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Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation

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COLLATERAL CONSEQUENCES AFTER *PADILLA v. KENTUCKY*: FROM PUNISHMENT TO REGULATION

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ABSTRACT

This Article analyzes the scope of Padilla v. Kentucky, *concluding that its logic extends beyond deportation to many other severe and certain consequences of conviction that are imposed by operation of law rather than by the sentencing court. It proposes a set of reforms that would limit the disruptive effect of these so-called "collateral consequences" on the guilty plea process and make a defense lawyer's job easier. Part I describes a case currently pending in the Pennsylvania Supreme Court that may yield some important clues about how broadly the* Padilla *doctrine will be applied to status-generated consequences other than deportation. At issue in* Commonwealth v. Abraham *is whether a retired public school teacher should have been warned by his lawyer that pleading guilty to a misdemeanor sex offense would result in the permanent forfeiture of his vested pension benefits. Part II looks at the collateral consequences doctrine as applied by the courts before* Padilla *to demonstrate its weakness in the Sixth Amendment context. It then examines the* Padilla *decision itself and its progeny to date and proposes a test for determining when a lawyer should be constitutionally required to notify a client about a particular legal consequence of conviction. It concludes that the pension forfeiture at issue in* Abraham *meets that test. Part III proposes three non-constitutional reforms to complete* Padilla*'s unfinished business where the substance of plea agreements is concerned. The goal of these reforms is to minimize the extent to which harsh categorical sanctions destabilize the plea process on which the justice system has come to depend. Using principles set forth in the ABA Criminal Justice Standards, the Article recommends that jurisdictions should 1) compile and disseminate information about collateral sanctions; 2) eliminate those collateral sanctions that are disproportionately severe or bear only a tenuous relationship to the crime; and 3) provide timely and effective ways to avoid or mitigate the sanctions that*

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remain. These reforms will not only shore up the plea system, they will propel a move away from a punitive model of collateral consequences that is frequently self-defeating and unfair to one that can be justified in both moral and utilitarian terms.

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INTRODUCTION

The Supreme Court's decision in *Padilla v. Kentucky*[1] in March 2010 struck even veteran Court-watchers as a bolt from the blue. In finding that a non-citizen defendant should have been advised by his lawyer that pleading guilty to drug charges would almost certainly result in his deportation, the Court for the first time extended the constitutional right to counsel to the substance of a guilty plea and to a consequence of conviction that is not part of the court-imposed sentence. The concurring Justices, noting the "longstanding and unanimous position of the federal courts" that lawyers need not inform their clients about this "collateral" consequence of conviction, characterized the Court's decision "a major upheaval in Sixth Amendment law" that "will

1. 130 S. Ct. 1473 (2010).

lead to much confusion and needless litigation."[2] The dissenters warned that the logic—and thus the reach—of the Court's decision could not be limited "except by judicial caprice."[3]

In retrospect, *Padilla* should not have come as such a surprise in light of two modern phenomena: the dominance of guilty pleas over trials in the disposition of criminal cases, and the large and growing role of conviction in overall regulatory policy. As to the first, *Padilla* has been explained in terms of the perceived need to regulate "a free market that sometimes resembled a Turkish Bazaar."[4] The decision thus represents an important step toward imposing constitutional discipline on a typically hidden and frequently one-sided process of negotiation that has become the norm for disposing of criminal cases.[5] As to the second, *Padilla* recognizes the need to make participants in a criminal case aware of non-criminal "collateral"[6] penalties

2. *Id.* at 1487, 1491 (Alito, J., concurring).

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

4. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1119 (2011).

5. The *Padilla* Court took note of the fact that in 2003, 95% of criminal convictions resulted from pleas. 130 S. Ct. at 1485 n.13; *see also* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2540 (2009) (noting "only a small fraction of . . . cases actually proceed to trial," relying on the 5% figure provided in Brief for Law Professors as Amici Curiae). More recent studies confirm this percentage. *See* THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 1 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf. If federal criminal cases are an accurate barometer of national trends, the percentage of cases resolved by plea has actually increased since *Padilla* was decided. *See* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.5.22.2010 (2010), *available at* http://www.albany.edu/sourcebook/pdf/t522 2010.pdf (noting that the percentage of federal cases disposed of by plea has increased since 2003 from 96.3% to 97.4%); U.S. FED. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.10 (2010), *available at* http://www.ussc.gov/Data_and_Statistics/ Annual_Reports_and_Sourcebooks/2010/Table10.pdf (noting the same).

6. The term "collateral consequences" has been used for forty years to describe the various legal penalties and disabilities to which people are exposed when they are convicted of a crime based on their status as a convicted person. *See* Parker v. Ellis, 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting) ("Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities."). *See generally* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 159 U. PA. L. REV. (forthcoming 2012) (describing the historical punishment of civil death and "its revival in the form of a system of collateral consequences imposed by positive law based on criminal conviction."). The *Padilla* court cast some doubt on the general usefulness of the term "collateral," at least for the purpose of defining lawyers' obligations to their clients under the Sixth Amendment: "We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance.'" 130 S. Ct. at 1481 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)). Post-*Padilla*, suggested alternative technology seems either too narrow to capture the full range of

that are frequently a crime's most serious punishment.[7] Until *Padilla*, the so-called "collateral consequences doctrine" kept defendants considering a guilty plea in the dark about severe statutory or regulatory penalties like deportation

consequences about which practitioners and affected individuals should be aware, *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, 821–27 (2011) (suggesting "enmeshed penalties" as an alternative term), or too broad to capture the highly punitive quality of many modern-day consequences of conviction. Thus, calling penalties that occur immediately and automatically "indirect" seems misleading, while using the term "civil" to describe these penalties gives criminal courts and practitioners permission to ignore them. For lack of a more legally precise descriptor, and in light of its general acceptance in the lexicon, this Article uses the term "collateral consequences" to describe the legal consequences of conviction that are not part of the court-imposed sentence. Part III of this Article also uses the term "collateral sanction" to designate a penalty that is imposed automatically upon conviction, as distinguished from a penalty that occurs as a result of some subsequent intervening action or discretionary decision. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-1.1(a) (3d ed. 2004). The Introduction to the Collateral Sanctions Standards notes that

> The convicted person's reduced legal status is derived from the ancient Greek concept of "infamy," or the penalty of "outlawry" among the German tribes. The idea that criminals should be separated from the rest of society led to "civil death" in the Middle Ages and to exile by "transportation" during the Enlightenment. The American colonies, and later the United States, followed the European practice of excluding convicted persons from many rights and privileges of citizenship.

Id. at 7 n.1 (citation omitted).

7. *See* Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to* Padilla v. Kentucky, CRIM. JUST., Fall 2010, at 21, 22 ("Imposing collateral consequences has become an increasingly important function of the criminal justice system, so that they have to all intents and purposes become part and parcel of the criminal case."). The public safety implications of this regime of collateral consequences have recently been recognized by the Attorney General of the United States in a letter to the attorney general of each state. *See* Letter from Eric H. Holder, Jr., U.S. Att'y Gen., to Attorneys General (Apr. 18, 2011), *available at* http://www.nationalreentryresourcecenter.org/documents/0000/1088/Reentry_Council_AG_Letter.pdf ("[G]ainful employment and stable housing are key factors that enable people with criminal convictions to avoid future arrests and incarceration."). Their racial implications have also been recognized. *See, e.g.*, Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 755–56 (2011) ("The fact that people of color are disproportionately branded and ostracized as criminals should be cause for alarm." (citing MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS (2010))).

or eviction or loss of employment until it was too late to avoid them.[8] After *Padilla*, the days of the "secret sentence"[9] may be numbered.

By requiring consideration of collateral consequences in plea negotiations, the *Padilla* decision could threaten the stability of a system of disposing of criminal cases on which the justice system has come to depend. This is particularly true if *Padilla*'s logic is extended to consequences other than deportation. The *Padilla* Court twice described deportation as "unique," as if at pains to convince itself of the limited reach of its own holding, coyly declining to predict the future usefulness of the collateral consequences doctrine to test a lawyer's Sixth Amendment obligation in the plea context.[10] But *Padilla*'s logic points to that doctrine's early demise, so that it remains only to play out the hand in the lower courts.[11] In the meantime, even basic terminology is in flux,[12] and questions are being raised about misdemeanants' right to counsel at plea even if they face no prison time.[13]

The question of *Padilla*'s scope is the subject of this Article. Part I describes a case currently pending in the Pennsylvania Supreme Court that may yield some important clues about how broadly the *Padilla* doctrine will be applied to status-generated consequences beyond the immigration context. At issue in *Commonwealth v. Abraham* is whether a criminal defense lawyer should have warned his client, a retired public school teacher, that pleading

8. *See generally* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670 (2008) (describing the origins and application of the "collateral consequences doctrine" in lower courts after Brady v. United States, 397 U.S. 742 (1970)).

9. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002).

10. *Padilla*, 130 S. Ct. at 1481 ("Whether [the distinction between direct and collateral consequences] is appropriate is a question we need not consider in this case because of the unique nature of deportation."); *id.* at 1482 ("Deportation as a consequence of a criminal conviction is . . . uniquely difficult to classify as either a direct or collateral consequence.").

11. *See infra* Part II.C.

12. *See supra* note 6.

13. If *Padilla* requires competent counsel in connection with any guilty plea that triggers the penalty of deportation, it appears to extend the right to counsel set forth in *Alabama v. Shelton*. 535 U.S. 654, 658 (2002) (holding that "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged" (quoting Argersinger v. Hamlin, 407 U.S. 25, 40 (1972))); *see* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. (forthcoming 2011) (manuscript at 30) ("As the nascent post-*Padilla* misdemeanor jurisprudence develops, it will send a message to defenders that warnings about deportation, and possibly other severe collateral consequences, are not only mandated in all levels of cases, but that the failure to warn is most likely going to prejudice the misdemeanor client."), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1963788.

guilty to a misdemeanor sex offense would result in the permanent forfeiture of his vested pension benefits.[14] Part II looks at the collateral consequences doctrine as applied by the courts before *Padilla* to demonstrate the weakness of that doctrine in the Sixth Amendment context. It then examines the *Padilla* decision itself, concluding that its logic extends beyond deportation to many other severe and certain consequences of conviction that are imposed by operation of law rather than by the sentencing court. Post-*Padilla* case law bears out this analysis. Part II then proposes a test for determining when the Sixth Amendment requires a lawyer to notify a client about a particular consequence, and concludes that the pension forfeiture at issue in *Abraham* meets that test.

Part III proposes a set of three non-constitutional reforms "to complete *Padilla*'s unfinished business" where the substance of plea agreements is concerned.[15] The goal of these proposed reforms is to minimize the extent to which harsh categorical sanctions disrupt and destabilize the plea process on which the justice system has come to depend. Using principles set forth in the ABA Criminal Justice Standards,[16] the Article recommends that jurisdictions should 1) compile and disseminate information about collateral sanctions; 2) eliminate sanctions that are disproportionately severe or bear only a tenuous relationship to the crime; and 3) provide timely and effective ways to avoid or mitigate those sanctions that remain. These reforms, if adopted, will not only shore up the plea system, they will also propel a move away from a punitive model of collateral consequences that is frequently self-defeating and unfair, toward one that can be justified in both moral and utilitarian terms.

