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Significant Entanglements: A Framework for the Civil Consequences of Criminal Convictions

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SIGNIFICANT ENTANGLEMENTS: A FRAMEWORK FOR THE CIVIL CONSEQUENCES OF CRIMINAL CONVICTIONS

Colleen F. Shanahan*

A significant and growing portion of the U.S. population is or has recently been in prison. Nearly all of these individuals will face significant obstacles as they struggle to reintegrate into society. A key source of these obstacles is the complex, sometimes unknown, and often harmful collection of civil consequences that flow from a criminal conviction. As the number and severity of these consequences have grown, courts, policymakers, and scholars have struggled with how to identify and understand them, how to communicate them to defendants and the public, and how to treat them in the criminal and civil processes. The phenomenon of civil consequences of conviction presents an overlap of civil and criminal law that poses difficult questions about how the theory behind this overlap translates to practical application.

Padilla v. Kentucky, heralded by some as a watershed and treated by others as an anomaly, is a first step in matching the law to the practical reality of the civil consequences of criminal convictions. This Article examines Padilla and the context in which it was decided and suggests that, although the dissenters in Padilla may be correct that the opinion will be difficult to apply in a coherent way, the decision has taken the first step towards a new legal doctrine of civil consequences. The Supreme Court's recent decision in Turner v. Rogers underscores that the Court's approach in these two cases creates an opportunity to consider this overlap of civil and criminal law and to create a more realistic, consistent, and just doctrine of civil consequences of criminal convictions.

This Article begins the process of defining this doctrine by suggesting that instead of inquiring into whether consequences are direct or collateral as courts have in the past, courts should inquire into whether these civil consequences are "significant entanglements" of civil and criminal law. First, courts should analyze whether the civil consequence is significant, in both an objective and subjective sense. Second, courts should examine whether the consequence is entangled with the criminal process. Where significant entanglements exist, corresponding protections should follow. The Article goes on to suggest that the significant entanglement framework can be used to analyze whether Sixth Amendment protections

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should apply to a particular civil consequence at a particular stage of the criminal process. Further, the significant entanglement framework can be applied outside the Sixth Amendment context to understand the other constitutional protections that may be applied by courts as a result of civil consequences of criminal convictions. Thus, the significant entanglement framework is the next step in developing a new doctrine for the protections that apply to civil consequences of criminal convictions and for understanding this particular intersection of civil and criminal law.

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I. INTRODUCTION

The United States is facing the results of decades of being “tough on crime”: millions of people who are leaving jail—many on probation and parole—are

attempting to reenter society.¹ This influx of individuals is a reentry crisis that potentially threatens our social and economic stability and consigns millions of Americans to a lifetime of poverty.² A key part of this reentry crisis is the civil consequences that state and federal legislatures have imposed on those convicted of a crime.³ Remarkably, many of these consequences are unknown to defendants, defense attorneys, prosecutors, and judges during plea and sentencing proceedings.⁴ The reality of this system is that individuals who have been convicted, served a sentence, and are attempting to reintegrate into society become aware of these consequences only when they are directly confronted by them—sometimes well after their interaction with the criminal justice system has ended and outside of any court proceeding.⁵ Yet, courts for years found no obligation—for a court or for counsel—to advise defendants of the consequences they would face after serving a sentence.⁶ Rather, courts relied on the theoretical division of civil and criminal law to create a distinction that labels these consequences “collateral” and isolates them from procedural protections afforded the “direct” consequences of conviction such as a jail sentence.⁷ It was into this reality that the Supreme Court’s decision in *Padilla v. Kentucky* stepped.⁸

For the first time, the Court in *Padilla* considered the practical functioning of the civil consequences of criminal convictions and rejected the distinction between direct and collateral consequences as a meaningful framework for analyzing the

1. See LAUREN GLAZE & THOMAS BONCZAR, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES 2008, BUREAU OF JUSTICE STATISTICS BULLETIN (2009) (noting that 5.1 million people were on probation or parole at the end of 2008); WILLIAM J. SABOL ET AL., U.S. DEP’T OF JUSTICE, PRISONERS IN 2008, BUREAU OF JUSTICE STATISTICS BULLETIN (2009) (noting that 2.4 million people were in state and federal prison and jail at the end of 2008).

2. See, e.g., Janet Reno, Remarks on Reentry Court Initiative at the John Jay College of Criminal Justice, New York (Feb. 10, 2000), available at <http://www.usdoj.gov/archive/ag/speeches/2000/doc2.htm>.

3. This Article uses the nomenclature “civil consequences of criminal conviction” rather than “collateral consequences” for consistency between its language and its argument that the direct-collateral distinction is no longer useful. There is, however, an important caveat to this language choice, which is that these consequences of conviction are not entirely “civil,” given their penal nature. See Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124 n.15 (2009). Similarly, one alternate set of vocabulary is “sanctions” for automatic consequences and “disqualifications” for discretionary consequences. See Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534 (codified as amended in scattered sections of 26 and 28 U.S.C.).

4. See Alec C. Ewald & Marnie Smith, *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, 29 JUST. SYS. J. 145, 153 (2008) (reporting results of survey of judges where half said prosecutors rarely or never discuss consequences, one-fifth said defense attorneys rarely or never do so, and half said defendants rarely or never do so).

5. For example, an individual who has served a prison sentence, returned to society, and chosen to pursue a new profession as a beautician may learn for the first time that she is barred from this profession. See Nora Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing*, 11 STAN. L. & POL’Y REV. 153, 156 (1999) (describing the evolution of this and similar consequences).

6. See *infra* notes 73–81 and accompanying text.

7. See *infra* notes 73–81 and accompanying text (discussing the direct-collateral distinction).

8. See 130 S. Ct. 1473 (2010).

rights of defendants.⁹ In *Padilla*, the defendant, a legally resident alien, pled guilty to a drug charge that made him automatically deportable.¹⁰ Before Mr. Padilla pled guilty, his attorney incorrectly advised him that he did not have to worry about being deported.¹¹ As a result, Mr. Padilla raised a Sixth Amendment claim for ineffective assistance of counsel.¹² The cases that preceded *Padilla*—including the Kentucky decision Mr. Padilla appealed—had found that immigration consequences were collateral and thus unprotected by the Sixth Amendment.¹³ In its reversal, the Supreme Court found that the immigration consequences to which Mr. Padilla was exposed were due Sixth Amendment protections.¹⁴ The Court then applied the two-prong test for ineffective assistance of counsel,¹⁵ found that Mr. Padilla had shown deficient performance by his attorney, and remanded for a consideration of whether prejudice had also been shown.¹⁶

In reaching its conclusion in the context of deportation resulting from a guilty plea, the Court rejected the direct-collateral distinction as a meaningful way of deciding whether Sixth Amendment protections apply to a particular civil consequence of conviction, and instead, chose to evaluate the consequence on its own terms.¹⁷ Through this fact-specific analysis, the Court found that Sixth Amendment protections apply to the consequence of deportation.¹⁸ In particular, the Court focused on the severity of deportation and examined the nature of the consequence and the criminal process to determine that a right to effective counsel existed.¹⁹ The Court's recognition of the lack of clarity and usefulness of the direct-collateral distinction, and its willingness to analyze the characteristics of a specific consequence rather than simply labeling it direct or collateral, civil or criminal, presents an opportunity.²⁰ This opportunity is to develop a coherent framework for analyzing the civil consequences of criminal convictions that reflects how these

9. *See id.*

10. *Id.* at 1477; *see infra* notes 84–119 and accompanying text (discussing *Padilla* in depth).

11. *Padilla*, 130 S. Ct. at 1478.

12. *Id.*

13. *See Commonwealth v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008).

14. *Padilla*, 130 S. Ct. at 1481.

15. *See id.* at 1482 (“[W]e first determine whether counsel’s representation ‘fell below an objective standard of reasonableness.’ Then we ask whether ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984))).

16. *Id.* at 1481–82.

17. *See id.* at 1481.

18. *See id.* at 1483.

19. *See id.*

20. *See id.* at 1476 (“However, this Court has never distinguished between direct and collateral consequences in defining the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland* The question whether that distinction is appropriate need not be considered in this case because of the unique nature of deportation. Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence. Because that distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation, advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.”).

consequences actually operate for millions of Americans. In short, it is an opportunity to provide access to justice that is currently blocked for many.

Padilla is not the only entry point for developing a new framework of civil consequences of conviction. Indeed, the broadest expression of the issue confronted in *Padilla* is the distinction between civil and criminal law.²¹ Although the theoretical distinction between civil and criminal law, the broad practical implications of that distinction, the evolution of that distinction across our legal system, and how the distinction serves (or does not serve) society are well beyond the reach of this Article, the civil consequences of conviction are one application through which to examine the fluidity between civil and criminal law.

Padilla poses this issue in the context of the right to counsel where deportation is a possible consequence of conviction, but courts are grappling with the right to counsel in multiple contexts. In the criminal process, the Sixth Amendment places the right to counsel at issue, and the protection has heightened importance because the adverse party is always the government.²² *Padilla* directly applies to those situations where the starting point is a criminal prosecution and the result is the imposition of a consequence that exists in civil law, specifically, of a consequence not created by criminal statute or regulation but by civil statute or regulation. But the right to counsel is also at issue in the civil process, where case law continues to evolve regarding how due process rights apply.²³ This related evolution that uses civil law as its entry point reveals the blurred distinction between civil and criminal law, and suggests that *Padilla*'s approach of intensive factual analysis in the criminal context also translates to protections in civil proceedings. The most recent development in this evolution is the decision in *Turner v. Rogers*.²⁴

The Supreme Court's decision in *Turner* underscores the staying power of *Padilla*'s analysis. *Turner* considered the right to counsel in a civil contempt proceeding and concluded that a defendant in such a civil proceeding is entitled to a base level of due process protections—including the right to counsel or other procedural safeguards—when threatened with incarceration.²⁵ The *Turner* decision, considering a purely civil proceeding with a penalty that resembled a

21. See, e.g., KATHERINE BECKETT & STEVE HERBERT, BANISHED (2009) (exploring “broken window” policing efforts that occur at the intersection of civil and criminal law); Wendy Gerwick Couture, *White Collar Crime's Gray Area: The Anomaly of Criminalizing Conduct Not Civilly Actionable*, 72 ALB. L. REV. 1 (2009); Laura J. Kerrigan et al., *Project: The Decriminalization of Administrative Law Penalties, Civil Remedies, Alternatives, Policy, and Constitutional Implications*, 45 ADMIN. L. REV. 367 (1993); Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385 (2011) (discussing an overlap of criminal and civil class actions, and proposing reforms in light of their respective goals).

22. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a criminal case).

23. See, e.g., *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (determining the Due Process Clause does not require provision of counsel in child support proceedings where the custodian to whom support is owed is not represented by counsel).

24. See *id.*

25. *Turner*, 131 S. Ct. 2507.

criminal one, echoes *Padilla* in that it recognizes the reality that the line between civil and criminal law is blurred.²⁶ The *Turner* Court also adopted the approach that an analysis of the procedural protections must include a consideration of the specifics of the particular proceeding and penalty.²⁷ Thus, the Court again focused on the significance of the consequence and the nature of the proceedings that the defendant confronted to conclude that procedural safeguards were required. Together, the *Padilla* and *Turner* decisions demonstrate that the Supreme Court has opened the door for a coherent doctrine of access to justice for individuals facing the civil consequences of criminal convictions.

This Article first examines the opportunity presented by the *Padilla* and *Turner* decisions. The Article goes on to propose a framework for courts considering whether Sixth Amendment rights should apply to the civil consequences of a criminal conviction. Rather than categorizing a civil consequence as either “direct” or “collateral” and then applying rights according to these strict categories, courts should begin by following the model of *Padilla* and *Turner* by examining each civil consequence based on the facts of the particular case. This examination should then analyze two key characteristics of a particular civil consequence: first, whether the consequence is “significant”; and second, whether the civil consequence is “entangled” with the criminal process. When both characteristics are present, then the consequence is a “significant entanglement,” namely, a civil consequence of sufficient importance and sufficiently intertwined with the criminal process as to warrant protection. If the consequence is a significant entanglement, then Sixth Amendment protections should apply.

The Article then applies the significant entanglement framework to several civil consequences of conviction, demonstrating how the framework operates in these instances to provide protection to some consequences but not others. In addition, the Article explores how this framework might apply in other contexts, such as analysis of the Sixth Amendment and due process protections that apply at critical stages other than the plea stage. The Article concludes that the significant entanglements framework provides a useful tool for considering the protections that should be afforded the civil consequences of criminal convictions, for considering broader procedural safeguards, and for understanding the fluidity between civil and criminal law.

26. See *supra* note 20 and accompanying text.

27. See *Turner*, 131 S. Ct. at 2510 (“Because a contempt proceeding to compel support payments is civil, the question whether the ‘specific dictates of due process’ require appointed counsel is determined by examining the ‘distinct factors’ this Court has used to decide what specific safeguards are needed to make a civil proceeding fundamentally fair. As relevant here those factors include (1) the nature of ‘the private interest that will be affected,’ (2) the comparative ‘risk’ of an ‘erroneous deprivation’ of that interest with and without ‘additional or substitute procedural safeguards,’ and (3) the nature and magnitude of any countervailing interest in not providing ‘additional or substitute procedural requirement[s].’” (citations omitted)).

II. CIVIL CONSEQUENCES OF CONVICTION, *PADILLA*, AND *TURNER*

In 2010, the Supreme Court decided *Padilla v. Kentucky*, spurring commentary alternately describing the decision as a major turning point and as inconsequential to defendants' rights.²⁸ Then, in 2011, the Supreme Court decided *Turner v. Rogers*,²⁹ which implicitly underscored the staying power of *Padilla*'s focus on the significance of penalties and the interaction of civil and criminal law. Setting aside predictions and characterizations about its potential impact on immigration, legal services, or professional responsibility, the *Padilla* decision serves as a starting point for analyzing the peculiar interaction of civil and criminal law that is the civil consequences of a criminal conviction. Rather than resting on assumptions out of sync with reality—such as that civil consequences of criminal convictions are wholly separate from the criminal process—the *Padilla* Court looked at how the civil consequence of deportation actually affects a criminal defendant.³⁰ Rather than simply deeming the deportation “collateral” to the criminal conviction and setting it aside, the Court engaged in a fact-specific and robust analysis of the applicability of the Sixth Amendment.³¹ This analysis led to all of the Justices concluding that the defendant deserved some type of notice of the consequences he faced.³² By basing its analysis on the practical application of these consequences,³³ the Court opened the door to a legal framework for considering the civil consequences of criminal convictions that accounts for the peculiar reality of this intersection of civil and criminal law. In the subsequent *Turner* decision, considering the right to counsel in a civil contempt hearing, the Court also engaged in a fact-specific inquiry into the reality of the intersection of civil and criminal law when an indigent defendant faces a criminal penalty resulting from a civil proceeding.³⁴ Thus, *Turner* underscores the Court's willingness to set aside a classification-based approach to the right to counsel and instead engage in the facts of each particular case to determine whether protections are warranted. To

28. See, e.g., Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393 (2011) (arguing that *Padilla* will not result in improvement in outcomes because substantive criminal law, sentencing law, and non-criminal law of collateral consequences will not be affected, and this broader context actually provides limited context for players to bargain to different outcomes); Rachel E. Rosenbloom, *Will Padilla Reach Across the Border?*, 34 NEW ENG. L. REV. 327, 328 (2011) (“*Padilla* undoubtedly represents a major turning point in the Court's understanding of the relationship between criminal law and immigration law.”).

29. 131 S. Ct. 2507.

30. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010) (“When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all. . . . [I]t would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so ‘clearly satisfies the first prong of the *Strickland* analysis.’” (citing *Hill v. Lockhart*, 474 U.S. 52, 62 (1985) (White, J., concurring))).

31. See *id.* at 1477–87.

32. See *id.* at 1477–97.

33. See *id.*

34. See *Turner*, 131 S. Ct. at 2512–20.

understand how the *Padilla* and *Turner* decisions present an opportunity for analyzing civil consequences of criminal convictions going forward, it is helpful to understand the legal framework that pre-dated these decisions and the context and content of the decisions themselves.

A. What Is a Civil Consequence of Conviction?

Collateral consequences, or civil consequences that follow a criminal conviction, stem from England's notion of "civil death" following conviction.³⁵ The concept of civil death was that, once a citizen had been convicted of a serious crime, he was effectively excluded from the functioning of civil society, whether by physical banishment or by complete deprivation of his rights and privileges.³⁶ Although modern American society might not admit to maintaining a system that imposes civil death, the civil consequences of a conviction "may be the most significant penalties resulting from a criminal conviction."³⁷ They affect virtually every aspect of a person's life and can range from deportation to additional incarceration to ineligibility for federal benefits to loss of custody.³⁸

Civil consequences of criminal convictions exist in disparate state and federal statutes and regulations,³⁹ but generally there are two categories of civil consequences of a criminal conviction. The first is sanctions that flow from the fact of conviction.⁴⁰ Within those consequences, some are automatically applied and some are applied on a discretionary basis, which unsurprisingly leads to wide variation.⁴¹ The second is penalties that follow, often discretionarily, from the

35. See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 511 n.310 (2010) [hereinafter Pinard, *Collateral Consequences*].

