Unlike in a criminal trial, an Outley hearing allows a court to enhance a sentence based on an untested accusation. This means that even if the arrest was based on weak or unreliable evidence, the court can still find a legitimate basis and impose a harsher sentence.

Imagine, for example, a defendant pleads guilty to a minor drug offense in exchange for a lower sentence. The plea agreement contains a standard no-arrest condition. Shortly afterward, while awaiting sentencing, the defendant is arrested for an alleged assault, based on a witness’s uncertain account. The prosecution, recognizing the weakness of the evidence, ultimately decides not to move forward with the assault charge. However, the arrest triggers an Outley hearing where the arrest alone could be enough for the court to consider enhancing the defendant’s sentence, up to the maximum, for the initial drug offense. The defendant can argue that the arrest lacked a legitimate basis, but this challenge is little more than a formality—judges rarely scrutinize the circumstances of the arrest beyond its existence. In effect, the hearing becomes a rubber stamp, where an accusation that wouldn’t survive probable cause review in a criminal court is enough to justify a harsher sentence. Despite the absence of probable cause or conviction for the new allegation—and the likelihood that the defendant would have been acquitted—their punishment is now increased based on an unproven accusation, revealing a serious flaw in the system.

This Note will examine the flaws inherent in the legitimate basis standard, arguing that it is fundamentally unjust and in need of reform. The current application of this standard jeopardizes the rights of

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4. *See id.*

defendants and fails to uphold the integrity of plea agreements, turning a low evidentiary threshold into a mechanism for imposing harsher penalties on those who may not be guilty of any additional offense. In its reliance on minimal evidence to justify sentence enhancements, the legitimate basis standard for Outley hearings in New York infringes on constitutional protections—the right to a jury trial, the right to due process, the right against double jeopardy—and breaches contractual principles of unconscionability, undermining the integrity of plea agreements.

In Part I, this Note will provide a background on the Outley hearing, explaining its purpose, evolution, and the legal standard it uses. It will focus on how *People v. Outley* set a precedent for sentence enhancement based on a “legitimate basis” for arrest without full evidentiary hearings and highlight the detrimental impact of these lower standards on defendants. Part II will analyze the thesis in two parts: (1) the constitutional infringements of the Outley standard; and (2) the contractual breaches in plea bargains, where the promise of reduced sentences is undermined. In Part III, this Note will examine sentence enhancement practices in other jurisdictions, evaluating whether more defendant-protective models exist and if they offer fairer approaches compared to New York’s. Ultimately, this Note’s conclusion will advocate for reform, recommending that New York adopt, at the least, a probable cause standard to better safeguard defendants’ rights and uphold the integrity of plea agreements.

### I. THE OUTLEY HEARING

Courts in New York enhance sentences when a defendant is rearrested between plea and sentencing to uphold the conditions of the plea agreement and deter further criminal conduct before sentencing.<sup>5</sup> The *Maietta* court reasoned that “if trial courts could not enhance a sentence, when a defendant breached a condition not to be re-arrested, such courts would be reluctant to ever permit defendants to remain free, during the period of time between plea and sentence.”<sup>6</sup> Thus, sentence enhancement serves as “a necessary and essential deterrent to criminal conduct by defendants, convicted upon their plea of guilty, who are released pending sentence.”<sup>7</sup>

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5. See *People v. Maietta*, 578 N.Y.S.2d 529, 533 (App. Div. 1st Dep’t 1991).

6. *Maietta*, 578 N.Y.S.2d at 533.

7. *Id.*

The rationale behind sentence enhancement is that plea bargains serve as a contract between the defendant and the state,<sup>8</sup> where leniency is offered in exchange for adherence to specific conditions, such as avoiding rearrest before sentencing.<sup>9</sup> The threat of an enhanced sentence provides a powerful incentive for defendants to comply, considering the arrest need not actually result in conviction to allow for sentence enhancement.<sup>10</sup> For this reason, the standard by which a rearrest is deemed sufficient for sentence enhancement is critical.

#### *A. Pre-Outley: Judicial Discretion*

Before the establishment of the Outley hearing, New York courts did not have a standardized process for addressing situations where a defendant violated a condition of their plea agreement between the plea and sentencing.<sup>11</sup> Judges generally had discretion to determine how to handle such violations, without a formalized procedure to assess the circumstances surrounding the defendant's new arrest.<sup>12</sup> In effect, judges had authority to enhance sentences as long as a defendant violated a condition to their plea agreement.<sup>13</sup>

The Court's discretion to enhance was limited only by the U.S. Supreme Court's holding that in order to satisfy due process, "the sentencing court must assure itself that the information upon which it bases the sentence is reliable and accurate."<sup>14</sup> However, the deferral to judicial discretion meant that decisions regarding potential sentence enhancements were less structured and could vary widely, leading to concerns about fairness and consistency in the sentencing process. The introduction of Outley hearings aimed to address this by setting a more uniform standard for evaluating whether a post-plea arrest was based on reliable and accurate information, allowing for sentence enhancement.<sup>15</sup>

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8. See Jennifer Rae Taylor, *Restoring the Bargain: Examining Post-Plea Sentence Enhancement as an Unconscionable Violation of Contract Law*, 48 CAL. W. L. REV. 129, 138 (2011).