I. TESTING THE BOUNDARIES OF *PADILLA V. KENTUCKY*: *COMMONWEALTH V. ABRAHAM*

Joseph Abraham had been teaching science at Alderdice High School in Pittsburgh for more than twenty years when he offered a fifteen-year-old student in his robotics class $300 to have sex with him and also touched her buttocks.[17] As recounted in the court's opinion, "[h]e gave her one of his business cards and wrote his private cell phone number on it."[18] Several months later, the student told a friend about the incident, the friend told a

14. 996 A.2d 1090, 1091 (Pa. Super. Ct. 2010), *appeal granted in part*, 9 A.3d 1133 (Pa. 2010). As recounted in this Article, the facts of the *Abraham* case contained in the opinion of the Superior Court are supplemented by the briefs of the parties filed in the Pennsylvania Supreme Court and an interview with Abraham's appellate counsel.

15. Bibas, *supra* note 4, at 1117. Professor Bibas is concerned primarily with *Padilla*'s impact on the plea process, while this Article is concerned primarily with *Padilla*'s impact on the substance of the resulting bargain.

16. *See infra* Part III.B.

17. *Abraham*, 996 A.2d at 1091.

18. *Id.*

teacher, and the teacher told the principal.[19] The student eventually related what had happened and turned the business card over to the school police.[20] "Abraham, sixty-seven years old at the time of the incident, was allowed to retire with his pension."[21]

Abraham was also charged criminally.[22] The prosecutor agreed to let him plead to two misdemeanors, corruption of a minor and indecent assault, and his lawyer encouraged him to take the offer and "get on with his life."[23] Abraham took his lawyer's advice, and in December 2008 was sentenced to three years' probation.[24] His lawyer assured him that neither of the offenses to which he pled guilty would require him to register as a sex offender.[25]

The lawyer's advice was accurate as far as it went: Abraham was not required to register as a sex offender. But six weeks after his sentencing he received a letter from the state pension board notifying him that his indecent assault conviction required the automatic and permanent forfeiture of his vested pension benefits.[26] Shocked and dismayed, he moved to withdraw his plea, claiming that his lawyer had failed to advise him about the mandatory pension forfeiture, and that this default had deprived him of his constitutional right to effective assistance of counsel.[27] He argued that his lawyer had been fully aware of how important his pension was to him, that the forfeiture penalty was a clear and unambiguous result of conviction even for a minor sex

19. *Id.*

20. *Id.*

21. *Id.*

22. Abraham was originally charged with four misdemeanors: Endangering the Welfare of Children, 18 PA. CONS. STAT. ANN. § 4304(a)(1) (West 2007); Corruption of Minors, 18 PA. CONS. STAT. ANN. § 6301(a)(1) (West 2010); Indecent Assault upon a Person Less than 16 Years of Age, 18 PA. CONS. STAT. ANN. § 3126(a)(8) (West 2006); Criminal Solicitation, 18 PA. CONS. STAT. ANN. § 902(a) (West 1973); *see Abraham*, 996 A.2d at 1091.

23. Interview with William Stickman, appellate counsel for Abraham (May 5, 2011) (on file with author).

24. *Abraham*, 996 A.2d at 1091.

25. None of the four misdemeanor offenses with which Abraham was originally charged qualify for registration under Pennsylvania's Megan's law. *See* 42 PA. CONS. STAT. ANN. § 9795.1 (West 2011). While certain sections of the indecent assault statute do qualify for registration, the particular section under which Abraham was charged is graded as a second degree misdemeanor and as such does not require registration. *See id.* § 9795.1(a) (a violation of Section 1326 requires registration only where the offense is graded as a misdemeanor of the first degree or higher).

26. *See* Interview with William Stickman, *supra* note 23; *Abraham*, 996 A.2d at 1091 (citing 43 PA. STAT. § 1312 (2004) (listing offenses qualifying for pension forfeiture)). There is no indication in the record that any of the participants in Abraham's case, including the prosecutor and sentencing court, was aware that this charge carried with it the forfeiture penalty. As explained earlier, the particular offense that resulted in forfeiture of Mr. Abraham's pension did not require him to register as a sex offender. *See supra* note 25.

27. *Abraham*, 996 A.2d at 1092.

offense, and that he would never have agreed to plead guilty to the indecent assault charge if he had known it would result in the permanent loss of his primary source of income.[28] The post-conviction court refused to allow Abraham to withdraw his plea, relying on a Pennsylvania Supreme Court holding that a defense lawyer's failure to advise a client about the immigration consequences of conviction was irrelevant to the validity of the client's guilty plea.[29] Because the pension forfeiture, like deportation, took effect without action by the sentencing court, it was a "collateral" consequence of conviction about which no warning was required.[30] Invoking the "collateral consequences doctrine," the court dismissed Abraham's post-conviction motion as "patently frivolous."[31]

Abraham had better luck in the court of appeals, which applied the same analytical framework to his claim but reached a different result. The court of appeals noted that the Supreme Court's then-recent *Padilla* decision had cast some doubt on the continued viability of the collateral consequences doctrine in the Sixth Amendment context, and that *Padilla* had effectively overruled the Pennsylvania precedent on which the post-conviction court had relied.[32] Yet the court was reluctant to abandon altogether the familiar construct: "[T]he direct/collateral analysis . . . might still be useful if the nature of the action is not as 'intimately connected' to the criminal process as deportation."[33]

28. In his submission to the Pennsylvania Supreme Court, Abraham argued that his counsel had information about his personal circumstances that should have led him to inquire about the consequences of the plea for his retirement benefits:

> At all times during the representation, [his defense lawyer] knew that Mr. Abraham was a retired public school teacher receiving a public-school pension. In fact, Mr. Abraham specifically discussed with [his attorney] the implications of early retirement on his pension—i.e., a one hundred dollar ($100.00) per month decrease in benefits. [His lawyer] explained to him that early retirement was his best option. Never at any time did [his lawyer] so much as suggest to Mr. Abraham that his pension could be implicated or in any way put at risk depending on his plea to any of the charges against him. Mr. Abraham would never have consented to a plea agreement which would place his pension in jeopardy, as it was his primary source of income and would continue to provide income to his wife should he die.

Brief of the Appellee at 2, Commonwealth v. Abraham, No. 36 WAP 2010 (Pa. 2010) (citations omitted).

29. *Abraham*, 996 A.2d at 1092 (noting the post-conviction court's reliance on *Commonwealth v. Frometa*, 555 A.2d 92 (Pa. 1989), for the proposition that failure to inform about immigration consequences does not invalidate plea). At the time, *Frometa* was consistent with the law in every federal circuit and most states. *See* Chin & Holmes, *supra* note 9, at 704–08.

30. Brief for Appellant at 8, Commonwealth v. Abraham, No. 36 WAP 2010 (Pa. 2010).

31. *Id.* at 6 (citation omitted).

32. *Abraham*, 996 A.2d at 1092–93.

33. *Id.* at 1092.

The court then turned to the question of whether to characterize pension forfeiture as "collateral" or "direct."[34] Relying on analysis borrowed from ex post facto and due process cases,[35] the court concluded that pension forfeiture was "akin to a fine" and "punitive in nature," and therefore a "penal" as opposed to a "civil" consequence.[36] It was a short further step to conclude that forfeiture was a "direct" rather than a "collateral" consequence of conviction about which Abraham should have been warned before giving up his right to put the government to its proof.[37] The court of appeals returned the case to the lower court to determine whether Abraham had been prejudiced by his lawyer's deficient performance.[38]

The government appealed, arguing that *Padilla* had left the collateral consequences doctrine undisturbed except where deportation is concerned, and that pension forfeiture falls squarely within the "collateral" category because it is "a civil requirement over which a sentencing judge has no control."[39] Citing the high percentage of criminal cases resolved by plea, it warned that "[e]ven an incremental weakening in the finality of pleas would have a dramatic effect on the integrity and effectiveness of . . . Pennsylvania's criminal justice system."[40] The Pennsylvania Supreme Court granted review to consider whether, in light of *Padilla*, the direct/collateral distinction remains an appropriate test of defense counsel's duty of effective representation; and, if it does, how pension forfeiture should be characterized.[41]

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34. *Id.* at 1093.

35. *See id.*:

> Determination of *ex post facto* consequences and constitutionally effective counsel both address due process concerns, and as such, there is no reason why an analysis used in one situation cannot be used in the other. Specifically, a consequence that is punitive in nature implicates *ex post facto* applications and punitive consequence is also a determining factor under *Padilla*.

Id.

36. *Id.* at 1094.

37. The court of appeals did not address the question whether the court accepting the plea ought also to have advised Mr. Abraham about the likelihood of pension forfeiture as a matter of due process, though this would appear to be a natural extension of its holding that the pension forfeiture was a direct consequence of conviction. *See* discussion *infra* Part II.A.

38. *Abraham*, 996 A.2d at 1095. The Sixth Amendment test for ineffective assistance of counsel under *Strickland v. Washington* is discussed in Part II. Failure to warn about a penalty that is determined to be punitive may raise due process as well as Sixth Amendment concerns. *See infra* Part II.

39. Brief for Appellant, *supra* note 30, at 18 (citing Commonwealth v. Duffey, 639 A.2d 1174, 1176–77 (Pa. 1994)).

40. *Id.* at 14.

41. Commonwealth v. Abraham, 9 A.3d 1133, 1133 (Pa. 2010) (limiting review to the following questions: "(1) Whether, in light of *Padilla v. Kentucky*, the distinction in Pennsylvania between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland v. Washington* is appropriate? (2) If so, whether

The *Abraham* case presents an opportunity to consider how far the *Padilla* holding extends beyond deportation, and how much clients are entitled to expect by way of advice from counsel about applicable collateral penalties before entering a guilty plea. The Pennsylvania Supreme Court has identified the first question presented in the case as precisely the one left open by *Padilla* itself: when, if ever, is it appropriate to distinguish between direct and collateral consequences in determining counsel's constitutional obligation to advise a client considering a plea.[42] Only if the collateral consequences doctrine retains some vitality in the Sixth Amendment context after *Padilla* will it be necessary to consider how pension forfeiture should be categorized. To take the pulse of the collateral consequences doctrine, the following section looks at the pre-*Padilla* case law, at *Padilla* itself, and at some early applications of *Padilla* to status-generated consequences other than deportation.