36. *Id.*

37. Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 259 (2002) [hereinafter Chin, *Race*].

38. See *id.* (noting that collateral consequences are often more severe than the sentence itself); Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259 (2009) (noting that many consequences are harsher and longer lasting than the imposed jail sentence, including: loss of parental rights; inability to perform voting and jury services; employment licensing consequences such as real estate, nursing, physical therapy, and government; inability to obtain a driver's license and passport; disqualification from educational grants, loans, and work assistance; and ineligibility for small business loans, mortgages, handgun licenses, military service, federal welfare benefits, and public housing).

39. See, e.g., Am. Bar Ass'n Criminal Justice Section, *Collateral Consequences Project*, AM. BAR ASS'N, <http://isrweb.isr.temple.edu/projects/accproject/> (last visited Mar. 5, 2012) (listing 38,012 consequences).

40. See AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 12 (3d ed. 2004) [hereinafter AM. BAR ASS'N, COLLATERAL SANCTIONS], http://www.fedcure.org/information/USSC-Symposium-0708/dir_16/Love_collateralsanctions.pdf. For example, certain convictions can lead to disqualification from voting and jury service, disqualification from federal benefits ranging from student loans to public housing, and deportation.

41. *Id.*; Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534 (codified as amended in scattered sections of 26 and 28 U.S.C.).

underlying conduct.⁴²

These consequences are imposed by local, state, or federal authorities after conviction and might go unnoticed in an individual's life until a particular circumstance or problem brings them to his or her attention. There is no mechanism in the criminal process to make individuals aware of the range of potential consequences, either before or after conviction.⁴³ This situation is complicated by the fact that consequences can apply across jurisdictions: a conviction in one state can trigger a consequence in another state even when a defendant relocates years after the conviction.⁴⁴ Further, once these consequences are imposed, there are only rare opportunities for a defendant to obtain relief.⁴⁵ Thus, although as a society we supposedly base our criminal justice system on the notion that once you have served your sentence for a crime, you have paid your debt to society and can start anew,⁴⁶ the reality is far from this ideal.

Unsurprisingly, these civil consequences of conviction are often a barrier to successful reentry.⁴⁷ Depriving individuals access to employment, identification, relationships with their children, and social services undeniably complicates the reentry process.⁴⁸ As a result, governments and non-profit organizations spend

42. For example, those who engage in "drug-related criminal activity" (as determined by a housing agency's administrative process, not by the fact of conviction) are excluded from federally funded housing benefits. Thus, the fact of conviction does not automatically impose the consequence, and a conviction is not the only basis for imposition of the consequence. *See* Lease Requirements, 24 C.F.R. § 966.4(l)(f)(12)(i)(B) (2010); *see also* Roberts, *supra* note 3, at 119, 136 n.65 (providing examples of cases where nolo contendere pleas still incur collateral consequences).

43. *See* Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 *How. L.J.* 675, 688 (2011).

44. *See* AM. BAR ASS'N, *COLLATERAL SANCTIONS*, *supra* note 40, at 22 n.23; Alec C. Ewald, *Criminal Disenfranchisement and the Challenge of American Federalism*, 39 *PUBLIUS* 427, 555 (2009).

45. *See generally* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 *How. L.J.* 753 (2011).

46. *See, e.g.,* Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 *GEO. J. ON POVERTY L. & POL'Y* 299, 299 (2005) ("You know you have made mistakes in the past, but you have learned your lesson and want to start over, this time doing things right. You are relieved to have finally paid your debt to society—or so you think. Little do you know that numerous political, social, and economic collateral consequences laws . . . intersect to negatively impact ex-offenders' lives and severely punish them long after their sentences have ended.").

47. *See* NAT'L DIST. ATT'YS ASS'N, *POLICY POSITIONS ON PRISONER REENTRY ISSUES* § 4(a), at 7 (2005), http://www.ndaa.org/pdf/policy_position_prisoner_reentry_july_17_05.pdf ("[T]he lack of employment, housing, transportation, medical services and education for ex-offenders creates barriers to successful reintegration and must be addressed as part of the reentry discussion.").

48. *See, e.g.,* Letter from Shaun Donovan, Sec'y of Hous. & Urban Dev., to State Pub. Hous. Auth. Dirs. (June 17, 2011), available at <http://www.nhlp.org/files/Reentry%20letter%20from%20Donovan%20to%20PHAs%206-17-11.pdf> (encouraging state directors to allow ex-offenders to rejoin their families in public housing); Letter from Eric Holder, U.S. Att'y Gen., to State Att'ys Gen. (April 18, 2011), available at http://www.nationalreentryresourcecenter.org/documents/0000/1088/Reentry_Council_AG_Letter.pdf ("Collateral consequence statutes and policies impose additional burdens on people who have served their sentences, including denial of employment and housing opportunities, without increasing public safety in essential ways."); Eric Holder, U.S. Att'y Gen., Speech to the European Offenders Employment Forum (Oct. 8, 2010), available at <http://www.justice.gov/iso/opa/ag/speeches/2010/ag-speech-101008.html> ("Once those who commit crimes pay their societal debt, we have

significant resources trying to ensure successful reentry in the face of these barriers.⁴⁹ The tension between the desire to successfully reintegrate former prisoners and the movement to impose civil consequences on those convicted of crimes is a practical problem, but it also raises fundamental questions of justice and human rights.⁵⁰ In particular, the racial disparities in U.S. prison populations raise serious questions about the role of race in the development, administration, and effect of civil consequences of criminal convictions.⁵¹

There have been a variety of calls for reform of civil consequences of criminal convictions, from abolishing them to reframing their role in defense lawyering.⁵² Three reform efforts that have taken hold are the collection and dissemination of information regarding civil consequences, the development of mechanisms to provide relief from consequences, and the integration of these consequences into the sentencing process.

The first area of effort has focused on informing criminal defendants of the consequences they face, and informing the public of the scope of consequences we impose. The movement to collect information regarding civil consequences is an effort to provide notice to defendants of these consequences.⁵³ The American Bar Association—funded by the 2007 Court Security Act⁵⁴—has undertaken this effort and, after its first year, had identified more than 30,000 consequences in a wide breadth of areas.⁵⁵ The American Bar Association expects to categorize these consequences and create a web tool by the summer of 2012 so that defendants can

many expectations: that they will reenter our communities, ready to assume a productive role . . . but as all of you have seen, these expectations are not always met. And while we know that stable employment is one of the keys to successful reintegration, we also know that it is one of the greatest challenges of reentry.”)

49. See Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (codified in scattered sections of 18 and 42 U.S.C.).

50. See Pinard, *Collateral Consequences*, *supra* note 35, at 464 & n.309 (suggesting that the reason the United States has harsher collateral consequences than comparison countries is because the United States uses a narrower dignity interest and not a human rights framework); 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) [hereinafter Pinard, *Integrated Perspective*] (making the case for collateral consequences and reentry as “interwoven and integrated components along the criminal justice continuum”).

51. See generally Finzen, *supra* note 46; Lyles-Chockley, *supra* note 38 (discussing the inextricability of race and collateral consequences because of the number of black ex-offenders with poor economic circumstances and deteriorated social networks who experience the double stigma of being black and an ex-offender).

52. See, e.g., Nora V. Demleitner, “*Collateral Damage*”: *No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1028 (2002) [hereinafter, “*Collateral Damage*”] (suggesting that collateral consequences should be abolished); Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067 (2004) (discussing movement of criminal defender offices toward holistic representation).

53. See Chin, *Race*, *supra* note 37, at 254 (“Basic fairness requires first that collateral consequences be collected in one place, and second that persons charged with a crime be notified of what the consequences are when they plead guilty or are sentenced.”).

54. See Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534 (codified in scattered sections of 28 U.S.C.).

55. See AM. BAR ASS’N, COLLATERAL SANCTIONS, *supra* note 40.

identify the full impact of their conviction and sentence.⁵⁶

Another area of reform is creating mechanisms for the restoration of rights, essentially an application process to free an individual from a particular civil consequence or set of consequences.⁵⁷ Some states have an automatic procedure for relief from civil consequences, some have an administrative procedure by which defendants can request relief from certain consequences, and some, including the federal system, allow only for pardons.⁵⁸ It is arguably less politically controversial to restore the rights of someone who has “earned” it after conviction, though the *Model Penal Code*’s recommendation of mechanisms for relief have not been universally adopted and the state mechanisms for doing so are often onerous, confusing, and little-used.⁵⁹ In a related effort, advocates for improved reentry outcomes are attempting to alleviate the effects of employment consequences by using anti-discrimination laws to sue employers who immediately reject job applicants based on their criminal records.⁶⁰

A final area for reform is to integrate civil consequences into sentencing by requiring courts to inform defendants of the consequences they face, and perhaps even choosing among consequences at sentencing. This reform draws support from those interested in disclosure of the full consequences of a conviction, as well as those who wish to improve sentencing more generally by tailoring the sentence to the offender.⁶¹ It has gained the support of the American Bar Association as part of its standards for sentencing.⁶² Indeed, a tailored approach to civil consequences also exists within certain regulatory schemes.⁶³

56. *Id.*

57. See Love, *supra* note 45, at 779–83.

58. Demleitner, “Collateral Damage”, *supra* note 52, at 1046.

59. See MODEL PENAL CODE § 306.6 (2009).

60. See, e.g., MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT (2011), http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf (proposing employment reforms for those with criminal records); Pinar, *Collateral Consequences*, *supra* note 35, at 457 n.197–200 (discussing anti-discrimination efforts in the employment context and noting that only four states have mechanisms for relief of employment-related civil consequences); see also NAT’L EMP’T LAW PROJECT, LEGISLATIVE UPDATE: HOUSE LEADERSHIP BILL SLASHES UNEMPLOYMENT INSURANCE 3 (2011), http://www.nelp.org/page/-/UI/2011/Leg_Update_House_UI_Bill.pdf?nocdn=1 (identifying current state legislative efforts to reduce barriers to employment for those with criminal records).

61. See, e.g., Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339 (2005); Pinar, *Integrated Perspective*, *supra* note 50, at 647 (suggesting that collateral consequences should be tailored to the underlying offense).

62. See AM. BAR ASS’N, COLLATERAL SANCTIONS, *supra* note 40, § 19-2.4(a), at 3 (“The legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender’s overall sentence.”); *id.* at 29 (“In accordance with the generally applicable principles of the Sentencing Standards, the sentencing court should ensure that the totality of the penalty is not unduly severe and that it does not give rise to undue disparity.”).

63. See, e.g., David A. Super, *Food Stamps and the Criminal Justice System*, CHAMPION MAG., Dec. 2001, at 20, available at <http://www.nacdl.org/Champion.aspx?id=22590> (explaining the requirement of a judicial finding for heightened denial of food stamps, and noting that the judge has flexibility to impose another penalty or

In addition to these reform movements, there have been efforts to limit the effect of civil consequences of conviction through constitutional protections. For example, civil consequences have been challenged, typically unsuccessfully, as being violations of the ex post facto or double jeopardy clauses of the federal and state constitutions.⁶⁴ Although these challenges continue, there has not been a consistent trend by courts to view civil consequences generally as a violation of these clauses.⁶⁵

This recognition of the import of civil consequences of conviction, and of movements for their reform, is a backdrop for courts' application of procedural protections. Although, as discussed above, there have been challenges to these consequences based on a variety of theories, this Article will consider the protections afforded these consequences by the criminal process.

B. Civil Consequences of Conviction in the Courts Before Padilla

Consideration of the civil consequences of conviction during a criminal prosecution arises in the context of what advice criminal counsel owes a defendant who is pleading guilty. The plea stage is the focus of these challenges because it is a "critical stage" and thus subject to Sixth Amendment protections, and because a defendant's choice to accept a plea—and the information upon which that choice is based—pose a clear framework for an ineffective assistance of counsel claim.⁶⁶ Before *Padilla*, courts used the direct-collateral distinction but applied it inconsistently.⁶⁷ The spectrum of approaches adopted reflected the difficulty of applying the direct-collateral distinction to fact-intensive cases, as well as an inclination to simplify the situation by creating formal rules that did not fit the practical reality of a defendant's experience.

Divergence among the courts also stemmed, in part, from a conflation of the due process and Sixth Amendment analyses that apply to a guilty plea. First, courts can consider the voluntariness of a plea in accordance with Fifth or Fourteenth

no penalty at all); *see also* 7 C.F.R. §§ 273.16(b)(5), 273.16(b)(7), 273.16(g)(2)(i), 273.16(h)(2)(i) (2011) (providing relevant regulations for denial of food stamps).

64. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 105 (2003) (rejecting ex post facto challenge to Alaska's sexual offender registration requirement); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (holding that Kansas's civil commitment law did not violate the Double Jeopardy Clause or the Ex Post Clause); *Turner v. Glickman*, 207 F.3d 419, 430–31 (7th Cir. 2000) (finding that the denial of certain welfare benefits to felony drug offenders does not constitute criminal punishment); *see also* Nora V. Demleitner, *A Vicious Cycle: Resanctioning Offenders*, in *CIVIL PENALTIES, SOCIAL CONSEQUENCES* 185–86 (Christopher Mele & Teresa A. Miller eds., 2005) ("Despite their debilitating impact on ex-offenders' lives, courts have generally declined to find such collateral sanctions punishment for constitutional purposes, largely because legislatures justify them in terms of public safety rather than retribution."); Pinard, *Integrated Perspective*, *supra* note 50, at 633 (discussing categories of challenges to collateral consequences).

65. *See* Pinard, *Integrated Perspective*, *supra* note 50, at 639–41.

66. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

67. *See, e.g., id.*

Amendment due process protections.⁶⁸ The due process protection is implicated in the court's duties when accepting a plea, and the established requirement is that a judge accepting a guilty plea must determine that a defendant fully understands the consequences of that plea.⁶⁹ Second, courts can apply the Sixth Amendment right to counsel to the plea stage. Under this protection, a defendant's rights are violated if the attorney's performance falls below an "objective standard of reasonable professional judgment" and the defendant was prejudiced by this behavior.⁷⁰ For both the due process and Sixth Amendment protections in the guilty plea context, courts before *Padilla* relied on the distinction between direct and collateral consequences to decide when the protections were applicable, but the distinction did not necessarily lead to clarity—or fair results—regarding such applicability.

As to a defendant's due process rights, courts agreed that there was a difference between the "direct" consequences of a plea and the "collateral" consequences of a plea: the rights applied with regard to the defendant's awareness of direct consequences but not of collateral consequences.⁷¹ That is, a defendant's plea was knowing and intelligent if he was aware of the direct consequences of the guilty plea, but no such awareness of the collateral consequences was required.⁷²

How to define whether a consequence was direct or collateral was the source of difficulty for many courts, leading to a variety of tests. For example, some courts took the view that a direct consequence was defined by the characteristics of its operation and was a consequence that was "definite, immediate, and largely automatic."⁷³ Other courts used a variation on this approach, focusing on the mechanism for imposing the consequence so that a collateral consequence was one where "an agent independent of the court" imposed the consequence.⁷⁴ Still other courts defined a consequence by its relationship to the sentence, with a collateral

68. See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."); see also *Boykin v. Alabama*, 395 U.S. 238 (1969) (finding due process requires a plea agreement to be voluntary).

69. *Boykin*, 395 U.S. at 243–44. This protection is also codified in rules of procedure. See, e.g., FED. R. CRIM. P. 11.

70. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (outlining a two-prong test for ineffective assistance of counsel); see also *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (applying *Strickland* test to guilty pleas).

71. See *Brady v. United States*, 397 U.S. 742, 755 (1970) (concluding an accused must be "fully aware of the direct consequences" of a guilty plea).

72. See 21 AM. JUR. 2D CRIMINAL LAW § 620 (2012) (collecting cases).

73. See, e.g., *United States v. U.S. Currency in the Amount of \$228,536.00*, 895 F.2d 908, 915 (2d Cir. 1990) (defining a direct consequence as "definite, immediate, and largely automatic"); *United States v. Salerno*, 66 F.3d 544, 551 (2d Cir. 1995) (following the *U.S. Currency* standard, and concluding: "That a defendant who is charged with a drug offense may later commit another drug offense, the penalty for which would be enhanced as a result of the original offense, is certainly a foreseeable possibility. But it is neither definite, immediate, nor largely automatic; hence, the defendant need not be told of this possible consequence in his original plea colloquy."); *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973) (stating that the distinction turned on whether the result represented a "definite, immediate and largely automatic effect on the range of the defendant's punishment").

