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## THE MYTH OF THE FULLY INFORMED RATIONAL ACTOR

STEPHANOS BIBAS\*

### I. THE OUTDATED LAISSEZ-FAIRE MODEL OF THE PLEA BARGAINING MARKET

Traditionally, American criminal procedure has treated the jury trial as the norm, the basic event protected by the Bill of Rights and rules of criminal procedure. The Supreme Court has developed a range of doctrines to ensure fair jury selection and instructions, confrontation and cross-examination, and the like. But when it comes to waiving a jury trial and pleading guilty, the Court has largely assumed that defendants can readily forecast the costs and benefits of pleading guilty and do so only if plea bargaining serves their interests. Put another way, the Court has taken a laissez-faire, hands-off approach, assuming that plea bargaining is a rational and well-functioning market in which price signals obviate regulation. Free markets require only the most modest regulation to prevent force, threats, fraud, and deceit; governments need not go much further to help buyers assess the substantive desirability of deals. In this respect, the case law presupposes economists' stylized model of plea bargaining, in which each party chooses to enter into a plea agreement only if there is "mutuality of advantage."<sup>1</sup> The defendant gets a lower sentence; in exchange, the prosecution frees up time and money to pursue more defendants, and may also purchase one defendant's testimony or cooperation to use against others.

The free market works pretty well for commercial transactions, in which enough market participants are sophisticated and shop around that sellers must lower prices for everyone to match the going rate. That model roughly describes much bargaining over civil settlements, where each side usually maximizes its own dollar recovery and attorneys' fees are often pegged to a percentage of their clients' recoveries.

Unfortunately, plea bargaining is far from a well-functioning market with transparent, competitive prices. For starters, the prosecutor is a monopsonist, the only buyer with whom a defendant can shop unless he will risk going to

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1. *Brady v. United States*, 397 U.S. 742, 752 (1970).

trial.<sup>2</sup> The prosecutor probably is not looking to maximize the overall punishment or sentence, but rather is seeking to guarantee a conviction and willing to trade off severity for certainty. Likewise, the defense lawyer, often underpaid and overworked, has strong interests in moving his docket by getting his clients to plead quickly. Appointed defense lawyers are often paid a salary, a flat fee, or a low fee per case, so there is little incentive to invest extra work and resources to turn over every stone.<sup>3</sup> Also, defense lawyers vary greatly in their skills, experience, and relationships with prosecutors, which can further influence plea bargaining outcomes.<sup>4</sup> Nevertheless, the Court put great faith in defense lawyers' advice as the key to making defendants' pleas knowing and voluntary and set a very high bar for overturning pleas based on deficient legal advice.<sup>5</sup>

Perhaps the biggest problem is the assumption that defendants have enough information to rationally forecast their guilt and expected sentences and whether it makes sense to plead guilty. Most defendants do indeed know whether they are guilty of something and whether they have an obvious defense, and most guilty defendants have a reasonable idea of the witnesses and other evidence against them.<sup>6</sup> But criminal cases are much more complex than binary judgments of guilt or innocence. Often, there is a range of criminal charges that can fit a criminal transaction, and prosecutors start out stacking multiple charges only to bargain some away. There also is usually a range of criminal sentences that can fit a particular charge. That is most obvious in unstructured-sentencing systems, in which a judge can give zero to twenty years for a robbery, for example. Structured sentencing systems, though narrower, still preserve a range over which the parties can bargain. In the federal system, for example, the top of the range is at least 25% higher than the bottom.<sup>7</sup> Even when mandatory-minimum penalties can apply, prosecutors may agree to drop charges, let them run concurrently, or recommend reductions below the minimum in exchange for cooperation against other defendants.<sup>8</sup>

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2. See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1477–88 (1993); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 64–66 (1988).

3. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2477 (2004).

4. *Id.* at 2480–82.

5. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

6. Even so, stingy discovery rules can hurt defendants, especially those who are innocent or were too intoxicated or mentally ill to remember the details. Bibas, *supra* note 3, at 2494.

7. See 28 U.S.C. § 994(b)(2) (2006) (limiting top of guidelines range to 25% or six months above the bottom of the range, whichever is greater); U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A tbl. (2011) (setting forth federal sentencing ranges).