II. COLLATERAL CONSEQUENCES IN THE COURTS BEFORE AND AFTER *PADILLA*

A. A Short History of the Collateral Consequences Doctrine

For many years, courts drew a bright doctrinal line between the "direct" consequences of conviction, which a criminal defendant had a right to know about before entering a guilty plea, and "collateral" consequences that were considered constitutionally irrelevant to that decision, no matter how important they might be to the defendant. The so-called collateral consequences doctrine is generally traced to the 1970 case of *Brady v. United States*, which dealt with a court's obligations under the Due Process Clause to ensure that a guilty plea is knowing and voluntary.[43] The *Brady* Court said that "[a] plea of guilty entered by one *fully aware of the direct consequences* . . . must stand unless induced by threats . . . , misrepresentation . . . , or perhaps by promises that are by their nature improper."[44] Though *Brady* itself was primarily concerned with the voluntariness of the defendant's plea, the lower courts latched onto its dictum about "direct consequences" when confronted with situations in which a defendant sought to undo a plea agreement because of imperfect knowledge

the forfeiture of a pension that stems from a public school teacher's negotiated plea to crimes committed in the scope of his employment is a collateral consequence of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise?" (citations omitted)). The case was argued in April 2011, and as of March 1, 2012 was awaiting decision.

42. *Id.*

43. 397 U.S. 742, 748 (1970).

44. *Id.* at 755 (emphasis added) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)).

of its consequences.[45] The rule developed that while courts must admonish defendants about the "direct" consequences of the plea (those the court itself imposed), they need not inform them about "collateral" consequences (those imposed by law or other official action).[46]

One problem with this formula was that there was no clear dividing line between "direct" and "collateral" consequences. Some courts defined a "direct" consequence in terms of its certainty and punitive intent, using a formula first advanced by the Fourth Circuit in a case involving the sentencing court's failure to warn about the possibility of civil commitment: No warning was required because this consequence did not have a "definite, immediate and largely automatic effect on the range of the defendant's punishment."[47] Later cases held that while a consequence like sex offender registration might meet the "definite, immediate and largely automatic" part of this test, it failed to qualify as "punishment" because the legislative purpose was "remedial and civil rather than punitive."[48] On the other hand, the Delaware Supreme Court applied the punishment test to set aside a plea where a drug offender was not warned that his plea would result in the automatic revocation of his driver's license.[49] A second familiar test of whether a consequence was "direct" or "collateral" was whether the court had the power to impose or limit it.[50] Thus, for example, in *People v. Ford*, the New York Court of Appeals held that consequences "peculiar to the individual's personal circumstances and . . . not within the control of the court system" were collateral for due process

45. *See, e.g.*, United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971) (en banc) ("We presume that the Supreme Court meant what it said when it used the word *direct*; by doing so, it excluded *collateral* consequences.").

46. *See* Roberts, *supra* note 8, at 689–93.

47. Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973).

48. Mitschke v. State, 129 S.W.3d 130, 135 (Tex. Crim. App. 2004).

49. Barkley v. State, 724 A.2d 558, 561 (Del. 1999) (holding that automatic license revocation was a "direct penal consequence" about which the defendant should have been warned by the court before his plea).

50. *See, e.g.*, El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002) (holding that deportation is a collateral consequence about which no warning is required because it "remains beyond the control and responsibility of the district court" (citation omitted)); United States v. Gonzales, 202 F.3d 20, 27 (1st Cir. 2000) ("However 'automatically' Gonzalez's deportation . . . might follow from his conviction, it remains beyond the control and responsibility of the district court in which that conviction was entered and it thus remains a collateral consequence thereof."); United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000) (holding that a court must advise about automatic loss of welfare benefits because it was not "contingent upon action taken by an individual or individuals other [than] the sentencing court"); State v. Bellamy, 835 A.2d 1231, 1238 (N.J. 2003) (holding that while civil commitment is neither direct nor collateral, fundamental fairness requires that a trial court ensure defendant understands that there is a possibility of future indefinite commitment).

purposes.[51] Under either the punishment test or the judicial authority test, deportation was universally considered a "collateral" consequence.[52] Courts struggled with which side of the direct/collateral line to place incidents of the sentence like parole eligibility, mandatory supervision, sentence enhancement, and consecutive sentences, with the deciding factor generally being whether a defendant had been given incorrect advice.[53]

Until 1984, no doctrinal distinction was made between the advisement obligations of court and counsel in connection with a guilty plea. That changed after the Supreme Court's decision in *Strickland v. Washington* made clear that the right to counsel in a criminal proceeding meant the right to *competent* counsel.[54] The following year, *Hill v. Lockhart* extended *Strickland* to a lawyer's performance before trial,[55] and defendants began to challenge their convictions based upon the quality of their lawyer's advice in the plea process.[56] Complaints about a lawyer's performance frequently involved a failure to warn about the same consequences of conviction that were the subject of complaints about the thoroughness of the court's admonishment. Courts applied the same formalistic distinction between direct and collateral consequences to test a lawyer's Sixth Amendment advisement obligations that they applied to test their own obligations under the Due Process Clause, ignoring the very different institutional roles and responsibilities of court and counsel at the guilty plea stage.[57] In this way, the advisement duties of court

51. 657 N.E.2d 265, 268, 269 (N.Y. 1995) (holding that court was not required to notify defendant of deportation consequences).

52. *See* Chin & Holmes, *supra* note 9, at 705 nn.50–57 (listing cases classifying deportation as a collateral consequence about which no warning is required).

53. *Compare* Bustos v. White, 521 F.3d 321, 326 (4th Cir. 2008) (holding ineligibility for parole a collateral consequence about which defendant need not be warned), *and* United States v. Kikuyama, 109 F.3d 536, 538 (9th Cir. 1997) (holding consecutive nature of sentences is a "collateral consequence" of guilty plea of which defendant need not be informed by court), *with* Craig v. People, 986 P.2d 951, 963 (Colo. 1999) (en banc) (stating parole eligibility is a direct consequence of a guilty plea about which the court must advise defendant), *and* People v. Catu, 825 N.E.2d 1081, 1082 (N.Y. 2005) (holding supervised release to be a direct consequence about which court required to warn).

54. 466 U.S. 668, 690 (1984).

55. Hill v. Lockhart, 474 U.S. 52, 58 (1985).

56. *See* Chin & Holmes, *supra* note 9, at 699, 712.

57. *See* Roberts, *supra* note 8, at 694–96 (discussing Page v. State, 615 S.E.2d 740 (S.C. 2005), which treats the advisement duties of court and counsel as interchangeable). Chin & Holmes have pointed out the fallacy of equating the advisement roles of court and counsel:

> [J]ust as defense counsel and the court have different duties of loyalty, investigation, and legal research as a result of their distinct roles as advocate and decisionmaker, there is no reason to assume that their obligations of advising the accused of the risks and benefits of pleading guilty should be identical. The judge is charged with ensuring that the plea is knowing, voluntary, and intelligent; counsel's job is to assist with the determination that a plea is a good idea, which encompasses a broader range of consideration.

and counsel came to be treated as generally coextensive, with defense counsel required to do no more than duplicate what was already required of the court. If a penalty was imposed by operation of law[58] rather than by the court's judgment, the defendant considering a guilty plea could be left entirely in the dark about what might be a matter of great personal moment.[59]

Doctrinal manipulation offered a partial solution to this uncomfortable situation: A defendant who was given affirmatively incorrect advice about a particular consequence of conviction, whether by his own lawyer or by the court or prosecutor, might have a constitutional basis for withdrawing his guilty plea.[60] This "misadvice exception" to the collateral consequences rule meant that counsel's only obligation was to refrain from giving his client bad advice. This in turn led to what the Court in *Padilla* would describe as the "absurd" result of giving counsel "an incentive to remain silent on matters of great importance, even when answers are readily available."[61]

After *Strickland*, the days of the neat dichotomy between direct and collateral consequences were numbered, at least where the duty of counsel was concerned. In retrospect, it is not clear why a lawyer's duty under the Sixth Amendment should ever have been thought the same as the duty of a court

Chin & Holmes, *supra* note 9, at 727; *see also id.* at 724–36 (describing five categories of cases that suggest invalidity of collateral consequences doctrine as applied to Sixth Amendment duty of counsel).

58. Penalties imposed "by operation of law" include those imposed by statute, by regulation, or by contract. *See infra* Part III.

59. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1487 (2010) (Alito, J., concurring) ("'[V]irtually all jurisdictions'—including 'eleven federal circuits, more than thirty states, and the District of Columbia'—'hold that defense counsel need not discuss with their clients the collateral consequences of a conviction,' including deportation." (quoting Chin & Holmes, *supra* note 9, at 697, 699)).

60. *See, e.g.*, United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002) (misadvice by counsel about immigration consequences); Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir. 1990) (en banc) (misadvice by counsel about parole eligibility); United States v. Russell, 686 F.2d 35, 36–37 (D.C. Cir. 1982) (misadvice by prosecutor about immigration consequences); United States v. Singh, 305 F. Supp. 2d 109, 111 (D.D.C. 2004) (misadvice by court and prosecutor about immigration consequences). *See generally* Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 131–139 (2009) (criticizing the misadvice rule as a "flawed exception to the flawed collateral-consequences rule"). In its brief in the Supreme Court in *Padilla v. Kentucky*, Kentucky described the misadvice doctrine as "result-driven, incestuous[, and] completely lacking in legal or rational bases." Brief for Respondent at 31, *Padilla*, 130 S. Ct. 1473 (No. 08-615).

61. *Padilla*, 130 S. Ct. at 1484. The Court held that "'there is no relevant difference 'between an act of commission and an act of omission' in this context." *Id.* (citing Strickland v. Washington, 466 U.S. 668, 690 (1984) ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.")).

under the Due Process Clause.[62] The considerations that make the direct/collateral distinction sensible from the standpoint of institutional competence when applied to a court, do not apply to criminal defense lawyers' relationships with their clients.[63] A court can be expected to know about penalties it has control over. It may also be expected to know about consequences that are necessarily incident to conviction of a particular offense, such as ineligibility for parole or sentencing enhancements or sex offender registration. However, a court cannot, and perhaps should not, be expected to know what consequences might be important to a particular criminal defendant by virtue of some personal characteristic or circumstance, such as citizenship or employment or residence. Even where a court is obligated by its own rules to advise a defendant about certain consequences of a guilty plea, that duty is necessarily a general one, and not dependent upon anything the court knows about the defendant's particular circumstances.[64]

By contrast, a defense lawyer is in a position to find out what is important to his client and is ethically obligated to use what he knows about his client's situation to get the best deal he can in negotiating with the government. In the past twenty years, professional standards have raised the bar on a defense lawyer's duty to advise the client about the consequences of a guilty plea.[65] To say that defense counsel's duty of advisement under the Sixth Amendment is no greater than that of a court under the Due Process Clause is to say that defense counsel has no duty at all. The poverty of the collateral consequences doctrine in the Sixth Amendment context is revealed in its exception for erroneous advice: While courts at least have an affirmative obligation under the Due Process Clause and court rules to ensure that a defendant's plea is

62. The reasons why collateral consequences were not considered a proper subject of advisement until relatively recently include their increase in number and severity since 1980 and the failure of relief mechanisms, like pardon. *See* Chin & Love, *supra* note 7, at 24–26.