74. See, e.g., *State v. Rojas-Martinez*, 125 P.3d 930, 933 (Utah 2005) (finding that a collateral consequence existed when "an agent independent of the court" acted to cause the consequence).

consequence defined as one “not related to the length or nature of the sentence imposed on the basis of the plea.”⁷⁵ Unsurprisingly, each of these definitions could lead to broad variation in application.

Courts also differed as to how the direct-collateral distinction translated to the Sixth Amendment context. As a threshold matter, the distinction’s role was to determine whether the Sixth Amendment should apply. If it did, then the claim was subject to the ineffective counsel analysis of *Strickland v. Washington*.⁷⁶ Some courts embraced the distinction completely, finding that collateral consequences were categorically excluded as the basis of a claim for ineffective assistance of counsel.⁷⁷ Other courts found that collateral consequences were included in the Sixth Amendment’s protections where counsel had affirmatively provided mistaken advice, but not when counsel was silent.⁷⁸ Regardless of how courts decided whether a consequence was direct or collateral, this dichotomy was generally accepted as the central inquiry regarding the applicability of due process or Sixth Amendment protections to the civil consequences of a criminal conviction at the plea stage. It was against this backdrop that *Padilla v. Kentucky* reached the Supreme Court.

C. *The Padilla Decision*

Jose Padilla—a Honduran native, Vietnam War veteran, and lawful permanent resident of the United States for more than forty years—was charged with drug distribution after his tractor-trailer was stopped and found to hold a large quantity of marijuana.⁷⁹ Mr. Padilla pled guilty after being told by his attorney that he “did not have to worry about immigration status since he had been in the country so long.”⁸⁰ His attorney was wrong: Mr. Padilla faced a proceeding where, by statute, his removal was an almost inevitable consequence of Mr. Padilla’s conviction.⁸¹ Mr. Padilla brought a post-conviction claim arguing that his Sixth Amendment

75. See, e.g., *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988) (holding that a collateral consequence is one “not related to the length or nature of the sentence imposed on the basis of the plea” and finding no error in court’s failure to advise defendant of deportation consequences of guilty plea during Rule 11 colloquy).

76. 466 U.S. 668, 687 (1984).

77. See, e.g., *Bustos v. White*, 521 F.3d 321, 325–26 (4th Cir. 2008) (looking to precedent regarding court’s obligation to inform defendant of consequences of plea when deciding whether it was ineffective assistance of counsel to fail to advise client regarding parole eligibility).

78. See, e.g., *Rojas-Martinez*, 125 P.3d at 933 (concluding that there was no affirmative duty of counsel to advise a defendant of possible deportation consequences of a guilty plea, but there was a duty to not provide misadvice).

79. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477 (2010).

80. *Id.* at 1478.

81. See *id.* at 1480 (“Under contemporary law, if a noncitizen has committed a removable offense . . . , his removal is practically inevitable”); see also 8 U.S.C. § 1101(a)(43)(b) (2006) (defining “aggravated felony” as including “illicit trafficking in a controlled substance”); § 1228 (2006) (providing for the expedited removal of aliens convicted of aggravated felonies).

right to effective counsel was violated and that under the applicable *Strickland* analysis of deficient and prejudicial performance by counsel, he was entitled to relief because he would not have entered a plea if he had known of the immigration consequences.⁸²

The Kentucky Supreme Court applied a categorical exclusion of collateral consequences from Sixth Amendment protections and rejected Mr. Padilla's claim.⁸³ The court specifically found that the exclusion of collateral consequences from the Sixth Amendment's protections at the plea stage included both failure of counsel to advise a client regarding immigration consequences, and affirmative misadvice regarding these consequences.⁸⁴ This decision was consistent with precedent that the plea stage is a "critical stage" of the proceedings and thus eligible for Sixth Amendment protection, but contrasted with decisions of many courts that had applied a less stringent rule of exclusion to collateral consequences in the Sixth Amendment context.⁸⁵

The Supreme Court granted certiorari, hearing arguments on the difference between non-advice and misadvice,⁸⁶ and on the unique character of immigration law and its interaction with criminal law.⁸⁷ In particular, the parties supporting Mr. Padilla leaned heavily, though not exclusively, on the severity of deportation as a consequence of a guilty plea.⁸⁸ The Court reversed, in a decision by Justice Stevens, with a concurrence by Justices Alito and Roberts, and dissents by Justices Scalia and Thomas. The majority found that the Sixth Amendment applied to Mr. Padilla's claim that counsel's performance was deficient, and remanded for an

82. *Padilla*, 130 S. Ct. at 1478.

83. *Id.*; see *Commonwealth v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008) ("As collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief.").

84. See *Padilla*, 253 S.W.3d at 485.

85. See *id.* at 484 ("Appellee correctly asserts that a number of jurisdictions which have held that failure to advise of a collateral matter is not ineffective assistance have nevertheless held that there is an exception for cases where the attorney misadvised the defendant on the consequences of his plea with regard to immigration.").

86. See Brief for Petitioner at 55, *Padilla*, 130 S. Ct. 1473 (No. 08-651) (urging misadvice as an obvious grounds for reversal); Brief for Respondent at 28, *Padilla*, 130 S. Ct. 1473 (No. 08-651) (drawing distinction between failure to advise and misadvice); Brief for the United States as Amici Curiae Supporting Affirmance at 20, *Padilla*, 130 S. Ct. 1473 (No. 08-651) (taking a position on misadvice); Brief for Legal Ethics, Criminal Procedure, & Criminal Law Professors as Amici Curiae Supporting Petitioner at 6, *Padilla*, 130 S. Ct. 1473 (No. 08-651) [hereinafter Brief for Law Professors as Amici Curiae] (portraying misadvice as demanding reversal).

87. See Brief for Petitioner, *supra* note 86, at 50 (differentiating deportation from other consequences); Brief for Respondent, *supra* note 86, at 36 (arguing that immigration is not different from other collateral consequences); Brief for the United States as Amici Curiae Supporting Affirmance, *supra* note 86, at 14–15; Brief for Law Professors as Amici Curiae, *supra* note 86, at 11–12 (focusing on the "unique" nature of immigration).

88. See Brief for Petitioner, *supra* note 86, at 50 (differentiating deportation from other consequences); Brief for Law Professors as Amici Curiae, *supra* note 86, at 11–12 (focusing on the "unique" nature of immigration). From a strategic standpoint, this was an excellent decision. However, the parties', and ultimately the majority's, focus on the "unique" nature of immigration consequences does not itself show that immigration consequences are the only civil consequences of criminal convictions that warrant protection or special consideration.

analysis of prejudice.⁸⁹

In this context, the *Padilla* decision reflects both bold and limited choices. The decision's rejection of the direct-collateral distinction for Sixth Amendment purposes, looking instead to the particular civil consequence on its own terms, is a bold step. So, too, was the majority's choice to ground its decision in the practicalities of how immigration consequences of conviction function. These steps were mitigated, however, by the choice to explicitly limit this reasoning to the immigration consequence of deportation that was presented by *Padilla*. Yet the concurrence and majority pointed out that the limitation may be illusory.⁹⁰ Thus, an open question is how *Padilla* will translate to future cases—involving different civil consequences and different rights. The *Padilla* decision itself gives some clues as to what the future holds.

1. Replacing the Direct-Collateral Distinction

The majority in *Padilla* rejected the direct-collateral distinction as it applied to Sixth Amendment claims. The Court first noted: “We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*.”⁹¹ The Court then declined to use the distinction, stating that “how to apply the direct/collateral distinction has no bearing on the disposition of this case.”⁹² Backed by these broad conclusions, the Court tethered its analysis of Mr. Padilla's Sixth Amendment claim to the facts before it, explaining: “Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.”⁹³ The majority then evaluated the consequence of deportation by inquiring into several of its key factual characteristics, each of which reflected the practical consideration that deportation, although technically in the realm of civil law, is entangled in the substance and process of criminal law when triggered by a criminal conviction.

First, the Court focused on the severity of the consequence and its significance to the defendant. In the instance of deportation, the Court concluded that “[w]e have long recognized that deportation is a particularly severe ‘penalty’”⁹⁴ and “as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who

89. See *Padilla*, 130 S. Ct. at 1486–87.

90. See *id.* at 1485–86, 1488 (Alito, J., concurring).

91. *Id.* at 1481.

92. *Id.* at 1481 n.8.

93. *Id.* at 1482.

94. *Id.* at 1481 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

plead guilty to specified crimes.”⁹⁵ Finally, the Court noted that “[w]e too have previously recognized that preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.”⁹⁶

It is striking that the majority chose to refer to deportation as a “penalty.”⁹⁷ A penalty is

Punishment imposed on a wrongdoer, usu. in the form of imprisonment or fine; esp., a sum of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party’s loss). Though usu. for crimes, penalties are also sometimes imposed for civil wrongs.⁹⁸

The Court’s choice to use this term represents a departure from historical characterizations of deportation and reflects the Court’s recognition that deportation is not simply some parallel action or result, separate from the criminal process.⁹⁹

Second, the Court asked how enmeshed the civil consequence was with the criminal process. The Court observed that deportation “is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century.”¹⁰⁰ Based on the interwoven nature of the civil consequence and the criminal process, the Court concluded: “[W]e find it most difficult to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.”¹⁰¹

As part of its analysis of the interaction between civil consequence and criminal process, the Court also noted the inevitability of the civil consequence. The Court implied that where a civil consequence flows automatically from a criminal conviction, its inevitability is evidence of the enmeshed nature of the civil

95. *Id.* at 1480.

96. *Id.* at 1483 (internal citations and quotation marks omitted).

97. *See id.* at 1480–81, 1486.

98. BLACK’S LAW DICTIONARY 1247 (9th ed. 2009).

99. *See* Maureen A. Sweeney, *Where Do We Go from Padilla v. Kentucky? Thoughts on Implementation and Future Directions*, 45 NEW ENG. L. REV. 353, 355–56 (2011) (“In short, the Court recognized deportation for criminal behavior as a penalty that results from criminal proceedings, something the Court had consistently and steadfastly refused to do up until that point. For over one hundred years, the Court had always described deportation as a civil, remedial sanction, designed not to punish, but to remedy an ongoing violation of the civil immigration law. This characterization has been the basis for a number of important decisions limiting the procedural and constitutional rights of respondents in removal proceedings. *Padilla*, in acknowledging the penal nature of removal for criminal convictions, represents a significant departure from these prior Supreme Court characterizations of deportation.”).

100. *Padilla*, 130 S. Ct. at 1481 (citations omitted).

101. *Id.*

consequence and the criminal process.¹⁰² In the case before it, the Court concluded “removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General”¹⁰³ and that “changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.”¹⁰⁴

Third, the Court evaluated whether giving legal advice regarding the civil consequence was an uncomplicated task. In the immigration context, the Court concluded that the relevant statute was “succinct, clear, and explicit in defining the removal consequence for Padilla’s conviction.”¹⁰⁵ This clarity supported the application of Sixth Amendment protections to the immigration consequence of the conviction.¹⁰⁶ The Court noted, though, that “[w]hen the law is not succinct and straightforward,” counsel’s advice need only be that there may be immigration consequences of some kind.¹⁰⁷

Finally, the Court grounded its decision in a prediction of its practical application, noting that the implementation of Sixth Amendment protections would be beneficial to all players: “[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.”¹⁰⁸

2. *Predicting Broad Application*

The *Padilla* decision had five Justices supporting the majority opinion, a concurrence, and a dissent. Notably, all of the Justices agreed that Mr. Padilla’s plea experience was unfair, and only disagreed as to exactly which part of the experience warranted relief. Justice Alito’s concurrence and Justice Scalia’s dissent disagree with the logic of the majority’s decision, and note that this logic is difficult to confine to deportation. Although the *Padilla* decision plainly considered only the civil consequence of deportation, the framework it uses is arguably applicable beyond that one consequence.

While agreeing with the majority’s conclusion as to affirmative misadvice, Justice Alito disagreed with, but seemed to begrudgingly accept, that this conclusion would spread to other consequences of conviction. He began his concurrence by underscoring the breadth of civil consequences that defendants may face:

102. *See id.*

103. *Id.* at 1480.

104. *Id.* at 1481.

105. *Id.* at 1483.

106. *See id.* (“This is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.”).

107. *Id.*

108. *Id.* at 1486.

[C]riminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities. All of those consequences are "seriou[s]," but this Court has never held that a criminal defense attorney's Sixth Amendment duties extend to providing advice about such matters.¹⁰⁹

Justice Alito went on to observe that the majority's holding requiring advice as to deportation alone would only complicate matters, and that

if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. . . . Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.¹¹⁰

Thus, the concurrence concludes, the majority went too far in requiring advice and should have confined its decision to banning affirmative misadvice.¹¹¹ Justice Alito explained that this conclusion was preferable because incompetent advice distorts the decision-making process, and counsel without expertise as to immigration consequences should be encouraged to refer the defendant to another attorney, or at least to say, "I do not know."¹¹²

Even though Justice Alito disagreed with the majority's decision to require advice—rather than simply ban affirmative misadvice—regarding immigration consequences, his concurrence seems to accept two key elements of the majority's decision. First, it accepts that there is a problem with criminal defendants who are unaware of the civil consequences of their guilty plea.¹¹³ Indeed, Justice Alito seems to believe a legislative remedy is forthcoming, noting "a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences."¹¹⁴ Second,

109. *Id.* at 1488 (Alito, J., concurring).

110. *Id.* at 1491.

111. *See id.*

112. *See id.* at 1493; *see also id.* at 1494 ("When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject.")

113. *See id.* at 1494 (discussing the unfairness in accepting guilty pleas from aliens who are unaware of the collateral consequence of deportation).

114. *Id.* at 1493.

Justice Alito noted the breadth of collateral consequences, at least implicitly recognized that immigration is not really unique, and did not attempt to reinforce the majority's limitation of its logic to only immigration.¹¹⁵ Thus, it seems that Justice Alito believed that accepting the majority's logic as to immigration would mean applying that logic to at least some other consequences.

Justice Scalia's dissent directly addressed the issue of the application of the majority's decision to other consequences. Justice Scalia noted that the logic of the majority's decision cannot be limited to the consequence of deportation "except by judicial caprice."¹¹⁶ Indeed, his dissent concludes that there is "no logical stopping-point" to the duty to advise about collateral consequences.¹¹⁷ Justice Scalia noted: "It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act."¹¹⁸ Thus, Justice Scalia explicitly addressed and opposed what Justice Alito seemed to implicitly accept: that the majority's decision will inevitably apply to consequences of conviction beyond immigration.¹¹⁹

3. Application Beyond Deportation

The extrapolation of *Padilla's* analysis of deportation to other consequences is a logical one for several reasons. First, other consequences share the characteristics of deportation identified in *Padilla* as the basis for providing Sixth Amendment protection. The majority opinion relies on the "unique" nature of deportation, but describes this uniqueness in terms of the importance of the consequence and its entanglement with the criminal process. While these things are true as to deportation, they are also true as to other consequences. The concurring and dissenting opinions, which complain that the majority's opinion is hard to constrain, recognize this reality, but are perhaps inaccurate in that the solution to this breadth is not to return to the direct-collateral distinction but rather to embrace the opportunity presented by the majority opinion.

Second, lower courts have not treated deportation as unique, before or after *Padilla*. Cases preceding *Padilla* regarding affirmative misadvice recognized the similarity between deportation and other consequences, and concluded that misadvice concerning a range of consequences was ineffective assistance of counsel.¹²⁰

115. *See id.* at 1488.

116. *Id.* at 1496 (Scalia, J., dissenting).

117. *See id.*

118. *Id.* The Armed Career Criminal Act provides sentencing enhancements when an individual has qualifying prior convictions; thus, Justice Scalia seems to be suggesting that *Padilla* will require counsel in an earlier predicate prosecution to advise a defendant that a future sentence may be enhanced by the fact of that earlier plea. *See* 18 U.S.C. § 924(e) (2006).

119. *See id.*

120. *See, e.g., Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir. 1990) (en banc) ("[T]he erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland v. Washington*."); Sparks

Unsurprisingly, cases applying *Padilla* to allegations of misadvice as to consequences other than deportation have continued to hold this view.¹²¹

Third, the *Padilla* Court rejected the stark distinction between direct and collateral consequences and instead chose to examine the consequence specifically and in the relevant context. As a matter of logic, it would be wholly inconsistent to reject a bright-line rule in the context presented in *Padilla* but then apply a strict rule as to other civil consequences of conviction.¹²² There is no reason why the fact-specific inquiry that the Court made in *Padilla* should not be applied in a different context.