9. See *id.* at 130.

10. See *Outley*, 610 N.E.2d at 361.

11. See, e.g., *Maietta*, 578 N.Y.S.2d at 532.

12. See *id.*

13. See *id.*

14. *Outley*, 610 N.E.2d at 360 (citing *Mempa v. Rhay*, 389 U.S. 128, 133 (1967); *Townsend v. Burke*, 334 U.S. 736, 741 (1948)).

15. See *id.* at 361.

*B. Post-Outley: Legitimate Basis for Arrest*

In the 1993 landmark case *People v. Outley*, the Court of Appeals established a procedure and legal standard for situations where a defendant breaches “a no-arrest condition by being arrested before the sentence but denies any complicity in the underlying crime.”<sup>16</sup> This decision created the Outley hearing and the legitimate basis standard, effectively replacing the preceding custom of deferral to judicial discretion in these situations.<sup>17</sup>

*Outley* addressed the appeals of three separate defendants who accepted plea bargains containing a no-arrest condition for their initial offenses.<sup>18</sup> Before sentencing, each defendant was rearrested on additional charges, thus violating their plea agreements.<sup>19</sup> The defendants “specifically denied the commission of any criminal acts and claimed that there was no basis for their arrests,” yet each of their sentences were enhanced to be “substantially greater than stipulated in the conditional plea bargains.”<sup>20</sup>

The court was tasked with deciding “what basis for the arrest must be shown in order for the court to be relieved of its obligation to impose the bargained-for sentence.”<sup>21</sup> The defendants argued that “when a defendant denies the post-plea criminal conduct, the court must conduct an evidentiary hearing to satisfy itself by a preponderance of the evidence that the defendant has, in fact, committed the crime for which he was arrested.”<sup>22</sup> The court rejected this argument, contending that “[i]mposing such a requirement would have the effect of changing the condition of the plea bargain from not being arrested for a crime to not actually committing a crime.”<sup>23</sup> Additionally, the court feared that “the proposed evidentiary hearing rule, if adopted, would have the undesirable consequence of requiring, in effect, ‘a minitrial’ of the defendant’s guilt or innocence on the new charge.”<sup>24</sup>

Being unconvinced by the defendants’ proposed standard, the court decided that “proof that defendant actually committed the post-plea offense which led to the arrest is not necessary.”<sup>25</sup> However, if

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16. *Id.*

17. *See id.*

18. *See id.* at 358–62.

19. *See Outley*, 610 N.E.2d at 358–62.

20. *Id.* at 358.

21. *Id.*

22. *Id.* at 361.

23. *Id.*

24. *Outley*, 610 N.E.2d at 361; *see also Maietta*, 578 N.Y.S.2d at 533.

25. *Outley*, 610 N.E.2d at 361.

proof of guilt was not required, the question remained: “what lesser showing does due process require in order for the court to impose the enhanced sentence? Obviously, the mere fact of the arrest, without more, is not enough.”<sup>26</sup> Therefore, according to the court, due process is satisfied somewhere between no basis for the arrest and proof of committing the crime.<sup>27</sup> On this spectrum, the court decided due process was located at the “legitimate basis” standard.<sup>28</sup>

To apply the legitimate basis standard, the court established what has come to be known as the *Outley* hearing—“an inquiry at which the defendant has an opportunity to show that the arrest is without foundation.”<sup>29</sup> The court retains discretion to decide the nature and extent of the inquiry, “whether through a summary hearing pursuant to CPL 400.10 or some other fair means.”<sup>30</sup> The inquiry must be thorough enough “so that the court can be satisfied—not of defendant’s guilt of the new criminal charge but of the existence of a legitimate basis for the arrest on that charge.”<sup>31</sup>

The *Outley* court determined that the legitimate basis standard for the rearrests of all three defendants had been satisfied without requiring an evidentiary hearing.<sup>32</sup> The Court affirmed each appeal, holding that the sentencing courts did not abuse their discretion in imposing the enhanced sentences.<sup>33</sup>

The first defendant, *Outley*, pleaded guilty to endangering the welfare of a child, and he was rearrested before sentencing for criminal contempt for violating orders of protection that required him to stay away from his wife and daughter.<sup>34</sup> *Outley* argued he didn’t intend to violate the orders and had no malicious intent, as he only visited the residence to collect papers for a legal proceeding.<sup>35</sup> His attorney requested an evidentiary hearing to contest the arrest.<sup>36</sup> The Court of Appeals held that there was a legitimate basis for the arrest, despite

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26. *Id.*

27. *See id.*

28. *See id.*

29. *Id.*

30. *Outley*, 610 N.E.2d at 361.

31. *Id.*

32. *See id.*

33. *See id.* at 362.

34. *See id.* at 358.

35. *Outley*, 610 N.E.2d at 358.

36. *See id.*

the innocent nature of Outley's conduct, because he conceded that he had violated the protection order.<sup>37</sup>

Defendant Maietta pleaded guilty to multiple burglary-related charges, and was later rearrested and indicted for another burglary in which his registered jeep was used.<sup>38</sup> In his defense, Maietta had three alibi witnesses willing to testify that he was working at the time of the crime.<sup>39</sup> Additionally, his attorney produced a statement from another person admitting to using the jeep for the burglary, effectively proving that Maietta had not committed the crime for which he was arrested.<sup>40</sup> Despite the exculpatory evidence, the Court of Appeals still held that the legitimate basis threshold was met, reasoning that the Grand Jury had returned an indictment, the jeep was concededly owned by Maietta, and a policeman had identified him as the driver of the jeep when it left the scene.<sup>41</sup>