63. *See, e.g.*, *Padilla*, 130 S. Ct. at 1481 ("The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.*, those matters not within the sentencing authority of the state trial court." (citing Commonwealth v. Padilla, 253 S.W.3d 482, 483–84 (Ky. 2008))).

64. Most courts have held post-*Padilla* that generic judicial admonishments are no substitute for advice of counsel. *See, e.g.*, United States v. Orocio, 645 F.3d 630, 645–46 (3d. Cir. 2011); Commonwealth v. Clarke, 949 N.E.2d 892, 903–04 (Mass. 2011); State v. Sandoval, 249 P.3d 1015, 1020–21 (Wash. 2011) (en banc). At the time of this writing, the Florida Supreme Court and the Texas Court of Criminal Appeals both had this issue under consideration. *See* Hernandez v. State, 61 So. 3d 1144, 1147–48 (Fla. Dist. Ct. App. 2011), *review granted*, Nos. SC11-941, SC11-1957, 2012 WL 285811 (Fla. Jan. 24, 2012); *Ex parte* Martinez, No. 13-10-00390-CR, 2011 Tex. App. LEXIS 5625 (Tex. Ct. App. July 21, 2011), *discretionary review granted*, No. PD-1338-11, 2011 Tex. Crim. App. LEXIS 1640 (Tex. Crim. App. Dec. 7, 2011).

65. *See* Brief of the Am. Bar Ass'n as Amicus Curiae in Support of Petitioner at 5–10, *Padilla*, 130 S. Ct. 1473 (No. 08-651).

knowing and voluntary, the misadvice rule gives defense lawyers a perverse incentive to tell their clients nothing at all. That is where the law stood in almost every U.S. jurisdiction on March 29, 2010, the day before the Court announced its decision in *Padilla v. Kentucky*.

B. Padilla v. Kentucky

In *Padilla v. Kentucky*, seven Justices ruled that criminal defense lawyers must advise their non-citizen clients considering a guilty plea that they are likely to be deported as a result.[66] The Court explained that "[o]ur longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less."[67] It was the first time the Court had extended the Sixth Amendment right to effective assistance of counsel to plea negotiations.[68] Jose Padilla was a long-time lawful permanent resident charged with transporting marijuana in state court in Kentucky.[69] He agreed to plead guilty after his attorney assured him that he "did not have to worry about immigration status since he had been in the country so long."[70] Actually, his offense rendered him deportable with no opportunity for statutory relief, and he was put in deportation proceedings.[71] Padilla challenged his plea on ineffective assistance grounds, and the Kentucky Supreme Court applied the collateral consequences doctrine to conclude, as had almost every other court, that his lawyer had no affirmative obligation to advise him about the likelihood of deportation.[72] The Kentucky court concluded further that it made no difference to the outcome that Padilla's lawyer had given him incorrect advice, since collateral consequences are entirely "outside the scope of the guarantee of the Sixth Amendment right to counsel."[73]

Justice Stevens, writing for a five-Justice majority, held that Padilla was constitutionally entitled to advice from his lawyer that pleading guilty would make him deportable.[74] In concluding that the lawyer's failure to give him correct advice about the deportation consequences of conviction made his performance constitutionally deficient under Strickland's first prong, the opinion pointed out that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen

66. *Padilla*, 130 S. Ct. at 1486.
67. *Id.*
68. *See* Bibas, *supra* note 4, at 1120.
69. *Padilla*, 130 S. Ct. at 1477.
70. *Id.* at 1478 (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)).
71. *Id.*
72. *See Padilla*, 253 S.W.3d at 485.
73. *Id.*
74. *Padilla*, 130 S. Ct. at 1486.

defendants who plead guilty to specified crimes."[75] It also looked to "the practice and expectations of the legal community" to determine whether the lawyer's performance had been "reasonable[] under prevailing professional norms . . . as reflected in American Bar Association standards and the like."[76] It concluded that "the weight of prevailing professional norms" supported the view that advice about the risk of deportation was constitutionally necessary.[77] This conclusion was reinforced by the fact that there was no particular mystery about whether conviction would trigger deportation:

> Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses.[78]

While the extent of the lawyer's advisory obligation may depend upon how clear the law is, the lawyer has a duty to warn the client even when the law is not clear:

> When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.[79]

The Court noted that Padilla's counsel had "provided him false assurance" about his removability, but it rejected the rule proposed by the Solicitor General that a constitutional violation should turn on whether a defendant had been affirmatively misadvised.[80] Such a rule would lead to two "absurd results": "[I]t would give counsel an incentive to remain silent on matters of great importance" and "deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available."[81] The Court remanded the case to the Kentucky courts for a finding

75. *Id.* at 1480 (footnote omitted).

76. *Id.* at 1482 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

77. *Id.* ("[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients." (citations omitted)). The Court cited, among other authorities, the ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-5.1(a) (3d. ed. 1993), and ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2(f) (3d ed. 1999). These Standards are discussed in Part III, *infra*.

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

79. *Id.* (footnote omitted).

80. *Id.* at 1483, 1484.

81. *Id.*

on whether Padilla had been prejudiced by his lawyer's deficient performance[82]: "[T]o obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."[83] The Court emphasized that its holding was limited to the deportation consequence of conviction.[84] Noting the prevailing rule in most lower courts that defendants need not be told about "collateral" consequences, the Court pointed out that it had "never applied a distinction between direct and collateral consequences to define the scope" of counsel's duty, and that it need not consider whether such a distinction was generally "appropriate" because of the "unique nature of deportation."[85] The Court explained deportation's "uniqueness" in the following terms:

> We have long recognized that deportation is *a particularly severe "penalty,"* but it 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. And, importantly, recent changes in our immigration law have made removal *nearly an automatic result* for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context.[86]

Boiled down to their essence, the two salient characteristics advanced by the Court in support of deportation's "uniqueness" are its severity ("a particularly severe 'penalty'"), and its certainty ("nearly an automatic result"). As to severity, the Court recalled recognizing in *INS v. St. Cyr* that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence."[87] As to certainty, the Court described how, over the previous twenty years, Congress had eliminated all features of the law that allowed a non-citizen defendant to avoid this result:

> These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an

82. *Id.* at 1487.

83. *Id.* at 1485 (citing Roe v. Flores-Ortega, 528 U.S. 470, 480, 486 (2000)). For a discussion of how Padilla affects the application of *Strickland*'s prejudice prong, see Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693, 712–719 (2011). *See also* United States v. Orocio, 645 F.3d 630, 643–44 (3d Cir. 2011) (overruling, in light of *Padilla*, circuit precedent requiring that defendant affirmatively show that he would have been acquitted at trial in order to establish prejudice).

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

85. *Id.* ("Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.").

86. *Id.* (emphasis added) (citations omitted).

87. *Id.* at 1483 (quoting 533 U.S. 289, 322 (2001)).

> integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.[88]

The Court noted that deportation is "intimately related to the criminal process," and that "[o]ur law has enmeshed criminal convictions and the penalty of deportation for nearly a century."[89] However, "intimate relationship" may simply be another way of stating the "certainty" test. More importantly, it is not clear why a penalty's ancient lineage should figure in the Sixth Amendment analysis, except perhaps as a reason that lawyers should be responsible for knowing about it. That said, the lineage of many present-day collateral sanctions can be traced to penalties of forfeiture and banishment that originated in Roman times,[90] or registration requirements developed in the nineteenth century.[91]

The concurring and dissenting Justices were not persuaded by the majority's description of deportation as "unique," and thought it would be hard to limit the holding. Justice Alito, concurring for himself and the Chief Justice, grudgingly recognized a lawyer's duty to warn the client that a guilty plea "may have adverse immigration consequences," but worried that this obligation might apply to "a wide variety of consequences other than conviction and sentencing" about which criminal defense lawyers have little or no expertise.[92] Justice Scalia, dissenting, thought that any constitutional duty

88. *Id.* at 1480 (footnote omitted).

89. *Id.* at 1481; *see also id.* at 1482 ("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.").

90. *See* Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 350–51 (1968) (tracing the history of the idea that criminals should be separated from the rest of society and deprived of both property and protection).

91. *See* WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 2, 5–9 (2009) (tracing historical antecedents of modern American criminal registration laws to thirteenth century efforts to apprehend wanted outlaws, and more systemic nineteenth century European efforts to "hold repeat offenders to account").

92. *Padilla*, 130 S. Ct. at 1487, 1488 (Alito, J., concurring).

> This case happens to involve removal, but criminal 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.

Id. at 1488 (citations omitted).

to advise must be the court's, not counsel's,[93] and warned that the Court's holding "cannot be limited to [deportation] consequences except by judicial caprice."[94]

C. Padilla*'s Scope: Early Returns from the Lower Courts*

Cases decided since *Padilla* involving status-generated consequences other than deportation suggest that the neat formalistic dichotomy between direct and collateral consequences is unlikely to survive very long, at least where counsel's Sixth Amendment obligations are concerned. In particular, the *Padilla* majority's effort to confine its holding to the "unique" consequence of deportation has proved no more convincing to the lower courts than it was to the concurring and dissenting Justices.

What is becoming clear is that "severity" and "certainty" are qualities shared by a great many consequences in contemporary codes. While it is less clear if a lawyer could be expected to know about all such consequences under "prevailing professional norms," several courts have relied upon *Padilla*'s reasoning to extend a lawyer's advisement obligation to sex offender registration. Thus, in *People v. Fonville*, the Michigan Court of Appeals found a "significant parallel" between sex offender registration and deportation, relying on the *Padilla* Court's reasoning to hold that a defendant charged with child enticement was entitled to be warned by his lawyer that a guilty plea would require him to register.[95] Derek Fonville was criminally charged after he kept his girlfriend's two young children, who he was babysitting, longer than agreed.[96] Fonville and a friend had driven around all night looking for drugs with the children in the back seat of their car and were apprehended the next day by police.[97] Based on his established relationship with the children and the fact that they were unharmed, the kidnapping charges against him were dropped and he was allowed to plead to child enticement.[98] He later challenged his conviction arguing, *inter alia*, that he had not been warned by his lawyer that this charge could require him to register as a sex offender.[99] The Court of Appeals agreed:

> We recognize a significant parallel to be drawn from the Supreme Court's rationale in *Padilla* to the circumstances of this case. Similar to the risk of

93. *Id.* at 1496 n.1 (Scalia, J., dissenting) ("[T]he effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the Due Process Clause.").

94. *Id.* at 1496.

95. 804 N.W.2d 878, 894–95 (Mich. Ct. App. 2011).

96. *Id.* at 881.

97. *Id.*

98. *Id.* at 882.

99. *Id.* at 882–83.