D. The Turner Decision

Padilla was an examination of the right to counsel in the context of the protections afforded a civil consequence in the criminal process. The Supreme Court addressed the reverse—the right to counsel as it applies to a criminal consequence of a civil proceeding—in its more recent decision in *Turner v. Rogers*.¹²³ Although the *Turner* decision emerges from a different body of law, it yield insights based on the parallels between Sixth Amendment and due process right-to-counsel jurisprudence.

Mr. Turner was the defendant in a civil contempt proceeding, convened due to his repeated failure to pay child support.¹²⁴ The opposing party was the child's mother, and neither party was represented by counsel.¹²⁵ At the contempt hearing,

v. Sowders, 852 F.2d 882, 885 (6th Cir. 1988) (“[G]ross misadvice concerning parole eligibility can amount to ineffective assistance of counsel.”); Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979) (“[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel.”); see also United States v. Kwan, 407 F.3d 1005, 1015 (9th Cir. 2005) (adopting affirmative misadvice rule in immigration context); United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002) (same); *In re Resendiz*, 19 P.3d 1171, 1174 (Cal. 2001) (same).

121. See, e.g., Bauder v. Dep’t of Corr., 619 F.3d 1272 (11th Cir. 2010) (finding ineffective assistance of counsel where counsel affirmatively misadvised defendant that he would not be exposed to civil commitment by pleading guilty); Webb v. State, 334 S.W.3d 126 (Mo. 2011) (finding that misadvice from counsel regarding parole eligibility for plea was sufficient for prima facie ineffective assistance claim and holding that “where counsel misinforms the client as to the effects of the client’s plea, the counsel has rendered ineffective representation”); Wilson v. State, 244 P.3d 535 (Alaska Ct. App. 2010) (finding that misadvice from counsel that no-contest plea could not be used against defendant in expected civil suit was sufficient for prima facie ineffective assistance claim); Pridham v. Commonwealth, No. 2008-CA-002190-MR, 2010 WL 4668961, at *3 (Ky. Ct. App. Nov. 19, 2010) (concluding that “gross misadvice concerning parole eligibility may amount to ineffective assistance of counsel worthy of post-conviction relief”).

122. See Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1333 (2011) (predicting that *Padilla* portends a shift in immigration law because it rejects the concept of immigration law as purely civil and thus will be a “pivot point” for the Court to treat deportation, and perhaps other areas, as quasi-criminal and develop protections accordingly).

123. 131 S. Ct. 2507 (2011).

124. *Id.* at 2513.

125. *Id.* The child’s maternal grandfather was also a party to the proceedings, as he had physical custody of the child. *Id.*

a civil proceeding, Mr. Turner was found to be in willful contempt and sentenced to twelve months in prison, a sentence he could purge by paying all back benefits.¹²⁶ Although the law required the judge to find that Mr. Turner was able to pay his back child support before imposing incarceration, the court made no specific finding regarding the issue and did not even complete a prewritten form that required circling a choice indicating a defendant's employment and ability to pay.¹²⁷

In civil contempt cases, the basis for a right-to-counsel claim is due process protections rather than Sixth Amendment protections, and these due process protections are more limited than in the criminal context.¹²⁸ To evaluate what due process rights apply in a civil proceeding, a court inquires as to: "(1) the private interest that will be affected . . . ; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the [countervailing] interest [in not providing additional or substitute procedural safeguards]."¹²⁹ In practice, due process protections have led courts to find that counsel is a necessary protection in at least some civil proceedings where there is the risk of incarceration.¹³⁰ However, this right to counsel is a limited one that appears to be driven by considerations of similarity between the civil proceeding and criminal proceedings.¹³¹ The particular question presented in *Turner*—whether there is a due process right to counsel in child-support contempt proceedings—is one that had divided lower courts, some of

126. See *id.* (internal citations omitted).

127. See *id.* at 2513–14.

128. See *Hicks v. Feiock*, 485 U.S. 624, 637–40 (1988) (holding that the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections in a civil contempt proceeding than in a criminal case).

129. *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976); see *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27–31 (1981) (applying the *Mathews* framework to a consideration of the right to counsel in a child custody proceeding).

130. See *Lassiter*, 452 U.S. at 26–27 (establishing "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty," but denying counsel in the case at bar); *Vitek v. Jones*, 445 U.S. 480, 496–97 (1980) (plurality holding that Fourteenth Amendment requires representation in proceeding to commit inmate to mental facility, but controlling decision finds no right to counsel); *Gagnon v. Scarpelli*, 411 U.S. 778, 789–90 (1973) (applying a case-by-case approach to the right to counsel for criminal defendants facing revocation of probation and resulting imprisonment, and noting that "[a]lthough the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings," some cases may require the State to provide counsel); *In re Gault*, 387 U.S. 1, 41 (1967) (noting that the Fourteenth Amendment requires state-provided counsel in a civil juvenile delinquency proceeding which could lead to incarceration); *In re Grand Jury Proceedings*, 468 F.2d 1368, 1369 (9th Cir. 1972) (per curiam) (finding a general right to counsel in civil contempt proceedings); *Duval v. Duval*, 322 A.2d 1, 3–4 (N.H. 1974) (finding no general right in civil contempt, but counsel may be required on case-by-case basis).

131. Cf. *In re Gault*, 387 U.S. at 35 (applying pre-*Mathews* test but noting that proceeding was little different from and "comparable in seriousness" to criminal proceeding).

which had found a clear right to counsel, some no right, and some a right in only certain circumstances.¹³²

In *Turner*, a 5-to-4 decision authored by Justice Breyer, the Court reiterated its longstanding premise that due process only requires counsel in certain civil proceedings, and considered whether Mr. Turner's case presented such a proceeding.¹³³ As a threshold matter, the Court reaffirmed that there is a presumption of a right to counsel only in those proceedings where incarceration is at issue, but rejected the conclusion that counsel is required in all such proceedings.¹³⁴ The Court then evaluated Mr. Turner's particular circumstances using the *Mathews v. Eldridge* test to determine what protections were required to render the proceedings fundamentally fair.¹³⁵ In applying the *Mathews* test, the Court found that the "private interest that will be affected argues strongly for the right to counsel here."¹³⁶ The Court identified the interest of Mr. Turner that was affected—namely his liberty in the face of a twelve-month jail sentence—and concluded that the threat of incarceration strongly favored a right to counsel.¹³⁷ However, the Court then concluded that the issue of the defendant's ability to pay was sufficiently straightforward, the unrepresented opposing party was sufficiently symmetrical, and the substitute safeguards such as forms explaining the legal standard and an opportunity to respond to questions at a hearing were sufficiently protective to provide adequate substitute procedural safeguards.¹³⁸ Because the opposing party was another individual rather than the government, the Court found this factor strongly weighed against a right to counsel.¹³⁹

Ultimately, the Court concluded that although counsel was not required,¹⁴⁰ there

132. Compare *Ridgway v. Baker*, 720 F.2d 1409, 1415 (5th Cir. 1983) (finding a right to counsel for indigents facing imprisonment in a child-support contempt proceeding under the Constitution); *Black v. Div. of Child Support Enforcement*, 686 A.2d 164, 168 (Del. 1996) (same); *Mead v. Batchlor*, 460 N.W.2d 493, 504 (Mich. 1990) (same), and *Pasqua v. Council*, 892 A.2d 663, 671–74 (N.J. 2006) (same), with *Andrews v. Walton*, 428 So.2d 663, 666 (Fla. 1983) (finding "no circumstances in which a parent is entitled to court-appointed counsel in a civil contempt proceeding for failure to pay child support"), and *Rodriguez v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 102 P.3d 41, 51 (Nev. 2004) (finding no right to counsel in civil contempt hearing for nonsupport, except in "rarest of cases").

133. See *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011).

134. See *id.* at 2517 ("We believe . . . that the Court previously had found a right to counsel 'only' in cases involving incarceration, not that a right to counsel exists in *all* such cases . . ." (emphasis in original)).

135. *Id.* at 2517–18 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

136. *Id.* at 2510 (internal quotations omitted).

137. See *id.* at 2518.

138. See *id.* at 2518–19.

139. See *id.* at 2519 ("A requirement that the State provide counsel to the noncustodial parent . . . could create an asymmetry of representation that would alter significantly the nature of the proceeding." (citation and quotation omitted)). Interestingly, the Court explicitly noted that its conclusion did not apply to cases where the government is attempting to collect support payments. See *id.* at 2520 ("We do not address civil contempt proceedings where the underlying child support payment is owed to the State . . .").

140. The Court based its conclusion that counsel was not required on the premise of *Gagnon v. Scarpelli*, a case that found no right to counsel in probation revocation hearings. See *id.* at 2518–19 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 789–90 (1973)). Interestingly, after *Gagnon* was decided, the FEDERAL RULES OF

were not sufficient alternative procedures implemented, such as explanatory forms and specific judicial findings, to safeguard Mr. Turner's rights.¹⁴¹ Thus, although Mr. Turner had no right to counsel in his civil contempt proceeding, he was nonetheless deprived of due process because he did not receive notice regarding the importance of the issue of ability to pay.¹⁴² At least implicitly, then, *Turner* recognizes and incorporates the practical operation of civil proceedings threatening incarceration.

Although *Turner* started from a different entry point than *Padilla*—a civil rather than criminal proceeding and thus a due process rather than Sixth Amendment analysis¹⁴³—the two cases share similarities that underscore the applicability of the *Padilla* decision beyond deportation. In both cases, the Court rejected an analysis grounded in strict categorical distinctions (direct-collateral in *Padilla*¹⁴⁴ and civil-criminal in *Turner*¹⁴⁵) and instead embraced a fact-specific inquiry. This consistent choice underscores the Court's conviction that the civil consequences of criminal convictions must each be considered on their own terms.

The *Padilla* decision is notable for its consideration of the practical realities of criminal defendants facing deportation. The Court relied heavily on the near certain consequence of removal for Mr. Padilla.¹⁴⁶ It also buttressed its conclusion that the Sixth Amendment applied with the observation that the practical application of its decision would be advantageous for all parties.¹⁴⁷

The *Turner* decision also reflected the practicality of counsel in civil proceedings that function more like criminal proceedings. In *Turner*, the Court engaged in a factual inquiry into the nature of the contempt proceeding to which Mr. Turner was subject, and specifically noted factual circumstances where a different requirement for counsel might apply.¹⁴⁸ This fact-specific approach and its consideration of context is the basis for the two core considerations that the opinions in *Padilla* and *Turner* share. First, both opinions focus on the significance of the consequence at issue and, second, both opinions focus on the interaction between the civil and criminal processes. These two core considerations shape the framework developed in this Article, and underscore how the increasing interaction of civil and criminal law in our society argues for a comprehensive and coherent framework for considering rights in blended situations.

CRIMINAL PROCEDURE were amended to provide for counsel in such hearings. See FED. R. CRIM. P. 32.1 advisory committee's note.

141. See *id.* Thus, although *Gagnon* remains precedent, *Turner* acknowledges that some procedural protections are nonetheless warranted—and in some circumstances may require counsel.

142. *Id.*

143. *Id.* at 2512.

144. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

145. *Turner*, 131 S. Ct. at 2521.

146. *Padilla*, 130 S. Ct. at 1483.

147. *Id.* at 1486.

148. *Turner*, 131 S. Ct. at 2519.

III. THE NEW CIVIL CONSEQUENCES TEST

Padilla and *Turner* provide the starting point for a new doctrine for the civil consequences of criminal convictions. As there are bound to be continuing legal challenges in this area, defining the parameters of future court inquiries regarding Sixth Amendment protections for the civil consequences of criminal convictions can guide this future analysis. Such a framework can provide consistency in how courts address the disparate consequences that defendants face. This Article articulates the significant entanglement framework—a new analysis for whether the imposition of a civil consequence of a criminal conviction gives rise to Sixth Amendment protections. This new framework encompasses an observation and two elements: First, the direct-collateral distinction is no longer applicable or useful. Second, a key consideration in whether the Sixth Amendment should apply is the significance of the consequence to the defendant. And third, the entanglement between the civil consequence and criminal law will determine whether protections apply.

This Part describes the significant entanglement framework and goes on to apply the framework in the context of Sixth Amendment protections at the plea stage. The application of the significant entanglement framework to specific civil consequences in different contexts is meant less to resolve the protections that should be afforded any single consequence, and more to illustrate that the framework is a useful mechanism for a fact-specific inquiry into what protections should be afforded a particular consequence for a particular defendant at a particular stage in the criminal process. The Part goes on to discuss how the framework can guide analysis of Sixth Amendment protections at other critical stages in the criminal process. Finally, the Part considers how the framework might guide the analysis of the due process protections afforded a criminal trial.

A. *The Direct-Collateral Distinction Is Gone*

One result of the *Padilla* decision is that the threshold inquiry for applying Sixth Amendment protections is no longer whether a civil consequence is a direct or collateral consequence of a criminal conviction. The Court explicitly rejected this distinction as a one-size-fits-all answer for addressing Sixth Amendment protections, noting that it had never used this test and the test was ill-suited for immigration consequences.¹⁴⁹ Instead of relying on this distinction, the Court embraced a more detailed analysis.¹⁵⁰ Although the Court attempted to justify its fact-specific inquiry by noting the particular characteristics of the consequence of

149. *Padilla*, 130 S. Ct. at 1481.

150. See Sweeney, *supra* note 99, at 353 (“One important aspect of the *Padilla* decision was the Court’s refusal to apply the distinction between direct and collateral consequences of a criminal conviction to define the scope of representation required by the Sixth Amendment in the case of deportation consequences. In other words, the Court recognized the protections of the Sixth Amendment to cover advice by criminal defense counsel about the

deportation,¹⁵¹ at the very least, the same logic would require inquiring into the particular characteristics of another consequence under consideration for Sixth Amendment protections. Although *Turner* was a consideration of due process protections in a civil proceeding, the Court took the same general approach: inquiring into the details of the particular procedural circumstance and consequence at issue.¹⁵² Thus, the first lesson of *Padilla* is that the direct-collateral distinction is no longer a necessary framework for inquiring into whether the Sixth Amendment applies to advice concerning a civil consequence at the plea stage.

In decisions following *Padilla*, courts have embraced this new approach and inquired into the factual details of how the civil consequence actually operates in order to decide whether Sixth Amendment protections are warranted. For example, in *Commonwealth v. Abraham*, a case currently pending appeal in the Pennsylvania Supreme Court, the court noted that “*Padilla* harkens back to the original *Strickland* concept . . . of examining the totality of the circumstances to determine what advice must be given to have a fully informed guilty plea.”¹⁵³ Although some cases have only implicitly accepted *Padilla*’s guidance as instructing them to reject the direct-collateral distinction and engage in a factual inquiry, it is clear that *Padilla* has been accepted as providing this guidance.¹⁵⁴ Future considerations of whether a particular civil consequence of a criminal conviction is entitled to Sixth Amendment protections are likely to embrace a fact-specific inquiry.

B. Significance to Defendant

Padilla and *Turner* provide guidance regarding the key areas of factual inquiry for a court considering a civil consequence of conviction. The first of these is the significance of the civil consequence to the defendant. In *Padilla*, the significance of the penalty of deportation was plainly a consideration.¹⁵⁵ The majority characterized this consequence as a “drastic measure” that is “sometimes the most important part of the penalty that may be imposed.”¹⁵⁶ In *Turner*, this same consideration detailed the “private interest that will be affected,” namely the “defendant’s loss of personal liberty through imprisonment.”¹⁵⁷ Assessing whether the consequence is significant to the defendant potentially includes several related issues, such as the severity of the consequence, the subjective importance to the defendant, and the stage in the process.

immigration consequences of a criminal proceeding, regardless of whether those consequences might be characterized as direct or collateral.”).

151. *Padilla*, 130 S. Ct. at 1478.

152. *Turner*, 131 S. Ct. at 2512–14.

153. 996 A.2d 1090, 1092 (Pa. Super. Ct. 2010).

154. *See infra* notes 195–97.

155. *See Padilla*, 130 S. Ct. 1473.

156. *Id.* at 1478, 1480.

157. *Turner*, 131 S. Ct. at 2518.