The third defendant, Ogtong, pleaded guilty to criminal possession of a weapon.<sup>42</sup> Directly after pleading guilty, Ogtong went to visit his probation officer, and he was discovered carrying a metal tin with traces of cocaine—only 0.4 grains, residue from a previous occasion.<sup>43</sup> Nevertheless, he was rearrested, denied an evidentiary hearing, and his original sentence was enhanced.<sup>44</sup> Again, the Court of Appeals held that there was a legitimate basis for the arrest.<sup>45</sup> The court reasoned that the sentencing court had afforded Ogtong an adequate opportunity to explain the circumstances of the arrest, and it concluded there was no error in the sentencing court finding Ogtong's explanation insufficient.<sup>46</sup>

The defendants' appeals in *People v. Outley* illustrate that the legitimate basis standard falls on the evidentiary spectrum between having no rationale for the arrest and proving the commission of a crime, but it sits much closer to the lower end of that range. It requires more than mere speculation but significantly less than what a probable cause standard or a preponderance of the evidence standard would demand. Essentially, this means that while a court cannot enhance a sentence

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37. *See id.* at 361.

38. *See id.* at 359.

39. *See id.*

40. *Outley*, 610 N.E.2d at 359.

41. *See id.* at 361–62.

42. *See id.* at 360.

43. *See id.*

44. *See id.*

45. *See Outley*, 610 N.E.2d at 362.

46. *See id.*

based on a baseless arrest alone, it also does not need to be persuaded that the defendant likely committed the offense. The standard permits a sentence enhancement as long as there is some credible indication—short of proving guilt, or even likelihood of guilt—that the arrest simply had a reasonable foundation.

## II. CONSTITUTIONAL AND CONTRACTUAL INJUSTICE OF THE OUTLEY STANDARD

The legitimate basis standard established in *People v. Outley* is deeply flawed, as it undermines both constitutional protections and fundamental principles of contract law. Plea agreements, which are essentially contracts between defendants and the state, are meant to provide defendants with certainty in exchange for waiving certain rights, such as the right to a trial. However, when courts impose sentence enhancements based on minimal evidence—such as an arrest that does not result in a conviction—they erode the integrity of these agreements and violate defendants' constitutional rights. By allowing courts to enhance sentences based on mere allegations rather than convictions, the legitimate basis standard undermines the presumption of innocence and facilitates a system in which defendants can suffer severe consequences for unproven conduct.

### *A. Violation of Constitutional Protections*

The legitimate basis standard compromises several constitutional safeguards designed to protect defendants from arbitrary or excessive punishment. By allowing sentence enhancements based on only a legitimate basis for arrest—a standard far lower than probable cause or proof beyond a reasonable doubt—defendants are deprived of their Sixth Amendment right to a jury trial, their Fifth and Fourteenth Amendment rights to due process, and, in some cases, their Fifth Amendment protection against double jeopardy. These constitutional guarantees are the foundation of a fair criminal justice system, ensuring that penalties are imposed only after rigorous procedural safeguards have been met. Yet, the legitimate basis standard bypasses these protections, leaving defendants vulnerable to increased sentences based on allegations that may never be proven in court.

#### *1. Right to a Jury Trial*

The right to a jury trial for criminal defendants is enshrined in the Sixth Amendment to the U.S. Constitution, which guarantees that “in all criminal prosecutions, the accused shall enjoy the right to a speedy

and public trial, by an impartial jury.”<sup>47</sup> This protection was designed to ensure that the power to decide a defendant’s fate lies with the community rather than the government alone, safeguarding individuals from arbitrary or excessive punishment.<sup>48</sup> The Supreme Court has interpreted this right to extend beyond the trial itself to include factual determinations that affect sentencing, as established in *Apprendi v. New Jersey* and *Blakely v. Washington*.<sup>49</sup> In *Apprendi*, the Court held that any fact that increases a defendant’s sentence beyond the statutory maximum must be determined by a jury.<sup>50</sup> *Blakely* further clarified that a sentence cannot be enhanced beyond the statutory maximum based on judicial findings of fact, even if those findings are within the guidelines range.<sup>51</sup> In *Blakely*, the Supreme Court held that the ‘statutory maximum’ for *Apprendi* purposes is not the highest sentence a judge may impose after finding additional facts, but rather the maximum sentence a judge may impose based solely on the facts reflected in the jury’s verdict or admitted by the defendant.<sup>52</sup> This decision reinforced the principle that any fact increasing a defendant’s punishment beyond this limit must be submitted to a jury and proved beyond a reasonable doubt, ensuring that sentencing remains within the bounds of Sixth Amendment protections.

While *Apprendi* and *Blakely* specifically address situations where sentence enhancements exceed the statutory maximum, their core principles can and should apply equally to enhancements within the statutory range.<sup>53</sup> The rationale of these decisions was that sentencing decisions, especially those with substantial consequences

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47. U.S. CONST. amend. VI.

48. See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

49. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); see also *Blakely v. Washington*, 542 U.S. 296, 343–47 (2004).