> deportation, sex offender registration "as a consequence of a criminal conviction is, because of its close connection to the criminal process, . . . difficult to classify as either a direct or a collateral consequence[,]" and that therefore "[t]he collateral versus direct distinction is . . . ill-suited to evaluat[e] a *Strickland* claim" concerning the sex-offender-registration requirement.
>
> Like the consequence of deportation, sex offender registration is not a criminal sanction, but it is a particularly severe penalty. In addition to the typical stigma that convicted criminals are subject to upon release from imprisonment, sexual offenders are subject to unique ramifications, including, for example, residency-reporting requirements and place-of-domicile restrictions. Moreover, sex offender registration is "intimately related to the criminal process." The "automatic result" of sex offender registration for certain defendants makes it difficult "to divorce the penalty from the conviction."[100]

Of particular interest in this case is the *Fonville* court's apparent belief that any consequence that is the "automatic result" of conviction is *ipso facto* "intimately related to the criminal process."[101] In other words, it takes nothing more to establish a "close connection" to or "intimate relationship" with the criminal process than that the consequence be "automatic." The court later emphasized the "mandatory" nature of sex offender registration in minimizing concerns that its holding might "open the door for defendants to withdraw their pleas for other collateral reasons."[102]

> [W]hile the *Padilla* decision has provided us with the key to open the door to allow defendants to withdraw their pleas for failure to be informed of the sex-offender-registration requirement, we do not see our decision as opening the floodgates to withdrawal-of-plea motions for other collateral reasons. Our decision is limited to distinguishing the unique and mandatory nature of the specific consequence of the sex-offender-registration requirement from the common, potential, and incidental consequences associated with criminal convictions.[103]

Note the *Fonville* court's interpretation of the term "unique" as anything other than a "common, potential, and incidental" consequence. While the court apparently did not think it relevant to establish that the penalty of registration has a long historical association with the criminal process, it could easily have done so.[104]

100. *Id.* at 894 (footnotes omitted).

101. *Fonville*, 804 N.W.2d at 894 (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010)).

102. *Id.* at 895 (quoting People v. Davidovich, 606 N.W.2d 387, 390 (Mich. Ct. App. 1999) (holding that no notice of deportation consequences was required)).

103. *Id.*

104. *See* LOGAN, *supra* note 89, at 2–48.

The *Fonville* court also held that because "the sex-offender-registration statute is 'succinct, clear, and explicit' in defining the registration requirement for [defendant's] conviction of child enticement," counsel "owed a duty to clearly advise [defendant] that his plea to the charge of child enticement would require that he register as a sex offender."[105] However, as in *Padilla*, the relative clarity of the registration statute meant that counsel must "clearly advise" the defendant.[106] Absent such clarity, counsel's duty can be satisfied by a more general warning, but in no case can a lawyer neglect entirely to mention such a severe and mandatory consequence.[107] In support of its decision, the *Fonville* court cited a Georgia Court of Appeals case that had reached the same conclusion about sex offender registration, also in reliance on *Padilla*.[108] Courts from other states have reached the same conclusion.[109]

A few stray swallows do not make a summer. Sex offender registration and other incidents of a sex offense sentence (e.g., lifetime supervision, residency requirements) are arguably as "intimately related" to the court-imposed sentence as consequences like parole eligibility that were held to be "direct" under pre-*Padilla* caselaw.[110] Presumably, consequences so closely linked to the offense of conviction and to the court-imposed sentence are ones a competent lawyer could be expected to know. But even here, the courts are showing some reluctance to let go of the collateral consequences doctrine and its apparently discredited misadvice exception. Thus, in a post-*Padilla* decision, the Missouri Supreme Court described parole eligibility as a "collateral" consequence and vacated the conviction only because the lawyer's advice about it was incorrect.[111] Concurring in the judgment, Chief Justice Michael Wolff pointed out that *Padilla* would seem to require accurate advice about any consequence as clear and certain as parole eligibility, as well as many other status-generated consequences.[112]

105. *Fonville*, 804 N.W.2d at 895–96 (quoting *Padilla*, 130 S. Ct. at 1483).

106. *Id.*

107. *Id.* at 894–95.

108. *Id.* (citing Taylor v. State, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010) (holding that the failure of trial counsel to advise his client that his guilty plea to child molestation would require that he register constituted deficient performance)).

109. *See In re* C.P.H., No. FJ-03-1313-02, 2010 WL 2926541, at *7 (N.J. Super. Ct. App. Div. July 23, 2010) (holding failure to advise juvenile of lifetime sex offender registration constituted ineffective assistance). See also the pre-*Padilla* decision of the New Mexico state court in *State v. Edwards*, 157 P.3d 56, 64–65 (N.M. Ct. App. 2007), holding ineffective assistance in failure to advise about sex offender registration.

110. *See supra* note 50.

111. Webb v. State, 334 S.W.3d 126, 129 (Mo. 2011) (en banc) (citing Reynolds v. State, 994 S.W.2d 944, 946 (Mo. 1999) (en banc)).

112. *Id.* at 138 (Wolff, C.J., concurring).

Since *Padilla*, several courts have held that civil commitment is not a candidate for inclusion on the "must warn" list of consequences.[113] This seems consistent with *Padilla*'s "severe and certain" test. While civil commitment is indisputably severe, it is not "automatic" or "mandatory" in the same way that deportation and sex offender registration are, but depends upon an additional administrative determination following conviction. All the same, the Eleventh Circuit Court of Appeals cited *Padilla* in support of its holding that a defendant was entitled to vacatur when he was incorrectly advised about the possibility of civil commitment.[114] And the Iowa Court of Appeals recently suggested that *Padilla* might require an affirmative counsel warning about civil commitment.[115]

The results where other collateral consequences are concerned have been mixed. For example, the Alaska Court of Appeals held, relying on *Padilla*, that a lawyer should have advised his client that pleading *nolo contendere* to assault would estop him from contesting the facts in a subsequent civil suit for damages by the victim.[116] However, the Minnesota Court of Appeals was not so sympathetic to a defendant who claimed that his sexual assault conviction would cost him his job as an over-the-road trucker because he would have to "register as a sex offender in all 48 states."[117]

In summary, despite the *Padilla* Court's effort to cabin its holding by describing deportation as "unique," courts are beginning to rely on its logic to extend counsel's advisory obligations to other certain consequences that they

113. *See* Brown v. Goodwin, No. 09-211 (RMB), 2010 WL 1930574, at *13 (D.N.J. May 11, 2010) (declining to apply *Padilla* to a claim that counsel failed to inform the defendant that his guilty plea would place him at risk of civil commitment as a sexually violent predator); Maxwell v. Larkins, No. 4:08 CV 1896 DDN, 2010 WL 2680333, at *9–10 (E.D. Mo. July 1, 2010) (declining to expand *Padilla* to find defense counsel ineffective for failing to advise the defendant of the possibility of commitment as a sexually violent predator, sex offender registry, or completion of the sex offender treatment program).

114. Bauder v. Dep't of Corr., 619 F.3d 1272, 1275 (11th Cir. 2010).

115. Blaise v. State, No. 10-0466, 2011 WL 2078091, at *3–4 (Iowa Ct. App. May 25, 2011). The defendant urged the court to vacate his conviction on grounds that commitment as a sexually violent predator was a "direct" consequence of his conviction. *Id.* at *4 n.6. The court rejected this argument because commitment is not a "definite, immediate, or automatic" result of conviction for first-degree harassment, relying on pre-*Padilla* case law. *Id.* The court noted, however, that "our conclusion might be different were the Supreme Court's analysis in *Padilla* applied." *Id.*

116. Wilson v. State, 244 P.3d 535, 536, 539 (Alaska Ct. App. 2010) (finding ineffective assistance where defendant misadvised about effect of *nolo contendere* plea on civil liability). *Contra* United States v. Bakilana, No. 1:10-cr-00093 (LMB), 2010 WL 4007608, at *2–3 (E.D. Va. Oct. 12, 2010).

117. State v. Elmblad, A10-444, 2011 Minn. App. Unpub. LEXIS 11, at *3–5 (Minn. Ct. App. Jan. 4, 2011). In affirming the lower court's denial of relief, the Court of Appeals pointed out that Elmblad knew of the registration requirement and could always get a job driving within the state. *Id.* at *5–7.

would characterize as "collateral" where their own advisory obligations are concerned, such as sex offender registration and civil commitment. It seems that it is enough to trigger counsel's advisory obligation that the consequence is an "automatic result" of conviction so that it is impossible "to divorce the penalty from the conviction"[118] ("intimately related to the criminal process"[119] appears to mean no more than that), and that it is severe enough to potentially affect the defendant's willingness to accept a particular plea offer. To the extent a penalty's historical association with the criminal process figures into the Sixth Amendment analysis, in many cases (as with registration and forfeiture penalties) this can easily be established.[120]

At the same time, courts have for the most part resisted *Padilla*'s influence where their own due process obligations are concerned, clinging to the collateral consequences doctrine to distinguish what they must advise about and what they need not mention. This seems appropriate, if only because of institutional limits on what a court may be expected to know about what is important to a particular defendant. For example, the Supreme Court of Georgia rejected a due process challenge to a plea based on the court's failure to notify the defendant about the possibility of deportation, noting that:

> [*Padilla*] clarifies that defense counsel may be ineffective in relation to a guilty plea due to professional duties for the representation of their individual clients that set a standard different—and higher—than those traditionally imposed on trial courts conducting plea hearings for defendants about whom the judges often know very little. This makes both analytical and practical sense.[121]

The Supreme Court of Tennessee did not even cite *Padilla* in holding that the trial court was not required to notify a defendant about sex offender registration, though it held that lifetime supervision was sufficiently close to the court-imposed sentence to be regarded as "direct."[122]

Even if *Padilla* does not directly implicate a court's due process obligation, its concern about excessively punitive collateral consequences reverberated in two recent due process decisions of the New York Court of Appeals. In *People v. Gravino*, a closely divided court rejected a claim that the plea court should have notified one defendant about sex offender registration requirements and another defendant about conditions of probation limiting his

118. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2011).

119. *Id.*

120. *See supra* notes 89–94 and accompanying text.