In *Padilla*, Justice Stevens began the analysis of whether *Strickland's* Sixth Amendment protections applied by noting: “We have long recognized that deportation is a particularly severe ‘penalty.’”¹⁵⁸ The majority also repeatedly returned to the importance of a deportation consequence in a defendant’s decision to plead guilty.¹⁵⁹ Thus, “[t]he severity of deportation—the equivalent of banishment or exile—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.”¹⁶⁰ As a corollary, once the Court decided to apply the Sixth Amendment and a *Strickland* analysis to Mr. Padilla’s claim, the harshness of the penalty was a part of the calculus of whether counsel’s performance fell below an objective standard of reasonableness.¹⁶¹ In this analysis, particularly harsh consequences tend to be those of which competent counsel should be aware.¹⁶² Similarly, the second *Strickland* prong necessarily incorporates the harshness of the penalty as part of an analysis of whether the defendant suffered prejudice.¹⁶³

A similar concern was expressed in *Turner*. Part of the due process analysis of whether counsel was required in this civil contempt proceeding was the “private interest that [would] be affected.”¹⁶⁴ This component essentially requires a court to look at the severity of the penalty that will result from the civil proceeding.¹⁶⁵ In *Turner*, the Court concluded: “That interest consists of an indigent defendant’s loss of personal liberty through imprisonment. The interest in securing that freedom, the freedom from bodily restraint, lies at the core of the liberty protected by the Due Process Clause.”¹⁶⁶ Thus, in the due process context, the severity of the penalty of imprisonment is a key consideration in deciding whether to establish procedural protections. Those consequences that threaten an individual’s liberty—whether by imposing incarceration or removal from the country—plainly meet the severity and importance threshold. Perhaps one way of expressing that something is significant enough to meet the threshold is when the consequence is itself a penalty. In *Padilla*, the conclusion that “as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may

158. *Padilla*, 130 S. Ct. at 1478 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)).

159. *See id.* at 1480–82.

160. *Id.* at 1486 (internal quotation and citation omitted).

161. *See id.* at 1483 (noting general consensus in the legal community that counsel should advise as to immigration consequences, and further noting that “numerous practice guides” could assist counsel in providing this advice).

162. *See id.*

163. The Supreme Court remanded to the Kentucky Supreme Court the issue of prejudice to Mr. Padilla. *Id.* at 1483–84.

164. *Turner*, 131 S. Ct. at 2517–18.

165. *Id.* at 2517–18.

166. *Id.* at 2518 (internal quotation marks omitted).

be imposed on noncitizen defendants who plead guilty to specified crimes” was central to the Court’s decision to apply Sixth Amendment protections.¹⁶⁷

A related inquiry is the subjective importance of the consequence to the defendant. Although this inquiry is often intertwined with the severity of the consequence, as a more severe consequence is logically more likely to be subjectively important to a defendant, the question is a distinct one. The importance to the defendant is best expressed as whether the consequence affects the defendant’s decision-making regarding a guilty plea: Is the consequence a determinative factor in the defendant’s decision whether or not to plead guilty? For example, in the deportation context, the circumstances surrounding a defendant’s return to her home country may make the issue of deportation more or less important to that defendant. The majority opinion in *Padilla* implicitly recognizes this issue, noting that “[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions”¹⁶⁸ and that the “impact of deportation on families living lawfully in this country demand[s] no less” than Sixth Amendment protections.¹⁶⁹ Indeed, a question posed to counsel at oral argument—whether counsel should advise a defendant of the immigration consequences of a plea when that defendant would be killed upon return to her home country—identifies this very issue.¹⁷⁰ This inquiry has as its corollary the due process inquiry in *Turner* into whether a process implicates a fundamental interest.¹⁷¹

A consideration in the issue of significance is the stage of proceedings at issue. In *Padilla*, the issue was whether counsel had properly advised regarding deportation consequences at the plea stage.¹⁷² As a defendant’s decision whether to plead guilty is perhaps the most significant decision in the criminal process, there is weight in the procedural posture itself.¹⁷³ Of course, this logic follows as constitutional rights in the criminal context are defined and applied according to the stage in the proceedings, so it is no surprise that the significance of a consequence—and the rights associated with it—are affected by the procedural posture.¹⁷⁴

167. See *Padilla*, 130 S. Ct. at 1480.

168. *Id.* at 1481–82 (internal quotation marks omitted).

169. See *id.* at 1486.

170. Oral Argument at 37:24–40:12, *Padilla*, 130 S. Ct. 1473 (No. 08-651), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-651.pdf.

171. See *Turner*, 131 S. Ct. at 2518 (“The ‘private interest that will be affected’ argues strongly for the right to counsel that Turner advocates.”).

172. See *id.*

173. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117 (2011) (discussing significance of *Padilla* and its focus on the reality of guilty pleas).

174. See *infra* notes 233–34 and accompanying text.

C. Entanglement of Civil and Criminal Law

Another area of inquiry framed by the decisions in *Padilla* and *Turner* is the entanglement of civil and criminal law in a particular civil consequence of a criminal conviction. In *Padilla*, the entanglement manifested itself in the fact that deportation is “virtually automatic” after a defendant is convicted.¹⁷⁵ Further, the Court concluded that, although deportation is nominally civil, it is functionally integrated into the criminal process.¹⁷⁶ The Court noted that deportation is “intimately related to the criminal process” and that the law “has enmeshed criminal convictions and the penalty of deportation for nearly a century.”¹⁷⁷ It is important to note, however, that the majority in *Padilla* reached this conclusion even though Mr. Padilla would have had the opportunity for a removal hearing, albeit with a very limited scope.¹⁷⁸

As *Padilla* suggests, the role of the criminal process in the imposition of the civil consequence is a crucial consideration. For example, if the criminal court essentially controls the outcome with regard to the civil consequence, then the two areas are entangled. Thus, deportation is entangled because it is, practically, an automatic extension of the criminal proceeding rather than a separate proceeding or function of the law.

In *Turner*, the Court also acknowledged the importance of the consideration of the nature of the proceedings, and particularly the role of the government.¹⁷⁹ Although the Court in *Turner* found that there can be sufficient procedural protections in a child support contempt proceeding without a right to counsel, it also explicitly noted that its holding does not extend to circumstances where the government, rather than a custodial spouse, is the adverse party.¹⁸⁰ Thus, although its particular holding was constrained to the facts of the case, the Court in *Turner* seemed to acknowledge that a civil proceeding with the government as a party, with the essentially criminal penalty of incarceration, may require protections more typical of a criminal process. Along these same lines, the Court in *Turner* noted the effect of the distinction between civil and criminal contempt on a defendant—the greater potential for wrongful incarceration if procedural protections were denied due to classification of civil contempt as non-criminal—further underscoring the Court’s inclination to consider the reality of these proceedings on

175. *Padilla*, 130 S. Ct. at 1481.

176. *Id.*

177. *Id.*

178. See Reply Brief of Petitioner at n.8, *Padilla*, 130 S. Ct. at 1477 (No. 08-651) (noting that removal proceeding was stayed pending criminal appeal); see also NORTON TOOBY & JOSEPH ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 2.15 (4th ed. 2007) (describing how a convicted felon can be relieved of deportation consequences only in exceptional circumstances such as a showing that he will be tortured if deported).

179. See *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011).

180. See *id.*

an individual.¹⁸¹ The *Turner* opinion essentially incorporates a consideration of entanglement into its due process analysis.

As the example of deportation suggests, one way to evaluate the entanglement of the civil and criminal law is to look at the relevant statutory scheme. Where a legislature has chosen to make the conviction operate past the imposed sentence of incarceration or fine through another civil consequence, without any additional process, the legislature is likely to have created sufficient entanglement under this framework. Conversely, where a legislature has created a separate civil proceeding, triggered by the conviction, to apply or otherwise consider the civil consequence, the legislature's choice to separate the two processes likely means that there is not an entanglement. In the former instance, the significant entanglement framework suggests that Sixth Amendment—and perhaps other—protections are appropriate. In the latter instance, protections may not be warranted.

D. If There Is a Significant Entanglement, Protections Apply

Padilla and *Turner* suggest, then, that if a civil consequence meets the significant entanglement framework, the protections of the Sixth Amendment apply. In the context of the right to counsel, this test has logical appeal: if a consequence is effectively a criminal penalty, then it should be afforded corresponding protections. In the due process context there is a corollary logic: if an individual is subject to a severe penalty via a civil proceeding, then some base level of procedural protection is warranted. In the circumstance of a civil consequence of a criminal conviction, where no separate civil proceeding necessarily occurs and thus no process is afforded, it makes sense to afford protections where the process does occur: in the criminal prosecution.

An interesting issue raised by *Turner*, beyond the scope of *Padilla*, is whether there are civil consequences of criminal convictions that do not warrant the effective assistance of counsel during the criminal prosecution because a separate civil process is provided. Yet, these consequences require some level of due process protection in that separate civil process. One can imagine immigration processes that could have been provided to Mr. Padilla that would have made his Sixth Amendment claim unsuccessful. For example, if immigration law were such that, after his conviction, Mr. Padilla was afforded a hearing where the government would need to make a showing beyond the fact of conviction in order to deport Mr. Padilla, then it is likely that this separate process would have changed the Supreme Court's view of the protections regarding his criminal plea. (Indeed, a version of this alternative scenario once existed, and the shift from a distinct and separate

181. See *id.* at 2518 (“Moreover, the fact that ability to comply marks a dividing line between civil and criminal contempt reinforces the need for accuracy. That is because an incorrect decision (wrongly classifying the contempt proceeding as civil) can increase the risk of wrongful incarceration by depriving the defendant of the procedural protections (including counsel) that the Constitution would demand in a criminal proceeding.”).

process to a nearly automatic outcome was a focus of the majority's opinion in *Padilla*.)¹⁸² In this hypothetical scenario, the entanglement prong would not have been met. However, Mr. Padilla would then have faced a situation contemplated by *Turner*: a civil proceeding with severe consequences and the government as an adverse party. In this situation, following the suggestion of *Turner*, Mr. Padilla would be entitled to due process protections that might include counsel. Thus, even in situations where the entanglement prong may not be met in a way that requires Sixth Amendment protections at a criminal proceeding, analogous but distinct due process protections may apply.

The significant entanglement framework addresses whether a particular protection should apply, but not the merits of the claim itself. Thus, the application of the particular protection that applies may or may not reveal a successful claim regarding a particular civil consequence. So, in the Sixth Amendment context, if the significant entanglement framework revealed that the Sixth Amendment should apply to a consequence, an application of the *Strickland* test would follow.¹⁸³ Applying the *Strickland* test leads to the overlapping but distinct issues of deficient performance and prejudice.¹⁸⁴ It is in the application of this standard that the balance of *Padilla*'s reality-based analysis appears: Can counsel realistically provide advice as to the consequence? Although the significant entanglement framework addresses only the applicability of the right, it is logical that where significant entanglements exist, *Strickland* will be satisfied in some instances.¹⁸⁵ Finally, *Padilla*'s conclusion that application of *Strickland*'s protections to such a consequence will benefit all of the actors in the system¹⁸⁶ applies equally to the significant entanglement framework.

One reaction to the *Padilla* decision was that it would create undue burdens on defense counsel. While other scholarship has been devoted to this issue,¹⁸⁷ two

182. See *Padilla*, 130 S. Ct. at 1479–80 (explaining the history of deportable offenses, including the now-obsolete procedure that a judge had discretion to recommend that an alien not be deported).

183. See *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the two-pronged test for ineffective assistance of counsel).

184. See *id.* (determining that ineffective assistance of counsel exists where there has been deficient performance and that performance prejudiced the defendant).

185. As with all factually intensive inquiries, there are alternative scenarios. For example, if Mr. Padilla had received notice from the immigration authorities before he entered his plea that the crime for which he had been charged, if convicted, would lead to his deportation, then it is unlikely that Mr. Padilla would have been able to satisfy the prejudice prong of *Strickland*, even if his counsel had said nothing regarding deportation. In fact, immigration authorities issued a notice before Mr. Padilla's plea that he was being investigated regarding the lawfulness of his entry, apparently in error because Mr. Padilla was a lawful permanent resident. Brief for Petitioner at 11–12, *Padilla*, 130 S. Ct. at 1477 (No. 08-651). But this notice did not mention the deportation consequences of the pending charges. *Id.*

186. See *Padilla*, 130 S. Ct. at 1486 (“[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants . . .”).

187. See, e.g., McGregor Smyth, *From “Collateral” to “Integral”: The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 *How. L.J.* 795 (2011) (suggesting that *Padilla* will create manageable burdens); Derek Wikstrom, *No Logical Stopping Point: The Consequences of Padilla v.*

observations may illuminate how the significant entanglement framework is unlikely to exacerbate any such burden. First, the *Strickland* prejudice standard is a high one.¹⁸⁸ As in other areas of case law regarding effectiveness of counsel, it is likely that the subset of behavior found to be ineffective is quite small. Second, defense counsel is only as effective as the resources available, and defense counsel will soon have available a significant resource in the form of a searchable database of civil consequences of conviction.¹⁸⁹ This resource will markedly lighten the burden of advising a client regarding possible consequences.

In sum, the significant entanglement framework allows courts to evaluate the protections that apply to the civil consequences of criminal convictions. This framework begins with the premise that each consequence must be evaluated on its own terms, and delineates two key areas of inquiry: the significance of the consequence to the defendant and the entanglement of the civil consequence with the criminal law. If the consequence is a significant entanglement, then the Sixth Amendment applies.

IV. APPLYING THE SIGNIFICANT ENTANGLEMENT FRAMEWORK

A. *Sixth Amendment Protection for Consequences of a Guilty Plea Other Than Deportation*

The most straightforward application of the significant entanglement framework is to consider when Sixth Amendment protections apply to civil consequences of a guilty plea other than deportation.¹⁹⁰ The extension of the framework to different consequences, but under the same constitutional right at the same “critical stage” of the proceeding as applied in *Padilla*, helps to understand the framework. While the lesson of *Padilla* and *Turner* is that each consequence must be evaluated individually, this application reveals several categories of consequences that are likely to warrant Sixth Amendment protections because their fundamental characteristics tend to satisfy the significant entanglement test. The types of civil consequences that are more likely to warrant protection include additional imprisonment beyond the particular criminal sentence, other serious deprivations of liberty, and perhaps significant financial penalties such as the deprivation of a pension. Rather than resolve which of the many civil consequences of criminal convictions are entitled to Sixth Amendment protection, the discussion below is intended to illustrate the application of the significant entanglement framework

Kentucky's *Inevitable Expansion*, 106 NW. U. L. REV. (forthcoming 2012) (arguing that *Padilla* may overburden the defense system).

188. See *Padilla*, 130 S. Ct. at 1485 (“Surmounting *Strickland*’s high bar is never an easy task”).

189. See AM. BAR ASS’N, COLLATERAL SANCTIONS, *supra* note 40.

190. See Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 738 (2002) (describing categories of consequences).

and its usefulness for deciding whether a consequence as presented by the facts of a particular case would be entitled to Sixth Amendment protection.

1. *Additional Imprisonment*

One category of civil consequences of criminal convictions is additional imprisonment, imposed on the defendant by civil statute in addition to the incarceration imposed by a criminal sentence. This situation arises in different contexts including civil commitment, the use of the plea to impose a different criminal sentence than that charged, and revocation of parole. Considering each of these examples is helpful to understand how the significant entanglement framework operates.

Civil commitment—whether for mental health reasons or under a state’s sexually violent predator laws—is a civil consequence of a criminal conviction that leads to additional detention.¹⁹¹ When an individual is civilly committed, she is supposed to be confined to a corrections facility with the capacity for mental health treatment.¹⁹² Although the individual is in prison, any detention past the duration of the criminal sentence occurs under operation of a civil statute. Before *Padilla*, courts agreed that this additional incarceration was a collateral consequence of conviction and thus not subject to Sixth Amendment protection.¹⁹³ However, the significant entanglement framework suggests that at least some instances of civil commitment may warrant Sixth Amendment protection.

Looking at the first prong, significance of the consequence, civil commitment seems to meet the test. First, incarceration is a severe consequence, perhaps the most severe deprivation of liberty.¹⁹⁴ Second, it is likely that a defendant who has served the sentence for his crime but nonetheless continues to be detained finds this consequence to be significant to him. Certainly those defendants who are bringing Sixth Amendment challenges because their attorneys did not advise them of the consequences of commitment would agree that the additional incarceration is significant. Lower courts considering counsel’s advice regarding civil commitment after *Padilla* have reached the conclusion that “[l]ike deportation was for the

191. See, e.g., Marco T. Torres, *Direct and Collateral Consequences After Padilla v. Kentucky*, 22 S.C. LAW. 16 (2011) (discussing civil commitment in the context of South Carolina’s Sexually Violent Predator Act).

192. See, e.g., CAL. WELF. & INST. CODE § 6604 (West 2010) (stating that a person civilly committed as a sexually violent predator is to be held “for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health. The facility shall be located on the grounds of an institution under the jurisdiction of the Department of Corrections.”).

193. See, e.g., *Steele v. Murphy*, 365 F.3d 14 (1st Cir. 2004) (finding civil commitment to be a collateral consequence and thus not warranting protection).