50. See *Apprendi*, 530 U.S. at 490.

51. See *Blakely*, 542 U.S. at 305, 308.

52. See *id.* at 303.

53. See Jonathan F. Mitchell, *Apprendi’s Domain* 298–99 (Chi. Unbound, Pub. L. and Legal Theory Working Paper No. 160, 2007) (arguing that judicial fact-finding in sentencing can undermine the Sixth Amendment jury trial right by allowing courts to impose heightened penalties based on facts not found by a jury beyond a reasonable doubt. Mitchell further critiques *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), for permitting mandatory minimum enhancements through judicial findings, warning that such practices erode the jury’s constitutional role. See *id.* at 311–19. The discussion highlights concerns about sentencing schemes that rely on judicial determinations rather than jury findings, raising similar questions about the extent to which fact-finding in sentence enhancements should be subject to the *Apprendi* and *Blakely* framework. See *id.*).

relating to punishment, should rest on facts determined by a jury.<sup>54</sup> A sentence that is enhanced up to the statutory maximum is no less consequential than one that exceeds it and should not escape the constitutional requirement for jury involvement.

When a sentence enhancement occurs, even within the prescribed range, the defendant's punishment is significantly altered. The sentencing judge's decision to impose the maximum permissible sentence based on factual determinations that may not be adjudicated by a jury violates the principle that sentencing facts are elements of the offense, just as the facts of guilt are. The absence of jury participation in such critical findings undermines the Sixth Amendment protections that *Apprendi* and *Blakely* were designed to safeguard.

Outley hearings illuminate the dangers of relying on a judge's factual determinations rather than those of a jury. The legitimate basis standard introduces a much lower threshold than the beyond-a-reasonable-doubt standard required for jury findings under *Apprendi* and *Blakely*. This contrasts with the constitutional protections guaranteed by the Sixth Amendment, where facts that could enhance a sentence must be proven to the jury beyond a reasonable doubt. A judge's ability to enhance a sentence based on findings that don't meet the rigorous evidentiary standards of a jury trial represents a failure to preserve the integrity of the Sixth Amendment's jury trial guarantee.

By permitting judicial fact-finding under the legitimate basis standard, we risk an erosion of the protections that *Apprendi* and *Blakely* afford. The Sixth Amendment's purpose is to ensure that any fact leading to a significant enhancement of a defendant's punishment is determined by a jury. If this standard is weakened, as it is under *Outley*, the defendant's right to a fair trial—which is core to the constitutional system of justice—is compromised.

## 2. Due Process

The Fifth and Fourteenth Amendments of the U.S. Constitution guarantee that no person shall be “deprived of life, liberty, or property, without due process of law.”<sup>55</sup> This fundamental principle ensures that individuals are not subjected to arbitrary or unfair treatment by the State, particularly when their liberty is at stake. In the context of sentence enhancements based on post-plea conduct, due process requires

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54. *Blakely*, 542 U.S. at 313 (“As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.”).

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

that the sentencing court “assure itself that the information upon which it bases the sentence is reliable and accurate.”<sup>56</sup>

The Supreme Court has long held that due process protections are not limited to trials but extend to any significant deprivation of liberty.<sup>57</sup> In *Mathews v. Eldridge*, the Court articulated a framework for determining what procedures are required under the Due Process Clauses, which includes balancing three factors: (1) the private interest affected by the action, (2) the risk of erroneous deprivation of that interest through the procedures used, and (3) the government’s interest in using the challenged procedures.<sup>58</sup> In the context of *Outley* hearings, the private interest at stake is significant—defendants face increased sentences and, in some cases, lengthy periods of incarceration. The legitimate basis standard, which permits sentence enhancements based on minimal evidence, increases the risk of erroneous deprivation of liberty. The government’s interest in swift sentence enhancements is not sufficiently compelling to justify this risk without further procedural safeguards.

In *Townsend v. Burke*, the Supreme Court highlighted the need for accuracy in sentencing, particularly where a judge relies on misinformation or inadequate evidence.<sup>59</sup> Although *Townsend* primarily dealt with the use of inaccurate information in sentencing, its principles about fairness in the sentencing process can be extended to the context of post-plea hearings. The legitimate basis standard allows sentence enhancements based on potentially unreliable information, such as arrests not followed by convictions or facts not properly adjudicated, without the procedural protections of a full hearing or trial. The lack of adequate safeguards risks increasing sentences based on erroneous or unverified facts, violating the defendant’s right to due process.

The New York Court of Appeals held in *Outley* that due process was satisfied by their newly established legitimate basis standard, reasoning that this minimal threshold was sufficient to ensure fairness in post-plea sentence enhancements.<sup>60</sup> The court concluded that this standard allowed the sentencing court to rely on information

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56. *Outley*, 610 N.E.2d at 360–61 (citing *Mempa v. Rhay*, 389 U.S. 128, 133 (1967); *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *United States v. Lee*, 818 F.2d 1052, 1055 (2d Cir. 1987)).

57. See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); see also *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 12 (1979).

58. *Mathews*, 424 U.S. at 334–35.

59. See *Townsend*, 334 U.S. at 740–41.

60. See *Outley*, 610 N.E.2d at 361.

supporting the arrest without requiring the full procedural protections of a trial.<sup>61</sup> This reasoning overlooks the core principle that decisions impacting a defendant's liberty must be based on reliable and accurate facts. The legitimate basis standard, which only requires a showing that an arrest was justified by some level of evidence—far below the level of probable cause—does not ensure that the underlying facts are thoroughly examined or verified. The court may rely on mere allegations or unproven accusations, without the safeguards of an evidentiary hearing or cross-examination, leaving the defendant vulnerable to sentence enhancements based on unreliable or incomplete information. The legitimate basis standard fails to meet the constitutional requirement that the facts relied upon in sentencing are accurate and reliable, compromising the fairness of the sentencing process and undermining the defendant's due process rights.