121. Smith v. State, 697 S.E.2d 177, 183–84 (Ga. 2010).

122. Ward v. State, 315 S.W.3d 461, 464 (Tenn. 2010). Prior to *Padilla*, other courts had held that mandatory supervision was a direct consequence about which a court must notify a defendant. *See, e.g.*, People v. Catu, 825 N.E.2d 1081, 1082 (N.Y. 2005); Palmer v. State, 59 P.3d 1192, 1196–97 (Nev. 2002); State v. Jamgochian, 832 A.2d 360, 362 (N.J. Super. Ct. App. Div. 2003).

contact with his own young children, because these were not deemed "direct" consequences of their pleas.[123] Noting that *Padilla* had rejected the direct/collateral distinction for Sixth Amendment purposes, the majority noted "[t]here may be cases in which a defendant can show that he pleaded guilty in ignorance of a consequence that, although collateral for purposes of due process, was of such great importance to him that he would have made a different decision had that consequence been disclosed."[124] The dissent, joined by Chief Judge Lippman, urged that mandatory registration must be regarded as a direct consequence of the plea under the court's precedents, and that "the rationale employed by the [Supreme Court in *Padilla*] in rejecting the direct/collateral consequences dichotomy applies with equal force . . . where the court has failed to advise the defendant of SORA registration, which is also a civil penalty 'difficult to divorce . . . from [a] conviction.'"[125] Several months later, the New York court extended its holding in *Gravino* to a failure to warn about the potential for civil commitment.[126] This time Chief Judge Lippman did not join the dissent, perhaps because civil commitment is not so closely tied to the court-imposed sentence as registration and terms of probation, and not so certain.[127]

These two New York cases suggest that severe consequences that are automatically triggered for any person convicted of a particular crime may be held to be "direct" and thus within a court's obligation to notify, in contrast to consequences like deportation that are "peculiar to the individual's personal circumstances" or "result from the actions taken by agencies the court does not control."[128] It should not be necessary to characterize a particular consequence as constitutional "punishment" in order to conclude that a defendant should be entitled to notice from the court as a matter of due process. But the Sixth Amendment sets a higher standard of advisement, since a defense lawyer should know what specific consequences of conviction are so important to the client, and so difficult to mitigate after the fact, that they will affect the client's

123. 928 N.E.2d 1048, 1053–56 (N.Y. 2010).

124. *Id.* at 1056.

125. *Id.* at 1058 n.1 (Ciparick, J., dissenting) (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010)).

126. *See* People v. Harnett, 945 N.E.2d 439, 443 (N.Y. 2011).

127. *Cf.* State v. Bellamy, 835 A.2d 1231, 1238–39 (N.J. 2003) (finding civil commitment neither direct nor collateral, but fundamental fairness requires that a trial court, prior to accepting a plea to a predicate offense under the SVPA, must ensure that the defendant understands that there is a possibility of future commitment, and that the commitment may be for an indefinite period of time, up to and including lifetime commitment).

128. *Gravino*, 928 N.E.2d at 1052 (citing People v. Ford, 657 N.E.2d 265, 268 (N.Y. 1995)).

bargaining calculus. The different advisement obligations of court and counsel are attributable, as they should be, to their different institutional competence.[129]

D. The New Test of Lawyer Competence Applied to Commonwealth v. Abraham

The foregoing analysis of the *Padilla* decision and its progeny to date suggests that the direct/collateral distinction has outlived its usefulness, at least for purposes of the Sixth Amendment. The questions posed by the Pennsylvania Supreme Court in granting review in *Abraham* suggest an interest in putting the appellate court's holding on a firmer doctrinal footing than the one on which that court relied. After *Padilla*, it should no longer be necessary to find a particular consequence to be "punitive" (as the court of appeals did in *Abraham*)[130] to find that notice is constitutionally required. Thus, the Pennsylvania Supreme Court may be prepared to reject the collateral/direct distinction for pension forfeiture for the same reasons the *Fonville* court rejected it for sex offender registration, and to add yet another consequence to the growing list of "unique" consequences that courts have held to be covered by the *Padilla* holding.

This seems to be the correct approach. *Padilla* teaches that competent counsel must warn a client considering a guilty plea about consequences of conviction that are severe and certain, and of predictable importance to the client, whether they arise from statute, regulation, or contract. The Sixth Amendment requires this warning without regard to whether the particular consequence amounts to punishment for purposes of other provisions of the Constitution. *Fonville* and other cases requiring notice of sex offender registration underscore this point, since the Supreme Court has specifically held that sex offender registration requirements may be imposed without regard to the Ex Post Facto Clause.[131] In a word, the court of appeals in *Abraham* did not need to conclude that the pension forfeiture at issue there was "punitive" in order to find that it was within counsel's obligation to notify his client about it.

129. *See* Chin & Holmes, *supra* note 9, at 727. *See generally* Danielle M. Lang, Note, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944 (2012) (arguing that plea colloquy warnings do not serve the same function as advice from counsel in protecting non-citizen defendants' rights, and criticizing cases holding that such warnings may negate findings of prejudice in Sixth Amendment *Padilla* claims).

130. 996 A.2d 1090, 1095 (Pa. Super. Ct. 2010).

131. *See* Smith v. Doe, 538 U.S. 84, 96, 99 (2003) (requiring convicted sex offenders to register with state was not ex post facto law since statute was intended as non-punitive civil means of protecting the public, and adverse effects to offenders did not render statute effectively punitive).

There is an additional reason why the reasoning of the court of appeals in *Abraham* should be rejected: If pension forfeiture is constitutional punishment, then the court would also have had an obligation to notify Abraham about it before accepting his plea, as a matter of due process.[132] But the constitutional advisement obligations of court and counsel are almost certainly not the same,[133] and nothing in the *Padilla* opinion suggests that they are: A court should have no occasion to make its own inquiry into the immigration status of a particular defendant, and this might even be considered inappropriate.[134] The *Abraham* case illustrates nicely the distinction between the advisory obligations of court and counsel, since the court would have had no more reason to inquire into Joseph Abraham's means of support than the Kentucky trial court had to inquire into Jose Padilla's immigration status. At most, the court might have satisfied itself that the offenses to which both men pled did not carry with them some mandatory requirement of registration or supervision under state or federal law. Finding no such requirement, or a similar one within its own institutional competence, the court could not be expected to do more.

Applying the principles and logic of *Padilla* to the facts of Joseph Abraham's case, the Pennsylvania Supreme Court should hold that the direct/collateral distinction is no longer relevant for determining counsel's Sixth Amendment advisement obligation in connection with a plea. It should hold further that it was not necessary to find that the pension forfeiture was "punitive" in order to conclude that Abraham's lawyer should have warned him about it. Rather, all that was required was a finding that the consequence was severe and certain, and one that Abraham's lawyer knew or should have known would have great importance to his client in deciding whether to accept the government's plea offer. The lawyer knew that Abraham was drawing a pension from his service as a public school teacher, and he should have done the necessary investigation to determine whether any of the charges Abraham was facing would have an adverse effect on his client's primary source of income. If more were thought necessary, the court could note that forfeiture of property is a penalty triggered by criminal conviction that is at least as old as banishment.[135]

While the forfeiture penalty in this case seems disproportionately severe and therefore surprising in light of the relatively minor nature of the crime, the

132. *See* cases cited *supra* note 122.

133. *Cf.* Calvert v. State, 342 S.W.3d 477, 490 (Tenn. 2011) (holding that counsel has same duty as court to notify defendant about consequence of lifetime supervision).

134. *See generally* Smith v. State, 697 S.E.2d 177, 184–85, 188 (Ga. 2011) (holding that *Padilla* did not require court to notify defendant of immigration consequences; claim based upon counsel's failure to provide such notice could be raised in collateral proceedings).

135. *See* Damaska, *supra* note 90, at 351.

law was plain that even conviction of a misdemeanor would result in pension forfeiture. As the Court stated in *Padilla*, if a consequence is "truly clear," as it was in Mr. Abraham's case, "the duty to give correct advice is equally clear."[136] Even if the pension forfeiture law were thought to be something less than "succinct and straightforward," Abraham's attorney should at least have warned his client that the charges against him "may carry a risk of adverse [pension] consequences."[137]

The only issue before the Pennsylvania Supreme Court is whether the lawyer's performance was "reasonable" under "prevailing professional norms."[138] It will be up to the post-conviction court, on remand, to decide whether Abraham was prejudiced by his lawyer's failure to advise him about the prospective loss of his pension. That inquiry will entail a determination whether Abraham, with appropriate knowledge, would have made a different choice about accepting the state's plea offer.[139] If the court finds that he would have, then Abraham should be entitled to withdraw his plea.

III. COMPLETING *PADILLA*'S UNFINISHED BUSINESS

The extraordinary growth of severe and certain collateral penalties in the past two decades threatens to destabilize the guilty plea system on which the criminal justice system has come to depend. Well-counseled defendants will be more reluctant to plead guilty if those penalties are too severe and if there is no readily available way to avoid or mitigate them. Courts and prosecutors alike have an interest in not "gumming up the plea-bargaining assembly line."[140] To this end, Professor Bibas has proposed a series of non-constitutional procedural reforms drawn from consumer protection law that are designed to ensure that defendants understand and consider carefully the most important terms of their bargains, such as written offers in terms comprehensible to lay persons, clear standardized disclosures by prosecutors, and cooling-off periods to moderate the pressure to enter an early plea.[141] This section proposes substantive ways in which the regime of collateral penalties can be limited, by giving defense lawyers new negotiating tools to avoid the

136. 130 S. Ct. 1473, 1483 (2010).

137. *Id.*

138. *Id.* at 1482 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

139. *See id.* at 1485 ("[A] petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."); Hill v. Lockhart, 474 U.S. 52, 58–9 (holding that the prejudice inquiry "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process"). *See generally* Roberts, *supra* note 83, at 712–19 (arguing that *Padilla* marks a rejection of a trial-outcome test of prejudice for ineffective assistance in the plea process).

140. *See* Bibas, *supra* note 4, at 1159.

141. *Id.* at 1153–59.

application of particular consequences, and by enabling defendants to mitigate those that cannot be avoided.

A. Padilla*'s Practical Challenge to Defense Lawyers*

As the preceding section suggests, the distinction between direct and collateral consequences that has informed the advisement duties of both court and counsel in the plea context is unlikely to survive the *Padilla* decision, at least where counsel's duties are concerned. If a particular consequence of conviction will have such a severe impact on the client that it will influence the client's decision to plead, and if that consequence will be triggered automatically by the particular crime to which the defendant is proposing to plead, a competent lawyer must inform the client about it. As Professor Bibas has argued,"[t]he Sixth Amendment test should be not whether a consequence is labeled civil or collateral, but whether it is severe enough and certain enough to be a significant factor in criminal defendants' bargaining calculus."[142] A competent lawyer should be required to advise (or at least warn) the client about *any* consequence that could dissuade him from agreeing to the prosecutor's offer.[143] Certainly the pension forfeiture that accompanied Joseph Abraham's indecent assault conviction falls into this category.

The conventional wisdom about the nature of a defense lawyer's role might excuse Abraham's lawyer's performance. How could he have been expected to know about the pension forfeiture? After all, there was no list of the hundreds of applicable statutory or regulatory penalties arising under state and federal law to which he could refer.[144] Like many defense lawyers,

142. *Id.* at 1147; *see also The Supreme Court, 2009 Term—Leading Cases*, 124 HARV. L. REV. 179, 199 (2010) ("The Court implicitly rejected the current approaches to determining *Strickland*'s reach and created a new category of covered topics that cannot reasonably be restricted to the deportation consequence alone."); Chin & Love, *supra* note 7, at 24 (noting that many other consequences "follow automatically from conviction and [are] thus tied directly to the criminal case, they are important to the individuals involved, and they may therefore drive plea bargains").