194. See *Turner v. Rogers*, 131 S. Ct. 2507, 2518 (2011) (“The interest in securing that freedom, the freedom from bodily restraint lies at the core of the liberty protected by the Due Process Clause. And we have made clear that its threatened loss through legal proceedings demands due process protection.” (internal citations and quotations omitted)).

defendant in *Padilla*, this is a matter of great importance to defendant.”¹⁹⁵ Some courts, such as the Eleventh Circuit in *United States v. Bauder*, have applied *Padilla* to find that affirmative misadvice regarding civil commitment constituted a valid Sixth Amendment claim.¹⁹⁶

As to the second prong, the entanglement of the civil consequence with the criminal process, the analysis will vary according to the particular commitment statute. If a statute operates such that the sentencing court essentially controls the outcome of the defendant’s commitment, then this would be sufficiently entangled to warrant Sixth Amendment protection. Indeed, such a defendant would face a more entangled process than the defendant in *Padilla*.¹⁹⁷ However, in many states, commitment requires a separate hearing.¹⁹⁸ If this hearing is simply implementing a near-automatic outcome, like in *Padilla*, then the entanglement prong is met. However, some civil commitment statutes provide for a distinct government burden at this hearing.¹⁹⁹ In this situation, the separate civil process means that there is not a sufficient entanglement to warrant Sixth Amendment protections at the guilty plea stage of the criminal process. Lower courts after *Padilla* have reached this conclusion, focusing on the issue of entanglement. For example, three federal district court cases since *Padilla* have found that the individualized assessment provided by the relevant commitment statute differentiated the present case from *Padilla* and Sixth Amendment protection was not warranted.²⁰⁰ In an Iowa case, *Blaise v. State*, the court examined the process provided by the state

195. *People v. Hughes*, 953 N.E.2d 1017, 1024 (Ill. App. Ct. 2011).

196. *See* 619 F.3d 1272 (11th Cir. 2010); *see also* *State v. Maldon*, 29 A.3d 745 (N.J. Super. Ct. App. Div. 2011) (finding that defendant presented prima facie ineffective assistance of counsel claim where counsel incorrectly advised defendant that he would not be subject to civil commitment as a result of his plea).

197. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1478–80 (discussing the limited civil process that would implement *Padilla*’s near-automatic deportation).

198. *See, e.g., Iowa Code* § 229A (outlining the separate review, petition, evaluation and hearing process for commitment).

199. *Id.*

200. *See United States v. Francis*, No. 5:04-CR-74-KS, 2010 WL 6428639, at *5–6 (E.D. Ky. Dec. 30, 2010) (applying direct-collateral distinction to due process claim and finding that failure to advise of civil commitment consequence of plea is not violation of Due Process Clause because federal civil commitment statute provides discretionarily initiated separate proceeding rather than automatic consequence, and also holding that ineffective assistance of counsel claim fails because no evidence of misadvice or failure to advise); *Maxwell v. Larkins*, No. 4:08 CV 1896 DDN, 2010 WL 2680333, at *9–10 (E.D. Mo. July 1, 2010) (declining to extend *Padilla* to failure of plea counsel to advise the defendant of the requirement to register as a sex offender, the requirement to complete the Missouri sex offender program (“MOSOP”) prior to release, and possible commitment under the state’s sexually violent predator (“SVP”) law, because none of these requirements are mentioned in the National Legal Aid and Defender Association guidelines, sex offender registration is only civil and regulatory in nature and not punitive, the MOSOP program does not resemble deportation because it is a requirement while in prison to complete parole, and SVP commitment is not an automatic result); *Brown v. Goodwin*, No. 09-211, 2010 WL 1930574, at *13 (D.N.J. May 11, 2010) (stating in dicta that failure to advise defendant of consequence of civil commitment as a result of plea cannot be ineffective under *Padilla* because civil commitment is not automatic like deportation because state commitment statute requires individualized assessment); *see also Hughes*, 953 N.E.2d 1017 (denying Sixth Amendment claim where, inter alia, defendant made no effort to show that civil commitment was “presumptively mandatory”).

civil commitment statute, which included notice and a trial, to conclude that the defendant did not have a Sixth Amendment claim.²⁰¹

A related example of additional imprisonment is where parole or probation is at issue. In this circumstance, the defendant's plea has some effect on parole eligibility or revocation, thereby extending the defendant's incarceration beyond the sentence associated with the plea. This example straddles the civil-criminal or direct-collateral divide in that parole and probation are not strictly part of a criminal sentence, but nonetheless are not purely civil in nature or in legal grounding. As with civil commitment, additional incarceration is a significant consequence. Further, whether additional process is provided is integral to the entanglement analysis. The Missouri Supreme Court has found that misadvice regarding parole eligibility can constitute ineffective assistance of counsel.²⁰² In that case, *Webb v. State*, there was no additional process available to the defendant and, as with deportation in *Padilla*, the criminal plea hearing was the only process afforded the defendant.²⁰³ Thus, the entanglement prong was also satisfied. This, however, may be an unusual factual circumstance.

Frequently, a separate hearing is held regarding the revocation of probation or parole. In such a situation, it is likely that the entanglement prong would not be met, and thus Sixth Amendment protections would not apply to the plea hearing. Yet the separate hearing would then be subject to the due process analysis that was applied in *Turner*, which relied on the key precedent of *Gagnon v. Scarpelli*.²⁰⁴ In *Gagnon*, the Court concluded that there is no right to counsel at a probation revocation hearing.²⁰⁵ And the *Turner* decision used *Gagnon* to justify its ultimate conclusion that procedural protections other than counsel were sufficient.²⁰⁶ An interesting twist is that, despite *Gagnon*, the *Federal Rules of Criminal Procedure* and corresponding state rules require counsel at each stage of a probation

201. *Blaise v. State*, 801 N.W.2d 627 (Iowa Ct. App. 2011) (noting that commitment as a sexually violent predator under IOWA CODE § 229A requires a review committee that “has determined that the person meets the definition of a sexually violent predator,” a petition by the Attorney General, a preliminary determination by the district court as to probable cause, an evaluation, and a jury or bench trial to determine whether the State proved beyond a reasonable doubt that the respondent is a sexually violent predator).

202. *Webb v. State*, 334 S.W.3d 126 (Mo. 2011) (finding that misadvice from counsel regarding parole eligibility for plea was sufficient for prima facie ineffective assistance claim and remanding for evidentiary hearing). Note, however, that *Webb* is explicitly a misadvice case, with a concurrence urging a holding that affirmative advice is required, and a dissent stating that parole is clearly collateral, and thus *Padilla* is inapplicable. *See id.*; accord *Frost v. State*, 76 So.3d 862 (Ala. Crim. App. 2011) (holding that defendant presented a valid claim for ineffective assistance of counsel where counsel failed to advise defendant that plea would result in ineligibility for parole under sex offender law).

203. *Webb*, 344 S.W.3d 126.

204. *See Turner v. Rogers*, 131 S. Ct. 2507, 2518–19 (2011) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 789–90 (1973)); *see also supra* note 140 (discussing *Turner's* reliance on *Gagnon*).

205. *Gagnon*, 411 U.S. 778.

206. *Turner*, 131 S. Ct. at 2520.

revocation hearing.²⁰⁷ Thus, although the Supreme Court has not decided to explicitly provide a right to counsel in revocation proceedings, it functionally exists, and a defendant in a separate revocation proceeding would enjoy this protection under the current rules.

A final example of additional incarceration is where a plea may be used to enhance or otherwise determine a sentence in a separate proceeding.²⁰⁸ This example is in fact a *criminal* consequence of a criminal conviction. But it nonetheless makes the point that *Padilla's* rejection of the direct-collateral distinction requires individualized consideration of each consequence to understand when the Sixth Amendment applies. In the instance of one plea being used to enhance another sentence, before *Padilla*, courts rejected the view that the Sixth Amendment requires the advice of counsel.²⁰⁹ Using the significant entanglement analysis, again the consequence of incarceration is significant, but the issue of entanglement is more complex. In this circumstance, because the consequence is a criminal one, there is a right to counsel that attaches in the secondary proceeding. However, it is also the case that the consequence itself is virtually automatic. To illustrate, if a defendant pleads guilty to crime *A* while he has been charged but not yet convicted of crime *B*, then once the defendant is convicted of crime *B*, there is no discretion as to the effect of the plea to crime *A* on the sentence for crime *B*. That is to say, no amount of advice of counsel or other process associated with crime *B* allows defendant to avoid the consequence of the plea to crime *A*. Thus, although it is not an entanglement of a civil consequence in the criminal process, the consequence of that initial plea is nonetheless entangled in the initial criminal process; that is, the initial court essentially controls the outcome in the second court. This entanglement suggests the Sixth Amendment should apply to the consequence as it arises in the initial criminal case. Courts after *Padilla* appear to be divided on this issue. At least two lower courts have rejected Sixth Amendment claims where the defendant was not advised that the plea could be used in a parallel criminal proceeding.²¹⁰ However, the Eleventh Circuit seemed to accept that such

207. See FED. R. CRIM. P. 32.1(a)(3) (stating that at the initial appearance, “the judge must inform the person of . . . the person’s right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel”); *id.* at 32.1(b)(1) (stating that at the preliminary hearing, “the judge must give the person: notice of . . . the person’s right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel”); *id.* at 32.1(b)(2) (stating that at the revocation hearing, “the person is entitled to: . . . notice of the person’s right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel”).

208. See generally JAMES FRANK ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION IN OHIO (2011) (considering enhancement of subsequent sentence as a collateral consequence of conviction).

209. See, e.g., *Ex parte Morrow*, 952 S.W.2d 530, 535 (Tex. Crim. App. 1997) (finding no Sixth Amendment ineffective assistance of counsel where a plea to noncapital offense became an aggravating factor in a capital case (citing *King v. Dutton*, 17 F.3d 151, 154 (6th Cir. 1994))).

210. See *State v. Rasheed*, 340 S.W.3d 280 (Mo. Ct. App. 2011) (declining to extend *Padilla* to use of plea in subsequent prosecution because “[t]he use of a federal-court guilty plea in a separate state proceeding is less a ‘practically inevitable’ consequence of that plea, than a rare result of concurrent federal and state prosecutions”); *People v. Pierre*, 913 N.Y.S.2d 655 (N.Y. App. Div. 2011) (rejecting a defendant’s claim, post-*Padilla*—but

an ineffective assistance of counsel claim was possible though it rejected the claim at issue based on insufficient evidence that counsel failed to advise the defendant of the implications of a state court plea on a federal court sentencing.²¹¹

In sum, those civil consequences of conviction that involve additional incarceration but no additional process are generally likely to satisfy the significant entanglement framework. Thus, this category of consequences, following the logic of *Padilla* and *Turner*, should be afforded Sixth Amendment protection at the plea stage.

2. Other Deprivations of Liberty

There are other civil consequences of criminal convictions that are deprivations of liberty, but do not involve additional incarceration. Examining these consequences helps to understand the significant entanglement test, and particularly the issue of significance. The classic example of this type of consequence is sex offender registries. A sex offender registry is plainly civil—stemming from a civil statute and involving civil law—but also necessarily flows from a criminal conviction. Courts before *Padilla* split on how the Sixth Amendment should be applied to these consequences.²¹²

Applying the significant entanglements framework, the significance prong considers the perspective that being listed on a public registry—essentially a public shaming that often translates into a community restricting one's presence or activities—is a harsh consequence.²¹³ However, this factor is more complex than it is in the incarceration context because of the factual variation in the ways a registry can affect a defendant's life after release. For example, some counties or municipalities have laws requiring registration and also prohibiting registered sex offenders from living in certain areas.²¹⁴ One individual living in a densely populated area or an area with a proportionally high number of individuals with criminal records may not be confronted on a regular basis with his presence on a registry, whereas a defendant living in a less populated area with a low proportion

without reference to it—that his guilty plea was rendered invalid because the trial court failed to advise him that his state conviction could be used to enhance a sentence on a pending federal criminal matter).

211. See *United States v. Mata*, 400 Fed. App'x 422 (11th Cir. 2010) (finding no ineffective assistance of counsel because there was no misadvice or evidence of prejudice regarding effect of state court plea on subsequent federal court sentencing).

212. Compare *State v. Edwards*, 157 P.3d 56, 64–65 (N.M. Ct. App. 2007) (“In light of the harsh and virtually certain consequences under [the New Mexico Sex Offender Registration and Notification Act (SORNA)] that flow from a plea of guilty or no contest to a sex offense, we . . . conclude that defense counsel has an affirmative duty to advise a defendant charged with a sex offense that a plea of guilty or no contest will almost certainly subject the defendant to the registration requirements of SORNA.”), with *Torres*, *supra* note 191 (discussing South Carolina sex offender registry precedent that no advice is required).

213. See HUMAN RIGHTS WATCH, NO EASY ANSWERS, SEX OFFENDER REGISTRATION LAWS IN THE U.S. 3 (2007), <http://www.hrw.org/fr/node/10685/section/2>.

214. See, e.g., MICH. COMP. LAWS § 28.734 (2006) (prohibiting registered sex offenders from working, loitering, or residing within certain areas).

of individuals with criminal records may suffer harassment and isolation as a result of the registry.²¹⁵ Thus, there may be some variation as to the importance to a defendant of this consequence. However, the consequence of sex offender registries is at least plausibly one that meets the significance prong.²¹⁶

For sex offender registries, the issue of entanglement may be more straightforward. Traditionally, the state statutes that require sex offender registration do not provide any additional process or discretion as to the requirement.²¹⁷ In fact, once a defendant has pled to a qualifying crime, the registration requirement is automatically part of the requirements of release from incarceration.²¹⁸ This particular civil consequence is entangled with the criminal process as much as, if not more than, deportation.

The few courts that have considered the civil consequence of sex offender registration after *Padilla* have split on whether Sixth Amendment protections are appropriate. At least three cases have found valid ineffective assistance of counsel claims under the Sixth Amendment where counsel failed to advise a defendant that a plea would require the defendant to register as a sex offender.²¹⁹ One of these courts specifically noted “the unique and mandatory nature of the specific consequence of the sex offender registration requirement.”²²⁰ However, other courts have found that there is no Sixth Amendment protection for the consequence of a sex offender registry because “sex offender registration is not punitive in that it is only civil and regulatory in nature.”²²¹ Thus, sex offender registries

215. See MARCUS NIETO & DAVID JUNG, *THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW* (2006), <http://www.library.ca.gov/crb/06/08/06-008.pdf>. This hypothetical contrast in experience raises the question of whether an individual listed on a registry has his liberty constrained by being effectively forced to live in more populated areas with high rates of individuals with criminal records.

216. See Joanna Woolman, *Padilla's "Truly Clear" Test: A Case for a Broader Application in Minnesota*, 37 WM. MITCHELL L. REV. 840 (2011) (arguing that in Minnesota, three categories of consequences should be included in counsel's post-*Padilla* duty due to their harshness: custody restrictions, Department of Health and Human Services licensing, and sex offender registry requirements).

217. See, e.g., CAL. PENAL CODE § 290(a)(2)(A)–(E) (2010) (requiring mandatory, lifelong registration for persons convicted of enumerated offenses and discretion for court to order registration for other offenses).

218. See *id.*

219. See *United States v. Rose*, ACM 36508, 2010 WL 4068976, at *10 (A.F. Ct. Crim. App. June 11, 2010) (finding ineffective assistance of counsel where counsel failed to advise defendant of the plea consequence of having to register as a sex offender, and noting military precedent of *United States v. Miller*, 63 M.J. 452, 458 (C.A.A.F. 2006) (establishing prospective requirement of advising defendants of sex offender registry consequence of plea)); *Taylor v. State*, 698 S.E.2d 384 (Ga. Ct. App. 2010) (applying *Padilla* factors and concluding that “the failure to advise a client that pleading guilty will require him to register as a sex offender is constitutionally deficient performance”); *People v. Fonville*, 804 N.W.2d 878, 892 (Mich. Ct. App. 2011) (relying on *Padilla* for “the logic of its rationale” and finding failure to advise of sex offender registry consequence of plea is ineffective assistance because it is a severe penalty, automatically applied, and intimately related to the criminal process); *Calvert v. State*, 342 S.W.3d 477 (Tenn. 2011) (holding that counsel's failure to advise of mandatory lifetime community supervision consequence of plea to sex offense was ineffective assistance of counsel).

220. See *Fonville*, 804 N.W.2d at 892.

221. See *Maxwell v. Larkins*, No. 4:08 CV 1896 DDN, 2010 WL 2680333, at *9–10 (E.D. Mo. July 1, 2010) (declining to extend *Padilla* to failure of plea counsel to advise the defendant of the requirement to register as a

may be an example where the application of the significant entanglement framework varies with the factual variation of each case. Nonetheless, in its classic variation, this consequence meets the significant entanglement framework and thus warrants Sixth Amendment protection.