### *3. Double Jeopardy*

The Fifth Amendment to the U.S. Constitution provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.”<sup>62</sup> This principle, known as the Double Jeopardy Clause, is a cornerstone of American jurisprudence, ensuring that individuals are not subjected to multiple punishments or repeated prosecutions for the same offense. While sentence enhancements like those in Outley hearings occur within a single proceeding, they raise significant double jeopardy concerns when predicated on unrelated and unproven allegations of post-plea conduct.

At its core, the prohibition against double jeopardy prevents not only successive prosecutions but also multiple punishments for the same offense.<sup>63</sup> The concern with Outley hearings arises because sentence enhancements in these cases are imposed based on allegations that have not been tested in a full criminal trial. Though part of the same general sentencing process, these enhancements are akin to a second punishment, as they are triggered by unadjudicated conduct that may be unrelated to the original offense. The enhancement serves to penalize the defendant for conduct that has not been proven beyond

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61. *See id.*

62. U.S. CONST. amend. V.

63. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (noting that the Fifth Amendment “guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.”).

a reasonable doubt, raising serious concerns about fairness and reliability in the judicial process.

The Outley framework introduces a notably lower standard of proof than what would be required in a criminal trial. By relying on the low evidentiary threshold of legitimate basis, the system opens the door for a punishment to be imposed based on questionable or unreliable facts. This is in direct conflict with the protections the Double Jeopardy Clause was designed to provide—namely, shielding a defendant from being punished twice for the same offense or based on unproven allegations.

Moreover, the potential for multiple punishments arises because the court, in some instances, is effectively imposing a penalty for a defendant's actions or behavior that have not been legally substantiated. This procedural flaw undermines the constitutional principle that punishment can only be meted out after a reliable and just adjudication of the facts.<sup>64</sup> Without stronger safeguards to ensure that enhancements are based on proven facts, the Outley standard circumvents double jeopardy protections and expose defendants to an unfair “second” punishment based on allegations that have not undergone the scrutiny of a full trial.

### *B. Breach of Contract Law Principles*

#### *1. The Plea Agreement as a Contract*

The legal framework of plea bargains is predicated on the understanding that these agreements function analogously to contracts, establishing obligations for both the defendant and the State. Courts have consistently recognized that a plea bargain represents a binding agreement, where leniency is exchanged for the defendant's waiver of jury trial and their compliance with specified terms, such as the no-arrest condition.<sup>65</sup> “Indeed, many scholars and courts have embraced the conflation of criminal and contract law, concluding: ‘a plea bargain is not like a contract; it is a contract.’”<sup>66</sup> Given this contractual characterization, it follows that the enforcement and modification of plea agreements must adhere to principles of contract law, including the foundational principle that parties must act in good faith and deal

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64. See U.S. CONST. amend. V; U.S. CONST. amend. VI; U.S. CONST. amend. XIV, § 1.

65. See Taylor, *supra* note 8, at 130.

66. Taylor, *supra* note 8, at 138 (citing Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 173 (2008)).

fairly with one another.<sup>67</sup> It also follows that the plea agreement, as a contract, can be invalidated when the process is “tainted by fraud or force, thus rendering the entire contract ‘unconscionable’—that is, impermissibly unfair.”<sup>68</sup>

## 2. Good Faith and Fair Dealing

A fundamental principle of contract law is the duty of good faith and fair dealing, which requires that neither party act in a way that undermines the agreed-upon terms or deprives the other party of the benefits of the contract.<sup>69</sup> This principle is especially crucial in plea agreements, where defendants waive significant constitutional rights, such as the right to a jury trial, in exchange for a lenient sentence.<sup>70</sup> If the State retains unchecked discretion to enhance a defendant’s sentence based on an unproven arrest, it effectively strips the defendant of the certainty that the plea agreement promised.

The legitimate basis standard established in *People v. Outley* allows courts to enhance sentences based on arrests that might not even be supported by probable cause. This practice fundamentally breaches the duty of fair dealing by permitting the State to impose additional punishment without proving actual wrongdoing. Because plea agreements are premised on a defendant’s reasonable expectation that they will receive the sentence for which they bargained, allowing post-plea sentence enhancements based on unproven allegations deprives the defendant of the benefit of the bargain. When the State enhances a sentence based on only a legitimate basis for the new arrest, it effectively modifies the plea agreement unilaterally, violating the principles of fair dealing that should govern contract enforcement.<sup>71</sup>

The duty of good faith also requires that contract enforcement mechanisms be proportionate; one party cannot impose disproportionate penalties for minor breaches.<sup>72</sup> Yet, under *Outley*, the State may impose the maximum allowable sentence—even when an arrest does not result in conviction. This result is fundamentally unfair, as it

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67. See RESTATEMENT (SECOND) OF CONTS. § 205 (AM. L. INST. 1981).

68. Taylor, *supra* note 8, at 138.

69. See RESTATEMENT (SECOND) OF CONTS. § 205 (AM. L. INST. 1981).

70. See Taylor, *supra* note 8, at 130.

71. See *Santobello v. New York*, 404 U.S. 257, 262 (1971) (recognizing that plea agreements are contractual in nature and must be adhered to in good faith, cautioning against unilateral modifications by the State).