8. Bibas, *supra* note 3, at 2485.

Today, criminal convictions not only carry prison terms and fines, but also trigger a range of so-called collateral consequences. A violent-crime conviction may cost a convict his right to carry a gun and thus to work as a police officer or security guard. A sex-offense conviction, even for flashing or public urination, may require a convict to register as a sex offender and not live in large parts of cities near schools, parks, or playgrounds. A drug conviction may count as an aggravated felony, making a noncitizen automatically removable from the country. These consequences can matter greatly to defendants;<sup>9</sup> someone who has lived in America for decades and has family here may care far more about deportation than about a sentence of probation or a few months in jail. But because these consequences are nominally civil, they are not mentioned in plea agreements or plea colloquies. Traditionally, neither judges nor defense lawyers have mentioned them to their clients, as they are imposed by civil agencies and statutes rather than criminal courts.<sup>10</sup> Criminal proceedings remained formally divorced from civil ones, even though collateral consequences have in effect become predictable parts of the total punishment package. And often, especially in cases of moderate severity, that package is negotiable. Traditionally, a criminal defense lawyer might ask to have a one-year sentence bumped up from 365 to 366 days, to qualify his client for good-time credits. But where a one-year sentence is the threshold for deportation, prosecutors and judges often will agree to lower a sentence by a day, to 364 days, if a defense lawyer is knowledgeable enough to request such a favor.<sup>11</sup> Savvy, experienced defense lawyers knew enough to advise their clients and try to bargain over these consequences where possible, but many others did not.

All too often, however, these plea-bargaining issues remained below the Court's radar. Guilty pleas, and especially plea bargains, waive most possible appellate issues. Thus, disproportionately few plea-bargained cases make it all the way up to the Supreme Court's docket. Confronting an unrepresentative sample of cases, the Court continued to hyper-regulate trials while leaving plea bargaining largely untouched.<sup>12</sup>

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9. See Gabriel J. Chin and Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002).

10. *Id.*

11. See, e.g., *State v. Quintero Morelos*, 137 P.3d 114, 119 (Wash. Ct. App. 2006); 1 NORTON TOOBY & JOSEPH ROLLIN, *CRIMINAL DEFENSE OF IMMIGRANTS* § 10.1 (4th ed. 2007).

12. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1118–19 (2011).

## II. PADILLA'S RECOGNITION OF PLEA BARGAINING REALITIES

The traditional model has long since become an anachronism for the 95% of defendants who plead guilty.<sup>13</sup> What they need is not a litany of boilerplate warnings about the procedural trial rights they are waiving, as criminal procedure rules require,<sup>14</sup> because for most, a jury trial was never a serious option and the various trial procedures were immaterial. Rather, they need clear information about the substantive outcomes they will face and how good a deal they are receiving. They need to know not only the prison and parole terms but also whether they will lose custody of their children or be deported, forbidden to live at home, or barred from working in their profession.

The bar had begun to acknowledge these realities. Bar publications explained how to spot and understand immigration consequences of criminal convictions, and continuing legal education programs taught criminal defense attorneys how to navigate the thicket of immigration consequences.<sup>15</sup> Good, experienced criminal defense attorneys increasingly saw explaining these consequences as part of representing the whole client's interests within the criminal case. But less experienced attorneys and those who do not specialize in criminal or immigration law remained ignorant or unconcerned with consequences beyond the criminal sentence itself. Thus, many defendants were unpleasantly surprised, taking seemingly lenient pleas only to discover that they had unwittingly agreed to be deported.

In *Padilla v. Kentucky*, the Court for the first time confronted this cluster of issues in interpreting the Sixth Amendment's guarantee of effective assistance of counsel.<sup>16</sup> The Court acknowledged that plea bargaining is no longer a negligible exception to the norm of trials; it is the norm.<sup>17</sup> A defendant who pleads guilty is not getting some exceptional break, but ought to be getting the going rate. In contrast, the defendant who goes to trial will probably receive a heavier sentence than usual, just as only a few suckers pay full sticker price for a car. A range of options is on the table, and defendants need to explore where within that range they can fall. A competent defense lawyer "may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence" that serves both the prosecution's and the defense's interests.<sup>18</sup> The parties trade risks for certainty and may likewise

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13. *Id.*

14. *See, e.g.*, FED. R. CRIM. P. 11.