3. *Financial Loss*

A final category of civil consequences of criminal convictions that is useful to help understand the significant entanglement framework is financial loss. Certainly a number of civil consequences of criminal conviction can fall in this category, but two are useful for explanatory purposes. The first is loss of licensing or access to a job, and the second is forfeiture of assets as a civil penalty subsequent to conviction.

The issue of licensing or job qualifications is likely to be a fact-intensive analysis, as this consequence can be implemented in several ways. Informal, employer-specific exclusions from employment, which are not addressed here, have generated their own reform efforts and commentary.²²² As for exclusion from jobs or professional licensing due to legal requirements, there are two general categories: The first is particular employers—such as law enforcement—that due to the nature of their business, but not based on licensing, exclude potential employees with criminal convictions.²²³ The second is state or federal statutes or regulations that exclude those with criminal convictions from state licensing for certain professions.²²⁴

Where there is no formal licensing statute but there is a formal exclusion from employment, the significant entanglement analysis may not be met. As to the significance of the consequence, deprivation of one's chosen profession seems harsh, but the restriction from a particular employer is a narrow penalty. Thus, significance of the consequence may turn on the context of a particular case and defendant, but as a general matter would not meet the significance prong. Further, this consequence is likely to be automatic, as it is unlikely that employers would want any discretion to, for example, hire those with criminal records as police

sex offender or the possibility of civil commitment); *see also* Robinson v. State, No. A11-550, 2012 WL 118259, at *4 (Minn. Ct. App. Jan. 17, 2012) (noting that *Padilla* does not clearly state that the direct-collateral distinction should not be applied outside of deportation, and finding that counsel's failure to advise regarding lifetime sex offender registry requirement was not deficient).

222. *See, e.g.*, CONN. GEN. STAT. § 10-142 (2010) (banning employers from asking on initial job applications for criminal history); MASS. GEN. LAWS ch. 151B, § 4 (9 ½) (2010) (same); MINN. STAT. § 364.021 (2009) (same); N.M. STAT. ANN. § 28-2-3(B) (2010) (same); *see also* AMY L. SOLOMON ET AL., URBAN INST., FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY 13 (2004), http://www.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf; RODRIGUEZ & ENSELLEM, *supra* note 60.

223. *See, e.g.*, MD. CODE REGS. 12.10.01.17(A) (2006) (prohibiting hiring of individuals convicted of certain felonies or misdemeanors as correctional officers).

224. *See, e.g.*, MD. CODE ANN., EDUC. § 6-113(1)–(3) (2004) (prohibiting licensing or hiring of school employees convicted of sex crimes or crimes of violence); MD. CODE REGS 10.09.54.06(B)(6) (2006) (prohibiting licensing of personal care aides convicted of felony).

officers. The one court that has addressed such a scenario declined, albeit with limited analysis, to afford Sixth Amendment protection in this context.²²⁵

In the case of a state licensing statute that categorically excludes individuals with convictions from certain types of employment, the significant entanglements framework is more likely to be met because of the significance of being banned from an entire industry and the potentially automatic nature of the consequence. For example, some states exclude individuals with criminal convictions from working in child care facilities, without any process regarding the application of the exclusion.²²⁶ This ban, an exclusion from a broad range of employment and thus significant, would also be entangled in the criminal process because of the lack of process provided. Although some have advocated for affording Sixth Amendment protections to the consequence of licensing requirements, there has not been an opinion after *Padilla* addressing the issue.²²⁷

Another civil consequence that involves financial deprivation is the forfeiture of property. It is necessary to draw a preliminary distinction: criminal statutes allow forfeiture of property as part of a criminal sentence, but that is a separate issue from a civil forfeiture triggered by the fact of a criminal conviction. For example, a federal statute authorizes a court—as part of the criminal sentence for offenses such as drug trafficking—to order the forfeiture of property involved in the offense.²²⁸ In this situation, the forfeiture is part of the sentence and plainly within the ambit of the Sixth Amendment.²²⁹ However, there can also be forfeiture due to a separate civil statute that requires the forfeiture of property because of a conviction. In this situation, the significant entanglement framework helps to analyze the protections that should apply.

Applying the significant entanglements analysis, some types of civil forfeiture may well require effective assistance of counsel after *Padilla*. First, the significance of the penalty will be a fact-intensive inquiry, but there are certainly situations where the forfeiture of assets would be a particularly severe penalty. Second, the issue of entanglement is also potentially satisfied if the civil forfeiture does not involve any additional process and is automatically triggered by the fact of conviction.

A recent case, *Commonwealth v. Abraham*,²³⁰ involves a factual scenario that seems to satisfy the significant entanglement framework. While the *Abraham* case

225. See *Thomas v. United States*, No. RWT-10-2274, 2011 WL 1457917, at *4–5 (D. Md. Apr. 15, 2011) (declining to extend *Padilla* to the consequence of ineligibility for employment with a public safety agency due to plea to illegally carrying a weapon on national park property).

226. See, e.g., W. Todd Miller, *The Central Registry Statute for Abuse and Neglect Matters Is Constitutionally Flawed*, 8 RUTGERS J. L. & PUB. POL'Y 651 (2011) (discussing New Jersey's categorical licensing exclusions).

227. See Woolman, *supra* note 216.

228. See 18 U.S.C. § 982 (2006) (authorizing a court to impose as part of a sentence the forfeiture of property “involved in such offense, or any property traceable to such offense”).

229. See *infra* notes 177–78 and accompanying text.

230. 996 A.2d 1090 (Pa. Super. Ct. 2010).

is pending on appeal to the Pennsylvania Supreme Court,²³¹ the intermediate appellate decision is helpful to understand the application of the significant entanglement framework to financial consequences of a criminal conviction. Mr. Abraham, a teacher, pled guilty to indecent assault, a charge that triggered the automatic loss of his pension under the Public Employee Pension Forfeiture Act.²³² Mr. Abraham brought a Sixth Amendment claim, alleging that his counsel was deficient for failing to inform him of this consequence.²³³ In considering the defendant's Sixth Amendment claim, the court recognized that "*Padilla* harkens back to the original *Strickland* concept, adopted by our Supreme Court in *Pierce*, of examining the totality of the circumstances to determine what advice must be given to have a fully informed guilty plea."²³⁴

Embracing a fact-intensive inquiry, the court concluded that counsel's failure to advise defendant that his plea would result in the loss of his pension was ineffective.²³⁵ In reaching this conclusion, the court relied on the observations that the loss was automatic, only criminal behavior triggered the consequence, and the consequence was of a punitive nature.²³⁶ Essentially, the court in *Abraham* applied the significant entanglement framework: it examined the significance to the defendant and the entanglement of the civil consequence with the criminal process to conclude that the Sixth Amendment applied.²³⁷ Thus, the forfeiture of a pension warranted Sixth Amendment protection because it satisfied the significant entanglement framework.

4. Other Consequences

As the significant entanglement framework is fact-specific, it is impossible to address in a single article how the framework would apply to each of the thousands of civil consequences of conviction.²³⁸ However, there are some general characteristics of consequences that predict the application of the framework.

First, the significance prong is unlikely to be met by consequences that are financial in nature, and represent a reduction in the financial options available to a defendant but not a comprehensive deprivation of financial opportunity. The

231. See *Commonwealth v. Abraham*, 9 A.3d 1133 (Pa. 2010) (granting petition for appeal).

232. See *Commonwealth v. Abraham*, 996 A.2d 1090, 1091 (Pa. Super. Ct. 2010).

233. *Id.* at 1092.

234. *Id.*; see Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 30 ST. LOUIS U. PUB. L. REV. (forthcoming 2011) (discussing *Abraham's* embrace of a fact-intensive inquiry).

235. See *Abraham*, 996 A.2d at 1092–95.

236. See *id.*

237. Outside the scope of this Article, but interesting for broader considerations of the distinction between civil and criminal law, is the court's analysis of whether the consequence of forfeiture is "civil" or "penal" under Pennsylvania law. See *id.* at 1094. Although this analysis has fluidity with the entanglement prong presented in this Article, it involves a separate line of state cases, with their origin in the Ex Post Facto Clause, that reveal fluidity in the line between civil law and criminal law.

238. See AM. BAR ASS'N, *COLLATERAL SANCTIONS*, *supra* note 40.

example discussed above regarding exclusion from a particular employer falls in this category: while exclusion from work has a financial impact, exclusion from a particular employer is narrow enough that it is unlikely to be objectively significant. Other consequences that may fall in this category are certain government benefits, prohibitions on financial trading, or licensing restrictions.

Second, the entanglement prong is unlikely to be met by non-automatic consequences that involve separate processes. Although there is a separate analysis to be done regarding the constitutional sufficiency of any civil process used to impose a civil consequence of conviction, the framework operates to exclude such consequences from protection during the criminal process. This is consistent with the underlying sources of protection for the significant entanglement framework: if the criminal court controls the outcome of a consequence, then protections should be provided in that court, but if a separate civil process controls the outcome, then the protections are properly provided in that process. Those civil commitment statutes, discussed above, that provide a separate civil process would fall in this category of consequences that do not meet the significant entanglement framework. Other consequences that similarly would not meet the framework are government benefits for which a civil process is provided, licensing restrictions with an appeal process, or gun ownership restrictions with a corresponding civil process.

B. Transferring the Significant Entanglement Framework to Civil Consequences of Conviction in Other Contexts

Although the significant entanglement framework emerges from *Padilla*, a case considering Sixth Amendment protection for a consequence of a guilty plea, the framework is not necessarily specific to either the Sixth Amendment or the plea stage, as is illustrated by the parallel logic applied in *Turner*. The framework is a gatekeeping mechanism that considers whether a particular consequence should be afforded protection at a particular stage in the criminal process, thus it is potentially useful in broader contexts. The previous discussion addressed how the significant entanglement framework can be used to determine whether Sixth Amendment protections apply to civil consequences of a guilty plea other than deportation. The next logical step in this inquiry is how the significant entanglement test applies to Sixth Amendment protections at critical stages in the criminal process other than a guilty plea. And the step beyond that is the application of the significant entanglement framework beyond the Sixth Amendment. To understand the applicability of the significant entanglement framework to these broader contexts, this Section will consider a few examples. As before, these examples are meant to illustrate the applicability of the framework as a mode of analysis, but by definition the resolution of whether any particular consequence is afforded protection—and whether a successful claim has been presented—must be resolved based on the specific facts of the case.

1. *Right to Counsel at Other Critical Stages*

The *Padilla* decision concerned the right to effective counsel at the guilty plea stage and was premised on precedent that the plea is a “critical stage” of the criminal process.²³⁹ Thus, an extension of this logic suggests that the significant entanglements framework might apply to civil consequences at other critical stages of the criminal process.²⁴⁰ Not every critical stage presents circumstances that involve civil consequences, so this inquiry is a limited one.

One critical stage where civil consequences are implicated is sentencing. The Supreme Court has made clear that the act of sentencing—regardless of how or when it appears in the criminal process—is a critical stage for purposes of the Sixth Amendment. In *Mempa v. Rhay*, the Court recognized the Sixth Amendment right to counsel at sentencing, and held that the imposition of a sentence at a parole revocation hearing was a “critical stage” for the purposes of the Sixth Amendment.²⁴¹ The Court noted that the imposition of a sentence triggers this right, “whether it be labeled a revocation of probation or a deferred sentencing.”²⁴²

At sentencing, a defendant faces exposure to civil consequences that is analogous to that at the plea stage. As with a guilty plea, counsel’s obligation clearly extends to advice about the sentence itself.²⁴³ Just as the charge to which a defendant pleads may implicate different civil consequences, the sentence a defendant receives may also implicate a variety of civil consequences. For example, some immigration consequences are triggered by sentences of one year or more.²⁴⁴ So, the assistance of counsel in advocating for a sentence of a lesser length, or in a situation with multiple crimes, for multiple shorter sentences, would be central to potential civil consequences. In this example, *Padilla* tells us that the civil consequence of deportation is a significant one because of its severity.²⁴⁵ *Padilla* also tells us that its nearly automatic operation makes it a consequence that

239. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1487 (2010); see also Brief for Law Professors as Amici Curiae, *supra* note 86, at 7 (discussing protection at critical stage in context of argument that Sixth Amendment does not carve out collateral consequences at plea stage).

240. See, e.g., *Kirby v. Illinois*, 406 U.S. 682, 689–90 (1972) (holding that the right to counsel attaches at initiation of formal judicial proceedings); *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970) (finding that a preliminary hearing is critical stage in criminal proceeding); *United States v. Wade*, 388 U.S. 218, 236–37 (1967) (finding right to counsel at pretrial lineup because it is a critical stage of the prosecution); *White v. Maryland*, 373 U.S. 59, 60 (1963) (same); *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961) (finding that arraignment is critical stage in criminal proceeding); *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (holding that the right to attorney attaches at the time of arraignment).

241. 389 U.S. 128, 136 (1967).

242. *Id.* at 137.

243. See *id.* at 136.

244. See 8 U.S.C. § 1227(a)(2)(A)(iii) (2006 & Supp. 2009) (stating that a defendant is deportable if convicted of an aggravated felony); 8 U.S.C.A. § 1101(a)(43) (2011) (defining “aggravated felony” as various crimes for which the defendant receives a sentence of at least one year).

245. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (“We have long recognized that deportation is a particularly severe penalty.” (internal quotation omitted)).

is entangled in the criminal process.²⁴⁶ The significant entanglement framework then suggests that the Sixth Amendment should apply to advice regarding civil consequences of sentencing just as it does to such advice regarding a plea. This analysis and the preceding discussion regarding consequences beyond deportation suggest that applying the significant entanglement framework to other consequences at sentencing may yield a similar conclusion.²⁴⁷ Although this reasoning facially suggests yet another expansion of obligations for defense counsel, the reality is that only a small subset of civil consequences are tied to sentence rather than conviction. Thus, the same information sources that will enable counsel to advise at the plea stage are likely to be sufficient as to advice at the sentencing stage.

2. *Significant Entanglements Outside the Sixth Amendment*

As discussed above, the direct-collateral distinction eschewed by *Padilla* has its roots in both Sixth Amendment and due process jurisprudence. Thus, if the significant entanglement framework is useful for considering civil consequences of conviction in the Sixth Amendment context, it may be useful in the due process context as well. An illustrative example is due process protections for the guilty plea stage of the criminal process. *Padilla* relies on the precedent that the guilty plea stage is sufficiently critical to warrant Sixth Amendment protections.²⁴⁸ But due process protections also apply to this critical stage.²⁴⁹

It is well-established that due process protections require courts to ensure that a guilty plea is knowing and voluntary.²⁵⁰ Before *Padilla*, courts had held that a knowing and voluntary plea includes an awareness of the direct consequences of conviction but does not need to include awareness of the collateral civil consequences of conviction.²⁵¹ Like the cases preceding *Padilla* concerning Sixth Amendment protections, this conclusion was based on the direct-collateral distinc-

246. See *id.* at 1480 (discussing the near-automatic result of deportation).

247. See Sweeney, *supra* note 99, at 359–60 (“Sentencing is another area that provides ample opportunities for constructive lawyering on behalf of a noncitizen client, especially where certain sentences (even if suspended) can trigger the ‘aggravated felony’ category and its draconian consequences. For example, suppose that during a plea negotiation on an assault charge the state insists on a three-year sentence. If the case involved an altercation with a number of individuals who could be seen as victims, a creative defense attorney could satisfy the state’s concerns and avoid the aggravated felony at the same time by proposing a plea deal that stacks three separate charges of assault, each with a sentence of 364 days, to be served consecutively. Alternatively, counsel could recommend that an offer for a longer, suspended sentence be declined in favor of a shorter sentence of ‘real’ time that the defendant will actually serve.”).

248. See *Padilla*, 130 S. Ct. at 1480–81 (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

249. See *Boykin v. Alabama*, 295 U.S. 238, 243 (1969) (establishing requirement that guilty plea be knowing and voluntary).

250. *Id.* at 244 n.5 (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).

251. See *Brady v. United States*, 397 U.S. 742, 755 (1970) (finding that a plea stands if “entered by one fully aware of the direct consequences” unless induced by threats, misrepresentation, or improper promises (citing *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev’d*, 356 U.S. 26 (1958))).

tion.²⁵² Thus, after *Padilla*, there is the question of whether the direct-collateral distinction should still exist in the due process context when it no longer has a place in a Sixth Amendment analysis. To answer this question, it is helpful to reevaluate the due process protections at the plea stage, applying the logic of *Padilla*, even though the holding in *Padilla* does not explicitly extend to due process protections. Indeed, courts applying *Padilla* to due process claims regarding the plea stage have recognized this limitation, and declined to extend *Padilla* to these claims.²⁵³ However, applying the significant entanglement framework to due process claims at the plea stage reveals that there is both consistency and logic to rejecting the direct-collateral distinction in this context.