72. See RESTATEMENT (SECOND) OF CONTS. § 356 (AM. L. INST. 1981) (noting that penalties for breach must bear a reasonable relationship to the harm caused by the breach. If a clause imposes disproportionate penalties for a minor breach, it could be deemed a penalty and thus unenforceable under the good faith standard).

allows the prosecution to benefit from the plea agreement while denying the defendant the certainty that formed the basis of their decision to plead guilty. A standard that allows for such arbitrary sentence enhancement renders the plea agreement illusory, violating the most basic tenets of contract law.<sup>73</sup>

### *3. Unconscionability*

Even assuming that the plea agreement functions as a valid contract, its enforcement may still be voidable if the agreement is unconscionable.<sup>74</sup> A contract is deemed unconscionable when it is so one-sided and unfair that it shocks the conscience or when one party lacks any meaningful bargaining power in negotiating its terms.<sup>75</sup> Courts have long recognized that unconscionable contracts can be invalidated, particularly when one party is coerced into an agreement under circumstances that give them no reasonable alternative.<sup>76</sup>

Plea agreements already involve a significant power imbalance, as defendants face the threat of a harsher sentence if they reject a plea deal and proceed to trial. This imbalance is exacerbated when the State reserves the right to enhance a defendant's sentence based on an arrest alone. Because defendants cannot negotiate against this risk, the plea agreement—once thought to offer certainty—becomes an illusory contract.<sup>77</sup>

In New York, an agreement may be invalidated based on unconscionability if it is both procedurally and substantively unconscionable.<sup>78</sup> Procedural unconscionability arises when a contract is imposed under conditions of coercion, lack of negotiation, or an imbalance of bargaining power.<sup>79</sup> Substantive unconscionability arises when the

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73. See RESTATEMENT (SECOND) OF CONTS. § 77 (AM. L. INST. 1981) (noting that a promise or agreement is illusory if, in essence, it doesn't actually commit the party to anything meaningful. An illusory contract cannot be enforced because it lacks mutual consideration, which is fundamental to contract formation and enforceability).

74. See Taylor, *supra* note 8, at 138; see also RESTATEMENT (SECOND) OF CONTS. § 208 (AM. L. INST. 1981).

75. See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

76. See, e.g., *id.*; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340 (2011); King v. Fox, 851 N.E.2d 1184, 1191 (N.Y. 2006); Gillman v. Chase Manhattan Bank, 534 N.E.2d 824, 828 (N.Y. 1988).

77. See RESTATEMENT (SECOND) OF CONTS. § 77 (AM. L. INS. 1981); see also Taylor, *supra* note 8 at 130.

78. See Gillman, 534 N.E.2d at 828.

79. See *id.*

contract's terms are so one-sided that they create an unfair advantage for one party.<sup>80</sup>

Enforcing a post-plea enhancement under the Outley standard is both procedurally and substantively unconscionable. The conditions of the plea process alone meet the criteria for procedural unconscionability because defendants cannot "shop around" for fairer prosecutors and must accept whatever terms the State offers.<sup>81</sup> In terms of substantive unconscionability, the State's ability to impose a harsher sentence based on an unproven allegation makes the plea agreement fundamentally unfair and one-sided. When the State can unilaterally alter the terms of the plea agreement based on only a legitimate basis for arrest, the lack of a higher evidentiary threshold further undermines the fairness of the agreement and should render it unenforceable.

### III. SENTENCE ENHANCEMENT STANDARDS ACROSS JURISDICTIONS

While jurisdictions vary in their approach to post-plea sentence enhancements, most fall into three broad categories: those that grant judges broad discretion, those that require a probable cause showing, and those that apply a preponderance of the evidence standard. New York stands apart as the only state to explicitly adopt a "legitimate basis" standard, which provides minimal protections for defendants. This section examines the predominant approaches used in other jurisdictions and concludes by situating New York's standard within this broader framework.

Before examining how other jurisdictions handle sentence enhancements based on post-plea arrests, it is important to clarify that this analysis does not purport to be an exhaustive empirical survey of all 50 states. Rather, it offers a representative sample of jurisdictions that illustrate the range of evidentiary standards courts apply in these circumstances. Tracking sentence enhancement standards empirically presents significant challenges, as states use varying terminology, rely on different sources of law, and often do not clearly articulate the

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80. *See id.* at 829.

81. *See Taylor, supra* note 8, at 143 ("In the plea bargain context, the 'market' in which these agreements are reached is substantially different from one in which free market principles are typically employed. There is no competition because 'defendants cannot shop around for prosecutors.' Indeed, individual prosecutors are identical agents of the office they work for, indistinguishable under the eyes of the law. As such, each prosecutor's office has an absolute monopoly on plea bargains and a massive premium on bargaining power compared to the defendants with whom they negotiate.").

precise evidentiary threshold required.<sup>82</sup> Accordingly, this section identifies general trends rather than attempting a comprehensive catalog of all state practices.

#### *A. Judicial Discretion*

Nearly half of states grant broad judicial discretion to enhance a defendant's sentence for violating a no-arrest condition of their plea agreement. In some of these states—such as North Carolina,<sup>83</sup> Ohio,<sup>84</sup> and South Dakota<sup>85</sup>—judicial discretion is explicitly codified in statute or case law. In others, the lack of a defined evidentiary threshold effectively leaves the decision to the sentencing judge's subjective assessment. While this flexibility allows courts to make individualized determinations, it also introduces significant variability and the potential for arbitrary or inconsistent sentencing outcomes.