15. *See generally* J. McGregor Smyth, *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, CRIM. JUST., Fall 2009, at 42 (describing ways to mitigate collateral consequences).

16. 130 S. Ct. 1473 (2010).

17. *Id.* at 1485 & n.13.

18. *Id.* at 1486.

agree to heavier criminal sentences or restitution in exchange for avoiding collateral consequences.<sup>19</sup>

Plea bargaining is thus not an esoteric corner of the market reserved for indisputably guilty defendants who should be happy to receive any lower sentences as a matter of grace. It is the market, and defendants need competent advice about the facets and consequences of the transaction before they agree to a deal. A corollary is that a fair deal requires more than a rubber stamp by a lawyer with a pulse. Defense lawyers must explain not only the criminal sentences, but also the other consequences that will clearly flow from the convictions.<sup>20</sup> Not only affirmative misadvice, but even failure to offer advice where the correct advice is clear, violates the Sixth Amendment.<sup>21</sup> That means that defendants are not left to fend for themselves, but have an affirmative right to at least minimally competent advice.

*Padilla* thus goes well beyond the night watchman state's minimal regulation of force, threats, fraud, misrepresentations, and broken promises in an otherwise laissez-faire market. It imposes an affirmative obligation: the state must ensure that defendants have counsel who will help them to understand and evaluate the substantive merits of plea deals. The goal is not simply to forbid inaccurate or coerced pleas, but to promote a more robust and intelligent choice among alternative outcomes. That goes much further than *Santobello*'s ban on broken promises<sup>22</sup> or *Brady*'s ban on threats, misrepresentations, and bribes.<sup>23</sup> *Brady* had also required judges and counsel to explain the direct consequences authorized by the plea,<sup>24</sup> but *Padilla* significantly extended that disclosure requirement as well.

Looking backwards, one might see something vaguely similar in earlier cases that trusted competent defense counsel to ensure fair deals.<sup>25</sup> But *Padilla* imposes a much more robust and affirmative requirement on counsel. It follows the accumulated wisdom of the bar and the academy in gradually explicating defense lawyers' professional obligations. Rather than creating a new duty out of whole cloth, *Padilla* takes an incremental, common-law approach to discerning the minimum that a client can expect. That minimum need not mirror best practices, but at least it evolves to adapt to new plea-bargaining realities in a fluid market.

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19. *Id.*

20. *See, e.g., id.* at 1481–82.

21. *Id.* at 1483; *see also id.* at 1494 (Alito, J., concurring) (proposing a rule that would go beyond forbidding misadvice to require a generic warning to consult an immigration attorney about possible immigration consequences).

22. *Santobello v. New York*, 404 U.S. 257, 261–62 (1971).

23. *Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)).

24. *Id.* at 754–55.

25. *E.g., id.* at 756–57; *McMann v. Richardson*, 397 U.S. 759, 769–71 (1970).

### III. THEORETICAL MODELS VERSUS REALITY

At root, the *Padilla* decision has gone a great way toward rejecting the simplistic assumption that defendants are fully informed rational actors. Anyone who has practiced criminal law for any length of time knows that few defendants resemble a cool, calculating, cerebral Vulcan. Many are hampered by poor education, low intelligence, and limited proficiency in English. Many mistrust their appointed defense lawyers, assuming that lawyers whom they are not paying are not looking out for their interests. More importantly, though some defendants are experienced recidivists and think they know the system, few understand the process, the legalese, and the realistic range of outcomes very well. Up until now, our system has trusted judges' boilerplate plea colloquies, which are mostly about foregone procedural rights rather than the substantive merits of deals and which largely rubber stamp deals already struck. Defendants need substantive information about likely outcomes before they strike deals from defense lawyers familiar with their particular cases.

*Padilla* cannot solve all of these problems. Given the chronic underfunding of criminal defense counsel and the wide variations in their quality and workloads, no constitutional doctrine could. But it begins to attack the problem of poor information and chronic misunderstandings in plea bargaining. One of the worst aspects of collateral consequences is that, even though they are often predictable, they are hidden because they take place outside the criminal courtroom. *Padilla* brings them out into the light. That will not help all defendants: those facing very serious charges, or those whose criminal transactions are extremely simple, may face deportation regardless and have little room to bargain. But it warns them of what is coming down the pike and empowers them to explore whether there is anything they can do.