143. If a lawyer fails in his duty to warn, a court will then be required to determine whether a defendant was prejudiced by his counsel's default: that is, whether there is a reasonable probability that, but for counsel's errors, he would have rejected the plea bargain. *See generally* Roberts, *supra* note 83. The contours of the prejudice test in the plea bargaining context may be further elucidated by the Court in two cases to be argued in the 2011 Term. Missouri v. Frye, 131 S. Ct. 856 (2011); Lafler v. Cooper, 131 S. Ct. 856 (2011). Both of these cases involve ineffective assistance claims arising from a client's failure to accept a plea offer because of deficient advice from his lawyer, but the test of prejudice under *Strickland* should be the same: But for counsel's incompetence, would the client have rejected (or accepted) the government's offer. Frye v. State, 311 S.W.3d 350, 351 (Mo. Ct. App. 2010); Cooper v. Lafler, 376 F. App'x 563, 569 (6th Cir. 2010).

144. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2(f) (3d. ed. 1999) ("To the extent possible, defense counsel should determine and advise the

whether private practitioner or public defender, his job was to get his client out of a jam as efficiently as possible so he could "get on with his life."[145] The prosecutor was willing to offer a quick plea to a misdemeanor that didn't even require registration as a sex offender, so his client could go home. How could he have reasonably been expected to do more? Abraham was charged with misdemeanors, which generally don't pack the civil wallop of a felony.[146] How could he or his lawyer have anticipated this draconian additional penalty? Would the result have been any different if Abraham had been a nursing student charged with drug possession[147] or a Navy Seal charged with assaulting his girlfriend?[148]

It is a commonplace that most busy defense lawyers cannot be expected to do the kind of research necessary to unearth and analyze all of the disparate statutory and regulatory consequences in state and federal law, or under private contract, that might conceivably place too high a price on a client's giving up the right to go to trial.[149] The system depends upon stable guilty pleas, and the "prevailing professional norms" that establish competence for Sixth Amendment purposes must "take seriously such considerations as cost and efficiency."[150] Any additional burden on counsel in high-volume misdemeanor courts would be particularly problematic.[151] But *Padilla* has made this narrow guilt-centered approach to a defense lawyer's obligations untenable, putting the weight of the Sixth Amendment behind a broader "holistic" concept of a criminal defense lawyer's responsibility to the client. The holistic approach

defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.").

145. *See* Interview with William Stickman, *supra* note 23.

146. *But see* Roberts, *supra* note 13 (manuscript at 13–17) (describing a variety of consequences, including deportation, sex offender registration, and eviction that may result from a misdemeanor conviction).

147. *See, e.g.*, 63 PA. CONS. STAT. ANN. § 216(c) (West 2002) (no person may be licensed as a registered nurse in Pennsylvania until ten years after conviction of a drug felony). Many states absolutely bar licensure as a nurse by anyone convicted of a drug felony.

148. Misdemeanor domestic violence convictions under 18 U.S.C. § 922(g)(9) (2006) are not within the exception in 18 U.S.C. § 925 that permits convicted persons otherwise subject to federal firearms disability to use firearms in the service of the United States or any of its agencies.

149. *See* Daryll Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1396–97 (2011) ("[T]he conditions of indigent defense provision . . . restrict attorneys' capacity to creatively negotiate please for their clients and perhaps to maintain more than a limited, general awareness of immigration law.").

150. Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L. REV. 675, 680 (2011); *see also id.* at 678 ("It is pointless to impose a duty on defense counsel that cannot be satisfied, either because it expects herculean research efforts, or because it will accept superficial advice based on moderate research.").

151. *See generally* Roberts, *supra* note 13 (describing the lower courts' dependence on pleas at arraignment).

would insist that defense lawyers take the time to understand the full effect of conviction on a client's professional and personal circumstances, whether it be loss of a job or eviction from housing, and craft an advocacy strategy based on this information.[152] The biggest challenge over the next decade will be to reconcile this new standard of competent defense with the reality that it may be hard in the beginning for most defense lawyers to meet it.[153]

One answer lies in making it easier. The system as a whole has a stake in providing defense counsel with the tools they need to determine what collateral penalties may derail a plea negotiation so that adequate warnings may be given. This should include putting data about these penalties in usable form and updating it on a regular basis.[154] Even before *Padilla*, jurisdictions had been working to collect information about statutory and regulatory penalties, and now the federal government is funding a comprehensive national survey.[155] The expanded duty of counsel will affect the way defense services are delivered[156] and the way other actors in the justice system behave.[157] While courts may continue to employ a distinction between direct and collateral consequences where their own duty of advisement is concerned, and while prosecutors have no constitutional obligation to know about collateral

152. *See, e.g.*, McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 480–87 (2005) (arguing that advocacy in the criminal case can mitigate collateral damage of criminal proceedings such as eviction or job loss).

153. *See generally*, 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) (arguing that because the constitutional test under the Sixth Amendment is necessarily an evolving one, the defense bar has a stake in participating in the process by which professional standards are established).

154. Chin argues that a logical place to repose this responsibility is a state sentencing commission or a legislative office charged with drafting and cataloguing statutes. Chin, *supra* note 150, at 686–87.

155. In April 2011, the Attorney General of the United States wrote to the attorneys general of all fifty states informing them of this compilation project, being conducted by the American Bar Association, and encouraging them "to evaluate the collateral consequences in your state—and to determine whether those that impose burdens on individuals convicted of crimes without increasing public safety should be eliminated." Letter from Eric H. Holder, Jr., to Attorneys General *supra* note 7, at 2. The letter indicated that the Justice Department "intend[s] to conduct a similar review of federal collateral consequences identified in the American Bar Association study." *Id.*

156. *See, e.g.*, Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1518–19 (2011) ("*Padilla* reinforces long-term trends in criminal defense. It tilts the field towards larger defender organizations with greater specialization of function and more coordination of effort among attorneys—in short, toward a more bureaucratic criminal defense.").

157. *See, e.g.*, Roberts, *supra* note 13 (manuscript at 36–54) (proposing a role for legislatures in decriminalizing relatively harmless behavior and for courts in developing a misdemeanor ineffective assistance jurisprudence).

penalties at all, both courts and prosecutors must be concerned that defense lawyers are able to do a competent job, lest the plea process itself be undermined.[158]

B. Three Reforms from the ABA Standards to Stabilize the Plea System and Make a Defender's Job Easier

Padilla can thus best be understood as a constitutional prompt to address, through non-constitutional means, what has become a vexing social problem. The preceding section suggests that defense lawyers will bear the brunt of making *Padilla*'s promise a reality. The ABA Criminal Justice Standards offer a comprehensive framework for making a defender's life easier. The Standards, the product of a project begun in 1964 by then-ABA President (and later Justice) Lewis F. Powell, Jr., "represent the considered consensus views of prosecutors, defenders, and judges, and constitute a realistic and balanced approach to criminal justice that has proven effective over time."[159] In the Sixth Amendment context, these Standards have been recognized by the Supreme Court, most recently in *Padilla* itself, as "valuable measures of the prevailing professional norms of effective representation" for Sixth Amendment purposes.[160]

The volume of the Standards dealing specifically with collateral consequences, the Standards on Collateral Sanctions and Discretionary

158. *See* Robert Pratt, *The Implications of* Padilla v. Kentucky *on Practice in United States District Courts*, 31 ST. LOUIS U. PUB. L. REV. 169, 176 (2011) ("[An] important factor judges must consider in determining whether to accept or reject a defendant's guilty plea is whether defense counsel has adequately fulfilled his duties in advising the defendant."); STEVEN WELLER ET AL., CTR. FOR PUB. POLICY STUDIES, A BENCH GUIDE FOR STATE TRIAL COURT JUDGES ON IMMIGRATION ISSUES IN JUVENILE AND FAMILY CASES (2010), *available at* http://www.centerforpublicpolicy.org/index.php?s=57; Catherine A. Christian, *Collateral Consequences: Role of the Prosecutor*, 54 HOW. L.J. 749, 750 (2011) ("[A] just and fair prosecutor will consider the collateral consequences that may apply in a particular case and take them into account when considering a disposition."); Robert M.A. Johnson, *Collateral Consequences*, PROSECUTOR, May/June 2001, at 5 ("[Prosecutors] must consider [collateral consequences] if we are to see that justice is done."); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-1.4(d) (3d. ed. 1999) ("[T]he court should not accept the plea where it appears the defendant has not had the effective assistance of counsel."); UNIF. R. CRIM. P. 444(b)(2) (1987) ("[T]he court . . . may not accept the plea if it appears that the defendant has not had the effective assistance of counsel.").

159. *See* Brief of the Am. Bar Ass'n as Amicus Curiae in Support of Petitioner, *supra* note 65, at 3.

160. Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010) (citing ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-5.1(a) (3d. ed. 1993); ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2(f)); *see also* Strickland v. Washington, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what [performance of counsel] is reasonable." (citation omitted)).

Disqualification,[161] presciently anticipated some of the reforms that will be required to complete the *Padilla* project. These Standards, supplemented by other volumes of the Standards, offer three specific ways that jurisdictions can limit the disruptive and destabilizing effect of collateral penalties on the plea negotiation process:

1. Ensure that defenders have the necessary information to advise clients about the consequences of conviction that are imposed by operation of law as opposed to the sentencing court ("collateral sanctions")[162] and engage the court in the advisement process; and
2. Limit collateral sanctions to those that can be justified as necessary and appropriate for any person convicted of a particular offense;
3. Provide a timely and effective way to avoid or mitigate any applicable collateral sanctions.

1. Information about Collateral Sanctions

The first reform to complete the *Padilla* project is to give all actors in the system the information they need to understand the range of automatic statutory or regulatory penalties that apply to conviction of particular crimes, under the law of the state where the prosecution is pending and under federal law. The Collateral Sanctions Standards require that jurisdictions should "collect, set out or reference all collateral sanctions in a single chapter of the jurisdiction's criminal code."[163] The availability of a full collection of collateral sanctions will make it more practicable for defense counsel to

161. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d. ed. 2004).

162. The Collateral Sanctions Standards define the term "collateral sanction" as a penalty or disability "that is imposed on a person automatically upon that person's conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence." ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-1.1(a). It is contrasted with a "discretionary disqualification," which is defined as a penalty or disability that a civil court or agency "is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction." *Id.* Standard 19-1.1(b). For purposes of this Article, the term "collateral sanction" is used interchangeably with "automatic penalty."

163. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.1. The commentary to Standard 19-2.1 notes that the "current difficulty in locating all of the widely dispersed statutes imposing collateral sanctions undermines the fundamental purpose of notice and fairness behind criminal codes." ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-1.1(a) cmt. In addition, "[a]n offender's failure to appreciate the changes in the legal situation resulting from conviction may have far-reaching consequences for the offender's ability to comply with the law." *Id.*

discharge their duty of advisement.[164] It will facilitate the ability of the court to ensure that defendants have been adequately advised,[165] and make it possible for the government to reassure the public that a case has been dealt

164. As previously noted, the Pleas of Guilty Standard 14-3.2(f) qualifies counsel's advisement duties under the Standards with the phrase "[t]o the extent possible." ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2(f). The commentary to Collateral Sanctions Standard 19-2.3 provides that "[c]ollection of applicable collateral sanctions pursuant to Standard 19-2.1 will make it possible for lawyers to give full advice in all cases. Thus, the contingency in Standard 14-3.2(f) that qualifies defense counsel's duty would no longer pertain." ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.3 cmt. The inventory required by Standard 19-2.1 will be confined to statutory and regulatory consequences, so that defense counsel must question a client closely about sanctions that may be imposed by private contract. For example, a private school might include the same sort of pension forfeiture provision in its employment contracts as applied to Joseph Abraham by operation of Pennsylvania law.