#### *B. Probable Cause*

A probable cause standard is used in Connecticut,<sup>86</sup> Montana,<sup>87</sup> and Wisconsin.<sup>88</sup> This standard aligns with the threshold required for

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82. A full empirical survey of how each state enhances sentences based on post-plea arrests would require extensive review of state statutes, case law, and judicial discretion in sentencing decisions, many of which do not clearly define the evidentiary threshold required. Some states apply explicit evidentiary standards, while others leave the decision to judicial discretion, making direct comparisons difficult. Additionally, state courts may use different wording to describe similar legal standards, further complicating efforts to categorize jurisdictions with precision. Consequently, this analysis relies on a representative selection of states to illustrate the spectrum of approaches rather than a complete empirical mapping.

83. *See State v. Thorne*, 865 S.E.2d 768, 772–73 (N.C. Ct. App. 2021); *State v. Ditty*, 902 S.E.2d 319, 322 (N.C. Ct. App. 2024).

84. *See State v. Mathews*, 456 N.E.2d 539, 541 (Ohio Ct. App. 1982) (“Ordinarily, the result of the breach of the plea-bargain agreement is a matter lying within the sound discretion of the trial court.”).

85. *See, e.g., State v. Stevenson*, 652 N.W.2d 735, 738 (S.D. 2002) (reasoning that the State had a basis to believe there was a violation of the plea agreement, which allowed the State to withdraw its agreement not to seek a harsher sentence).

86. *See State v. Petaway*, 946 A.2d 906, 915 (Conn. App. Ct. 2008) (“[T]he court set forth the burden of proof for the violation of the conditions of the *Garvin* agreement as ‘probable cause.’”).

87. *See State v. Claus*, 538 P.3d 14, 20 (Mont. 2023) (“[A] district court has the discretion to decide whether there was probable cause the defendant committed a crime considering all the evidence, and they are not obliged to rule for the defendant simply because the defendant presents a defense.”).

88. *See State v. Reed*, 839 N.W.2d 877, 882 (Wis. Ct. App. 2013) (“Allowing the State to make a sentencing recommendation based on the probable cause charging of new crimes does not deprive Reed of any constitutional protections because this dispute does not arise in the prosecution for the new crimes.”).

an arrest, demanding sufficient facts to lead a reasonable person to believe that the defendant committed the alleged offense.<sup>89</sup> While still lower than the burden of proof required for conviction, this standard at least provides greater protection than mere judicial discretion by ensuring some evidentiary basis for the alleged conduct before a harsher sentence is imposed.

### *C. Preponderance of the Evidence*

A plurality of states apply a “preponderance of the evidence” standard, including Alabama,<sup>90</sup> Alaska,<sup>91</sup> Arizona,<sup>92</sup> Arkansas,<sup>93</sup> California,<sup>94</sup> Colorado,<sup>95</sup> Delaware,<sup>96</sup> Florida,<sup>97</sup> Georgia,<sup>98</sup> Indiana,<sup>99</sup>

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89. *See Gerstein v. Pugh*, 420 U.S. 103, 111 (1975).

90. *See ALA. R. CRIM. P. 26.6(b)(2)* (“Disputed facts shall be determined by the preponderance of evidence.”).

91. *See ALASKA STAT. tit. 12, § 12.55.025(i)* (“Except as otherwise provided in this chapter, the preponderance of the evidence standard of proof applies to sentencing proceedings.”).

92. *See State v. Warren*, 604 P.2d 660, 665 (Ariz. Ct. App. 1979) (reasoning that the preponderance of the evidence standard is applied to determinations regarding the defendant’s violation of the terms of the plea agreement).

93. *See Wiley v. State*, 655 S.W.3d 751, 752 (Ark. Ct. App. 2022). (reasoning that the preponderance of the evidence standard is applied to find sufficient evidence of the defendant committing a new crime, allowing the court to revoke his suspended sentence).

94. *See People v. Rabanales*, 85 Cal. Rptr. 3d 607, 619 (Ct. App. 2008) (“[I]t was appropriate for the trial court to apply the preponderance of evidence standard to determine whether defendant violated the break no laws condition of his release.”).

95. *See COLO. REV. STAT. ANN. tit. 18, § 18-1.3-102* (“The burden of proof at the hearing shall be by a preponderance of the evidence”).

96. *See Chavous v. State*, 953 A.2d 282, 286 (Del. 2008) (“Whether a plea agreement has been breached is a matter for the trial judge to determine based upon a preponderance of the evidence.”).

97. *See Neeld v. State*, 977 So. 2d 740, 745 (Fla. Dist. Ct. App. 2008) (“Although proof of a violation of the plea agreement is required, we conclude that the State need only present evidence establishing the breach by the preponderance of the evidence.”).

98. *See White v. State*, 837 S.E.2d 838, 844 (Ga. 2020) (reinforcing that the preponderance of the evidence is a sufficient standard of proof in various sentencing contexts, unless a higher standard is explicitly required by law).

99. *See Debro v. State*, 821 N.E.2d 367, 374 (Ind. 2005) (comparing the process of determining whether a defendant violated a plea agreement to a probation revocation hearing, where the state is required to prove the violation by a preponderance of the evidence).

New Hampshire,<sup>100</sup> Oklahoma,<sup>101</sup> Pennsylvania,<sup>102</sup> Tennessee,<sup>103</sup> Texas,<sup>104</sup> Utah,<sup>105</sup> and Washington.<sup>106</sup> Under this standard, the prosecution must demonstrate that it is more likely than not that the defendant engaged in the alleged conduct. This threshold is significantly higher than the probable cause standard and provides a greater safeguard against wrongful sentence enhancements, ensuring that courts rely on more substantial evidence before imposing additional punishment.