There are many other ways to provide more information to complement *Padilla's* new right to information about deportation. *Padilla's* right may or may not ultimately reach other consequences such as loss of custody, employment, public housing, or residency restrictions. Even if the Constitution does not require it, good defense lawyers should mention at least these serious consequences where they are likely to apply. Likewise, statutes and rules of criminal procedure can learn lessons from another area of law that has experimented with imparting useful information to inexperienced market participants: consumer-protection law. Laws could require putting plea agreements in writing and in plain English, with graphics to help defendants grasp numbers and comparisons. They could forbid or disfavor high-pressure tactics, such as threats to prosecute a family member, and require cooling-off periods before accepting serious felony pleas. Mildly pro-defendant default rules of construction could force prosecutors to set out their understandings and terms clearly, so that defendants will focus on them. And most of all, defense lawyers need not only better funding and lower caseloads, but also

better training and checklists to keep them from overlooking common issues and concerns.

The root problem, however, is deeper and harder to fix. There are two distinct barriers to informed decision-making: first, defendants must have enough information; and second, they must be able to understand, digest, and use that information. Almost all of our efforts, from *Boykin* on,<sup>26</sup> have gone into the first requirement. If some information is good, we reason, then more must be better. *Padilla* makes sure that defendants get some good information about immigration consequences. But that important information risks drowning, unnoticed, amidst the many other warnings that defendants receive in preparation for and during their plea colloquy. Litany after boilerplate litany can cause defendants to tune out, as the unimportant procedural wallpaper of a plea colloquy masks the crucial substantive information on which defendants ought to be focusing. Mandatory disclosures often fail for this very reason.<sup>27</sup> Less is more. But trial judges and legislatures are unlikely to pare back warnings, lest some appellate court reverse a conviction for omitting some minor point. As happens with jury instructions, warnings can encrust the plea process like barnacles, becoming verbose and incomprehensible. If it could be done, boiling down information to a simple grade or report card, and training defense counsel to offer better advice, would help more.<sup>28</sup>

Improving the advice of counsel would also address a second problem with our current over-reliance on judges' advisements at plea colloquies: the information comes too late to be of help. By the time of the plea colloquy, the defendant is not legally but psychologically committed to the deal. Given psychological sunk costs, time pressures, and all actors' desires to get things over with, defendants have almost no time to reflect and weigh collateral-consequence information if it comes at the end of the process. They need substantive information about criminal and collateral civil penalties when they are weighing the deal in earnest.

There are concrete things defense lawyers can do to improve the timely advice that defendants receive. As Professor Jack Chin suggests, defender organizations can collaborate to create and update lists of collateral consequences for each jurisdiction, as the ABA is in the process of doing, and then to turn these into usable checklists.<sup>29</sup> Lawyers must also question their clients and then summarize the most serious and common consequences

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

27. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 737–38 (2011).

28. *Id.* at 743–44.

29. Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 685–87 (2011).



applicable to each client's situation.<sup>30</sup> They must, for example, learn their clients' citizenship and professions in order to figure out whether they may face immigration or employment consequences. They must focus on the type of convictions: violent, drug, and sex offenses each carry consequences specific to that category. Margaret Love recommends that defenders take time to explore with their clients ways to avoid or mitigate collateral consequences, both by negotiating with the government at the front end of cases and through relief mechanisms at the back end.<sup>31</sup> And, as Professor Ron Wright suggests, defense lawyers can band together into larger public-defender organizations with in-house immigration and collateral-consequence experts, to better handle complex areas in which not all line attorneys can become experts.<sup>32</sup>

*Padilla* cannot revolutionize criminal justice; our system suffers from too many pathologies for a single decision to fix. But it is a welcome recognition that defendants are not fully informed rational actors who need only the negative rights to be free of threats, broken promises, lies, and bribes. They need affirmative help from their defense counsel to evaluate the fairness and desirability of their pleas, and *Padilla* is an important step in that direction.

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30. *Id.* at 689–90.

31. Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Internal Punishment to Regulation*, 30 ST. LOUIS U. PUB. L. REV. 87, 113–16 (2011).

32. Ronald F. Wright, *Padilla and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1536–39 (2011).