This conclusion is, in part, tied to the history of Supreme Court jurisprudence that shifted the basis for the right to counsel from due process to the Sixth Amendment. Before *Gideon v. Wainwright* recognized the Sixth Amendment's right-to-counsel protections,²⁵⁴ the Court relied on special circumstances to invoke the right to counsel in criminal proceedings, and these protections were grounded

252. See *Bustos v. White*, 521 F.3d 321, 325–26 (4th Cir. 2008) (considering precedent regarding court's obligation to inform defendant of consequences of plea when deciding whether it was ineffective assistance of counsel to fail to advise client regarding parole eligibility); *Steele v. Murphy*, 365 F.3d 14, 17 (1st Cir. 2004) (holding that the judge's failure to inform petitioner before he pled guilty of possibility of civil commitment as sexual offender did not violate due process, and thus plea was still valid); *United States v. U.S. Currency in the Amount of \$228,536.00*, 895 F.2d 908, 915 (2d Cir. 1990) ("Certain possible consequences of a guilty plea are 'collateral' rather than direct and need not be explained to the defendant in order to ensure that the plea is voluntary."); *Holmes v. United States*, 876 F.2d 1545, 1549 (11th Cir. 1989) (holding that "the requirements of Rule 11 [of the Federal Rules of Criminal Procedure] do not encompass the court's failure to inform a defendant of his ineligibility for parole since parole eligibility is a collateral rather than a direct consequence of a guilty plea"); *Hill v. Lockhart*, 731 F.2d 568, 570 (8th Cir. 1984) ("The details of parole eligibility are considered collateral rather than direct consequences of a plea, of which a defendant need not be informed before pleading guilty." (citations omitted)), *aff'd*, 474 U.S. 52 (1985); *Armstrong v. Egeler*, 563 F.2d 796, 800 (6th Cir. 1977) (holding that due process does not require that a defendant be informed of his parole ineligibility before pleading guilty); *Trujillo v. United States*, 377 F.2d 266, 268–69 (5th Cir. 1967) (holding that a defendant need not be advised of his parole ineligibility before entering a guilty plea because "eligibility for parole is not a 'consequence' of a plea of guilty, but a matter of legislative grace" and thus "noneligibility for parole is not a 'consequence' of a plea of guilty" but rather "a consequence of the withholding of legislative grace").

253. See *United States v. Francis*, No. 5:04-CR-74-KSF, 2010 U.S. Dist. LEXIS 142509, at *13–14 (E.D. Ky. Dec. 30, 2010) (applying the direct-collateral distinction to a due process claim and finding that failure to advise of civil commitment consequence of plea is not violation of due process because federal civil commitment statute provides discretionarily initiated separate proceeding rather than automatic consequence); *State v. Salazar*, No. 2 CA-CR 2010-0296-PR, 2011 Ariz. App. LEXIS 279, at *4–5 (Ariz. Ct. App. Jan. 19, 2011) (declining to extend *Padilla* to due process claim that trial court should have warned defendant of the immigration consequence of his guilty plea); *Smith v. State*, 697 S.E.2d 177, 184 (Ga. 2010) (drawing distinction between Fifth Amendment due process context—where the direct-collateral distinction is appropriate—and Sixth Amendment ineffective assistance of counsel claim where the direct-collateral distinction is not appropriate); *Clark v. State*, 702 S.E.2d 657, 659 (Ga. Ct. App. 2010) (finding guilty plea was knowing and voluntary despite trial court's failure to advise defendant that a consequence of conviction would be a prohibition from living with his minor daughter because defendant raised only a due process claim regarding the voluntariness of the plea, and not an ineffective assistance of counsel claim, thus the direct-collateral consequence distinction applied).

254. 372 U.S. 335 (1963).

in due process.²⁵⁵ After *Gideon*, the context for these protections shifted to the Sixth Amendment.²⁵⁶ Defendants often raise parallel due process claims—regarding the court’s behavior—and Sixth Amendment claims—regarding counsel’s behavior—in the plea context.²⁵⁷ As the cases discussed in this Article reveal, courts continue to conflate Sixth Amendment standards and due process standards when it comes to the right to counsel in a criminal prosecution.²⁵⁸ This makes sense; until *Padilla*, the analysis for each set of protections regarding civil consequences of conviction was similar, with the key variation being whether it was the court or counsel who was responsible for implementing the protection. The historical overlap between these protections, the conflation by courts of due process and Sixth Amendment claims, and the parallel nature of these claims under modern case law all support the view that *Padilla*’s rejection of a direct-collateral distinction for civil consequences should extend to due process protections for guilty pleas.

If a basic premise of *Padilla* is that a specific factual examination of the civil consequence and its place in the criminal process is necessary to understand the scope of the Sixth Amendment protections afforded to it, then a similar examination should apply to due process protections. Indeed the justifications of *Padilla* for its conclusion in the Sixth Amendment context translate almost identically to the due process context. This translation is underscored by the Court’s willingness in *Turner* to make a fact-specific inquiry, embracing the significant entanglement criteria, in a consideration of due process protections in a civil proceeding.

In addition, a key premise of the *Padilla* decision was recognition of the reality of plea bargains in the criminal process: the prevalence and importance of pleas for actual defendants, as well as how defendants experience the plea process.²⁵⁹ That same reality provides the context for due process protections at the plea stage.²⁶⁰

255. See *Hamilton v. Alabama*, 368 U.S. 52 (1961) (finding that failure to appoint counsel at arraignment deprived defendant of due process); *Moore v. Michigan*, 355 U.S. 155 (1957) (finding denial of due process where the defendant did not intelligently and understandingly waive counsel before entering a plea of guilty and no counsel was present at hearing on the degree of the crime following entry of the guilty plea); *Betts v. Brady*, 316 U.S. 455, 461–62 (1942) (relying on “special circumstances” to make the right to counsel applicable as a due process protection).

256. See *Gideon*, 372 U.S. 335 (overruling *Betts* and holding that the Sixth Amendment as applied through the Due Process Clause of the Fourteenth Amendment is applicable to the states and, accordingly, that there is an absolute right to appointment of counsel in felony cases).

257. See, e.g., *id.*

258. See *supra* p. 1398–99.

259. See Brief of State Attorneys General as Amici Curiae Supporting Affirmance at *9, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651) (calling plea bargaining the “backbone of the criminal justice system”); *Bibas*, *supra* note 173, at 1138 (discussing significance of *Padilla* and its focus on the reality of guilty pleas); Gabriel J. Chin & Margaret Colgate Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, 25 CRIM. JUST. 21, 30 (2010) (discussing how prevalence of plea bargains is key factor in the context in which *Padilla* came to be decided).

260. The importance of pleas to the criminal process has led to suggestions that due process suggests or requires a stronger role for courts in that process. See Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731 (2010)

For example, *Padilla* recognized the role of counsel's misrepresentation or omission at the plea stage as inducing behavior.²⁶¹ Misrepresentation or omission of information by the court at the plea stage would similarly induce behavior by a defendant.

Further, a key element of the analysis in *Padilla* was the legal community's view that counsel should provide advice regarding immigration consequences. Before *Padilla*, the American Bar Association's ("ABA") standards required defense attorneys to advise clients regarding deportation consequences.²⁶² So, too, did organizations of defense attorneys at the state and national level.²⁶³ Indeed, the Uniform Collateral Consequences of Conviction Act—a result of collaboration among a variety of stakeholders—even concluded that effective counsel included effective advice regarding the civil consequences of conviction.²⁶⁴

A similar evolution is occurring regarding due process protections provided at the plea stage. The Uniform Collateral Consequences of Conviction Act provides for notice of potential civil consequences by a court at or before arraignment, sentencing, and release.²⁶⁵ The ABA's standards require a court to inform a defendant when pleading guilty of potential civil consequences of the conviction.²⁶⁶ In addition, states have created rules of procedure requiring the court to inform defendants of civil consequences of a plea.²⁶⁷ Similarly, the committee for the *Federal Rules of Criminal Procedure* has supported the recommendation that Rule 11 be amended to add to the plea colloquy an advisement regarding immigration and sex offender consequences of a plea.²⁶⁸ In practice, many prosecutors and judges include some civil consequences of a plea in the plea

(arguing that juries should be involved in pleas); Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 48 AM. CRIM. L. REV. 1293 (2010) (arguing that a judicial role in plea discussions would increase fairness).

261. See *Padilla*, 130 S. Ct. at 1497.

262. See AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-5.1(a), at 197 (3d ed. 1993); see also AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.2(f), at 116 (3d ed. 1999).

263. See NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 6.2 (1995); *Standards for Attorney Performance*, in 2 COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS D10, H8, J8 (Neal Miller & Peter Ohlhausen eds., 2000) (surveying guidelines across multiple jurisdictions).

264. See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (rev. ed. 2010), http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010final_amends.pdf.

265. See *id.* § 5-6.

266. See AM. BAR ASS'N, COLLATERAL SANCTIONS, *supra* note 40, § 19-2.3, at 2-3.

267. See, e.g., TENN. CODE ANN. § 40-14-109(b) (2011) (requiring a trial court accepting a guilty plea for domestic violence to advise the defendant that he will never be able to buy a firearm and to only accept the plea if defendant acknowledges this warning on the record); FLA. R. CRIM. P. 3.172(c)(8) (requiring judges to inform defendants of deportation consequences of guilty pleas); MASS. R. CRIM. P. 12(c)(3)(B) (requiring judge to inform defendant of potential consequences when charge involves potential finding of sexual dangerousness); WYO. R. CRIM. P. 11(b)(1) (requiring trial court to advise that guilty plea for drugs may result in loss of federal benefits).

268. See Minutes of the Judicial Conference Advisory Committee on Criminal Rules (Sept. 27-28, 2010).

colloquy or plea negotiations.²⁶⁹ Although each of these rules and standards simply provides the protection, but does not create a due process claim if the protection is not provided,²⁷⁰ they nonetheless exhibit a parallel circumstance to the one that motivated the decision in *Padilla*. Thus, as in the Sixth Amendment context, the reality of plea bargains and the way courts apply due process protections suggests that the direct-collateral distinction is neither useful nor realistic.

There is a practicality to this conclusion: it does not make sense—from the perspective of efficiency or fairness or likelihood of success—to place the entire burden of the plea stage on counsel’s shoulders.²⁷¹ As with many procedural protections, a balance in the role of court and counsel seems the best way to ensure fairness and access to justice.²⁷² The court should not bear the burden of effective counsel, including investigating and advising a client about the civil consequences of a guilty plea. But counsel should not bear the burden of the court by having to ensure that the defendant has notice of and thus voluntarily and intelligently accepts what the court’s entry of a conviction imposes, including at least the most significant and entangled civil consequences. If the plea stage is one to which we afford protections, those protections should be consistent. And consistency suggests that Sixth Amendment and due process protections both consider the civil consequences of convictions on their own terms. The significant entanglements framework provides a useful framework to do so.

V. CONCLUSION: A GENERAL SIGNIFICANT ENTANGLEMENT INQUIRY EMERGES

The significant entanglement framework can guide consideration of which constitutional rights apply at critical stages of the criminal process. Courts can ask: is the consequence significant as an objective matter and to the particular defendant, and is the consequence entangled with the criminal process? For a critical stage, if the significant entanglement framework is met, then the protections afforded that stage apply to the civil consequence. By engaging in this analysis, courts can grapple in a structured way with the protections that should be

269. *Id.*; FRANK ET AL., *supra* note 208; Ewald & Smith, *supra* note 4, at 152.

270. *See, e.g.,* Steele v. Murphy, 365 F.3d 14, 19 n.2 (1st Cir. 2004) (noting the requirement of MASS. R. CRIM. P. 12, but concluding that failure to follow the rule does not affect a federal constitutional claim); *see also* Roberts, *supra* note 3, at 150 (noting that a state-established duty of the court to warn of civil consequences is not a basis for finding a plea involuntary, or even if the plea is found involuntary, an admission during the plea colloquy can be enough to impose a civil consequence).

271. Chin, *Race*, *supra* note 37, at 254 (“Basic fairness requires first that collateral consequences be collected in one place, and second that persons charged with a crime be notified of what the consequences are when they plead guilty or are sentenced.”).

272. *See* Roberts, *supra* note 3, at 150 (noting that even where states require judges to warn defendants of civil consequences of a plea, it may be too late in the plea process to make any difference, and noting that Maine allows a judge to adjourn a plea hearing after a defendant has been advised by the court of consequences, to allow for consultation with counsel).

afforded the civil consequences of criminal convictions, across stages of process and across different rights.

This framework shares the reliance of *Padilla* and *Turner* on a fact-specific analysis of the civil consequence and the stage of the criminal process. Thus, the framework is based on the assumption that a fact-specific inquiry is appropriate and helpful in determining the scope of rights, and made functional by applying the significant entanglements framework. This is consistent with rights associated with the criminal process generally and is in part due to the particular nature of criminal law—with its inherent potential for serious deprivation of an individual's rights—which warrants close and individualized examination of its application. This fact-specific basis for the significant entanglement framework means that, beyond the threshold inquiry of the framework itself, the success of each individual claim will be fact-dependent and thus highly variable.

Further, the significant entanglement framework suggests a substantial practical impact on criminal defense and the criminal process. The *Padilla* decision, on its own, raises serious practical questions about how defense counsel can fulfill her constitutional obligations to her client. Some have suggested it is impractical to meet this additional burden, while others have suggested that *Padilla* will lead to improved collaborative representation.²⁷³ However, *Padilla* is the law of the land, and the consequences that flow from it are unavoidable. In part, the significant entanglement framework is an effort to lend coherence to civil consequences after *Padilla*. The significant entanglement framework explicitly addresses a broader range of consequences than *Padilla*, and the same arguments regarding the burden on defense counsel apply. So, too, does the observation that mechanisms that increase the ease with which defense counsel, and all actors in the process, obtain information will undoubtedly mitigate this burden.²⁷⁴

There is also a potentially broader systemic impact of the significant entanglement framework. If this application of constitutional protections imposes practical

273. See, e.g., McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795 (2011) (proposing frameworks for defense attorneys to adequately advise clients in light of *Padilla* and focusing on the importance of holistic defense); Derek Wikstrom, *No Logical Stopping Point: The Consequences of Padilla v. Kentucky's Inevitable Expansion*, 106 NW. U. L. REV. (forthcoming 2012) (arguing that expansion of *Padilla* to consequences other than immigration will overburden the defense system and thwart adequate representation); Ronald F. Wright, *Padilla and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515 (2011) (discussing how *Padilla* is indicative of and will contribute to a trend toward criminal defense where attorneys collaborate to address the breadth of representation needs).

274. See James J. Bell & Kathleen E. Rudis, *Advising Criminal Defendants in Indiana of Potential Collateral Consequences of a Guilty Plea in the Aftermath of Padilla v. Kentucky*, RES GESTAE, Apr. 2011, at 10, <http://www.kmlawyers.com/userfiles/collateral-consequences.pdf> (including a "Padilla Advisory" chart for defense counsel to use to ensure advice is given regarding thirty-one categories of consequences); Mario K. Castillo, *Immigration Consequences: A Primer for Texas Criminal Defense Attorneys in Light of Padilla v. Kentucky*, 63 BAYLOR L. REV. 587 (2011) (including a chart to be used as a tool for attorneys that tracks immigration consequences in light of sentencing guidelines).

burdens on defense counsel, prosecutors, and courts, these burdens may draw additional attention to the system of civil consequences in the American legal system.²⁷⁵ And this additional attention can create an opportunity to consider whether the system we have created—historically, in a piecemeal way—is the one we want to continue. At a minimum, the import of *Padilla* and *Turner* is that the direct-collateral distinction is a flawed lens for evaluating the operation of civil consequences of conviction in the reality of the modern criminal process. The significant entanglement framework is a starting point for developing a more coherent approach to that evaluation. This framework suggests a more just and realistic doctrine for the protections afforded the civil consequences of criminal convictions, and it may ultimately be a catalyst for redefining how our legal system conceives of and applies the civil consequences of conviction.

275. See Daniel Kanstroom, *Padilla v. Kentucky and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?*, 45 NEW ENG. L. REV. 305 (2011) (discussing the tension that remains after *Padilla* with the civil-criminal distinction in immigration law and suggesting that structural change is necessary to resolve the incoherence resulting from this tension); Margaret Colgate Love, *Evolving Standards of Reasonableness: The ABA Standards and the Right to Counsel in Plea Negotiations*, 39 FORDHAM URB. L.J. (forthcoming 2012) (discussing how the *ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons* can be a catalyst for changing the behavior of all actors in the plea process and the systemic norms); Markowitz, *supra* note 122 (predicting that *Padilla* portends a shift in immigration law because it rejects the concept of immigration law as purely civil and thus will be a “pivot point” for the Court to treat deportation, and perhaps other areas, as quasi-criminal and develop protections accordingly).