#### *D. Situating New York's Legitimate Basis Standard*

New York is unique in its explicit use of the legitimate basis standard, which falls below even the probable cause threshold and allows sentence enhancements based on little more than an unverified arrest.<sup>107</sup> Unlike jurisdictions that grant judges broad discretion without a defined standard, New York has formally adopted a threshold—but one that provides minimal protection for defendants. Compared to the probable cause and preponderance of the evidence standards,

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100. *See State v. Kelly*, 986 A.2d 575, 577 (N.H. 2009) (“A deferred sentence may be imposed upon proof by a preponderance of the evidence of a violation of the condition upon which the sentence was deferred.”).

101. *See Hagar v. State*, 990 P.2d 894, 898 (Okla. Crim. App. 1999) (“Violations of the terms of the plea agreement or performance contract need only be shown by a ‘preponderance’ of the evidence.”).

102. *See* 204 PA. CODE tit. 204 § 303.9 (“The application of an enhancement is determined by the court at sentencing, based on a preponderance of the evidence that the enhancement factor is present.”); *see also Commonwealth v. Walker*, 666 A.2d 301, 304 (Pa. Super. Ct. 1995) (“When reviewing whether the evidence supports application of a sentencing enhancement provision, this court has held that a preponderance of the evidence standard is appropriate and does not violate due process . . . .”).

103. *See State v. Bowman*, 327 S.W.3d 69, 102 (Tenn. Crim. App. 2009) (“The trial court properly found that application of this enhancement factor was supported by a preponderance of evidence, and we therefore conclude that the trial court’s application of this enhancement factor did not constitute an abuse of discretion.”).

104. *See Hacker v. State*, 389 S.W.3d 860, 864–65 (Tex. Crim. App. 2013) (“To convict a defendant of a crime, the State must prove guilt beyond a reasonable doubt, but to revoke probation [whether it be regular probation or deferred adjudication], the State need prove the violation of a condition of probation only by a preponderance of the evidence.”).

105. *See Layton City v. Stevenson*, 337 P.3d 242, 247 (Utah 2014) (“We conclude that the ‘preponderance of the evidence’ standard applies when the prosecution attempts to prove that a defendant failed to comply with a plea in abeyance condition.”).

106. *See State v. Townsend*, 409 P.3d 1094, 1097 (Wash. Ct. App. 2018) (“If a defendant breaches a plea agreement, the State may rescind it. However, before doing so the State must prove breach by a preponderance of the evidence.”).

107. *See Outley*, 610 N.E.2d at 361.

which demand a more rigorous factual basis, New York's approach offers the least protection against unjust sentence enhancements.

#### CONCLUSION

The comparative analysis of sentence enhancement standards affirms that New York's legitimate basis standard is among the least protective of defendants' rights. The largest share of states employs the preponderance of the evidence standard, which strikes a more appropriate balance between judicial efficiency and the protection of constitutional rights. New York should, at a minimum, adopt the probable cause standard to ensure that sentence enhancements are not based on tenuous or unproven allegations. However, aligning with the larger share of states by adopting the preponderance of the evidence standard would better safeguard defendants' rights and uphold the integrity of plea agreements, ensuring that enhanced sentences are imposed based on substantial and credible evidence.

Beyond the comparison of state practices, this Note demonstrates that New York's legitimate basis standard not only undermines the presumption of innocence but also infringes upon fundamental constitutional protections, including the right to a jury trial, the right to due process, and protections against double jeopardy. The standard allows for punitive consequences based on mere allegations, disregarding the foundational principle that individuals are innocent until proven guilty. Furthermore, this standard erodes the contractual nature of plea agreements by allowing the state to renege on negotiated terms without substantial justification, subverting the trust and predictability essential to the plea-bargaining process.

The systemic inequities introduced by the legitimate basis standard disproportionately affect marginalized communities, where over-policing increases the likelihood of arrests based on tenuous grounds.<sup>108</sup> This exacerbates existing disparities in the criminal justice

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108. See Nazgol Ghandnoosh, *Black Lives Matter: Eliminating Racial Inequality in the Criminal Justice System*, THE SENT'G PROJECT (Feb. 3, 2015), <https://www.sentencingproject.org/reports/black-lives-matter-eliminating-racial-inequality-in-the-criminal-justice-system/> (on file with the Syracuse Law Review); Floyd v. City of New York, 959 F. Supp. 2d 540, 589 (S.D.N.Y. 2013) (finding that, within any area, NYPD conducted more stops in areas with higher populations of Black and Hispanic residents, even when controlling for other variables); *See generally* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75 (2020) (finding the criminal justice system's structural biases result in the disproportionate targeting and arrest of people of color); Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, 4 NATURE HUM. BEHAV. 736, 737–39

system and perpetuates cycles of incarceration for individuals who may not have committed new offenses. By adopting a higher evidentiary standard, such as preponderance of the evidence, New York can move toward a more just and equitable system that respects defendants' rights, maintains the integrity of plea agreements, and upholds constitutional protections. Such reform is essential to ensure that sentencing practices do not become mechanisms for arbitrary or unjust punishment, but rather reflect the fair and balanced administration of justice.

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(2020) (finding that Black drivers are stopped and searched more frequently than white drivers despite lower likelihoods of contraband possession).