165. The Collateral Sanctions Standards provide:

> The rules of procedure should require a court to ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law. Except where notification by the court itself is otherwise required by law or rules of procedure, this requirement may be satisfied by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged.

ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.3(a).

The Pleas of Guilty Standards further provide:

> [T]he court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant's immigration status.

ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-1.4(c); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-1.4(d) ("[T]he court should not to accept the plea where it appears the defendant has not had the effective assistance of counsel."); UNIF. R. CRIM. P. 444(b)(2) (1987) ("[T]he court . . . may not accept the plea if it appears that the defendant has not had the effective assistance of counsel."). The commentary to Standard 19-2.3 points out that "[l]egislatures by statute or courts by rule or other law may choose to make notice of particular sanctions a condition of a valid plea," and may "choose to make a substantial failure to comply with the duty of notification a basis for setting aside a plea." ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.3 cmt.; *see, e.g.*, Brief of the Nat'l Ass'n of Criminal Def. Lawyers et al. at app. B, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651) (listing thirty states that as of June 2009 required the court to give notice of immigration consequences of conviction). In August 2011, the Judicial Conference published for comment a proposed amendment to Rule 11 of the Federal Rules of Criminal Procedure requiring notice of immigration consequences. *Federal Rules Published for Comment*, USCOURTS.GOV, http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PublishedRules.aspx (Aug. 2011)).

with in a just manner.[166] If Pennsylvania's statutes imposing collateral sanctions had been collected and linked to the crimes triggering them, it would have been relatively easy for Joseph Abraham's counsel to check the four misdemeanors with which his client was charged and to adjust his negotiating strategy accordingly. As the *Padilla* Court recognized, "[c]ounsel who possess the most rudimentary understanding of the [statutory] consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of" that consequence occurring.[167] The result can be a solution that "satisf[ies] the interests of both parties."[168] Having a compilation of collateral sanctions at hand would have allowed the court that accepted Abraham's plea to make inquiry of his lawyer with a certain degree of confidence. A just resolution of Abraham's case would have been facilitated if all actors in the process, including the court, had had access to the same detailed information about the consequences of his guilty plea.

The idea of compiling collateral consequences for each jurisdiction was carried forward from the Standards into the 2009 Uniform Collateral Consequences of Conviction Act promulgated by the Uniform Law Commission.[169] To assist states in what seemed a daunting compilation endeavor, Congress directed the Department of Justice to carry out a nationwide survey of collateral consequences,[170] a project now underway under the auspices of the American Bar Association. The ABA research project will create a comprehensive searchable database, but it will remain for particular jurisdictions to put this data into useable form,[171] and to keep it

166. *See supra* note 7 and accompanying text.

167. *Padilla*, 130 S. Ct. at 1486.

168. *Id.*; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.1(c)(iv) (noting that the prosecuting attorney may "enter an agreement with the defendant regarding the disposition of related civil matters . . . including civil penalties and/or civil forfeiture").

169. *See* UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 4 (2010).

170. *See* Love, *supra* note 7, at 785 n.136.

> At one point in the enactment process, the project nearly foundered over objections from commissioners that compiling so many laws and regulations would place too great a burden on the states. The day was saved when United States Senator Patrick Leahy, chair of the Senate Judiciary Committee, was persuaded that this was an area where the federal government should provide some assistance to the states. And so it came about that the Court Security Act of 2007 included a provision requiring the National Institute of Justice to undertake a fifty-state survey of all collateral consequences—both sanctions and disqualifications.

Id. (citing Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534).

171. *See* Chin, *supra* note 150, at 686–87. Chin points out that there is "a trade-off between completeness of information and usability," and recommends that data on consequences be "digested into readily usable form" for the crimes that are most frequently charged. *Id.* at 686.

updated as new laws are passed and existing laws are amended.[172] In addition to this national project, state-specific compilations are underway in Ohio and North Carolina.[173]

2. Limitation of Collateral Sanctions

The second necessary reform is to make most status-generated penalties subject to administrative waiver. If collateral penalties are not "certain" in the sense that they are not automatic and categorical but subject to case-by-case imposition, there is less need for a defender to warn a client about them. Anyone convicted of a crime can anticipate having to defend themselves in an inquiry into their character and fitness by a licensing board or administrative agency, and nothing more than the most general warning in this regard should be necessary. Collateral Sanctions Standard 19-2.2 would accomplish this by limiting situations in which a legislature could impose a "collateral sanction" (or automatic penalty) to those in which it "cannot reasonably contemplate any circumstance in which imposing the sanction would not be justified."[174] The commentary to this Standard explains that this requirement "places a heavy burden of justification on the legislature where automatic collateral penalties are concerned."[175] Examples of restrictions that are "obviously . . . necessary and appropriate" are "exclusion of those convicted of sexual abuse from employment involving close contact with children, loss of public office upon conviction of bribery, denial of licensure where the offense involves the licensed activity, and prohibition of firearms to those convicted of violent offenses."[176] However, many other categorical sanctions are hard to justify, such as automatic denial of student aid or revocation of a driver's license upon conviction of a drug offense. As a general matter, "[a]bsolute barriers to employment or licensure are problematic, particularly where no time limitation is specified and no waiver or relief mechanisms is provided."[177] While "it may

While these digests will not cover all consequences for all crimes, "it will be much more useful that presenting attorneys or clients with an undifferentiated list of hundreds or thousands of collateral consequences." *Id.* at 687.

172. *See id.* ("[U]nless [the ABA compilation] is maintained, it will become increasingly obsolete and unreliable," and become "useable only as the basis for preliminary research."). See discussion, *supra* note 164, for the additional inquiry that may be required to ascertain consequences that are imposed by contract as opposed to statute or regulation.

173. *See* Chin, *supra* note 150, at 687 n.39 (describing the North Carolina compilation); *Civil Impacts of Criminal Convictions Under Ohio Law*, OFFICE OF THE OHIO PUB. DEFENDER, http://opd.ohio.gov/CIVICC/ (May 10, 2011).

174. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.2 (3d. ed. 2004).

175. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.2 cmt.

176. *Id.* (footnotes omitted).

177. *Id.*

be appropriate to revoke a driver's license or exclude from aid on a case-by-case basis . . . it is unreasonable and counterproductive to deny all drug offenders access to the means of rehabilitating themselves and supporting their families, thereby imposing a cost on the community with no evident corresponding benefit."[178]

Instead, the Standards provide that any adverse action taken against an individual on grounds relating to their conviction should be based upon the conduct constituting the offense, not upon the fact of conviction alone. Standard 19-3.1 provides that adverse action based upon that conduct should not be taken at all unless it "would provide a substantial basis for disqualification even if the person had not been convicted."[179] In a word, a convicted person should be judged by the conduct he or she was found to have engaged in, not by the status acquired as a result.

If these principles had been applied to the pension forfeiture at issue in Joseph Abraham's case, conviction would not have resulted automatically in the loss of his pension, but rather the appropriateness of this severe penalty in his particular case would have been considered by the state public employees' retirement board or a similar agency. Because the consequence would no longer have been a "certain" result of conviction but rather dependent upon subsequent discretionary administrative action, it would not have been the sort of consequence to which the principles underlying the *Padilla* holding would apply, and therefore it would not have distorted the plea process. Converting automatic sanctions into discretionary administrative penalties means that they will no longer figure so prominently in the plea negotiations, and a failure to warn a client about them will not threaten the stability of pleas. While it is of course helpful for defense lawyers to be able to warn their clients that conviction will harm their reputation and likely make it harder to establish good character, the advisement function does not bear the constitutional freight of an automatic sanction. Prosecutors should have an interest in pressing the legislature for this sort of substantive reform.[180]

It will take a certain amount of political will in legislatures to roll back the regime of categorical sanctions that has characterized the past two decades,

178. *Id.* Section 7 of the Uniform Act limits collateral sanctions to those specifically authorized by statute, but contains no standard to guide legislatures in deciding whether to impose one. *See* Love, *supra* note 7, at 784 & n.132 (noting that the Uniform Act deals with procedural issues only, and "[does] not address a number of normative issues that [are] addressed in the ABA [Collateral Sanctions] Standards").

179. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-3.1.

180. *See* Bibas, *supra* note 4, at 1158 ("If full disclosure of overly harsh collateral consequences causes many defendants to balk at pleading guilty, prosecutors may press for reforms. They may urge legislatures either to curtail collateral consequences, or at least to make them waivable as part of plea bargains . . . .").

just as it will then take courage for administrative agencies to apply discretionary penalties in a fair and reasonable manner. Allowing courts to waive certain penalties, as discussed, may be a middle ground that will allow legislatures to avoid having to take direct action to repeal them.

3. Relief from Collateral Sanctions

The third key reform to limit the disruptive effect of collateral consequences on the plea process is to make relief from collateral penalties easily accessible and routinely available.[181] Where it is not possible to avoid a particular collateral sanction through negotiation at plea or sentencing, jurisdictions should provide a way to mitigate its effect through durational limits or administrative relief measures.

The Collateral Sanctions Standards provide several opportunities to avoid or mitigate collateral sanctions. Standard 19-2.4 provides that a court at sentencing should be authorized to take them into account in determining the overall sentence.[182] Standard 19-2.5 provides that a court (or administrative agency) should be authorized "to enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction."[183] There will be occasions when "timely and effective" relief can only be granted at sentencing itself, as where a defendant sentenced to probation will otherwise lose his job or home or, like Joseph Abraham, his retirement income. And, the availability of relief from collateral sanctions in post-conviction proceedings has been held relevant in constitutional challenges to their imposition in the first instance.[184]

181. More than two hundred years ago, in the *Federalist Papers*, Alexander Hamilton spoke of the "necessary severity" of the criminal code that requires "an easy access to exceptions in favor of unfortunate guilt," lest justice "wear a countenance too sanguinary and cruel." THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

182. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.4.

183. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.5(a). The commentary to Standard 19-2.5 provides that "[j]urisdictions could choose to allow the waiver authority to be exercised at the time of sentencing, or at some later date." ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.5 cmt.; *see* Love, *supra* note 7, at 781–82 (analyzing the "timely and effective" requirement of Standard 19-2.5).

184. I have argued elsewhere that *Padilla* gives new force to an argument that criminal offenders are entitled to a chance at forgiveness. *See* Margaret Colgate Love, *The Collateral Consequences of* Padilla v. Kentucky*: Is Forgiveness Now Constitutionally Required?*, 160 U. PA. L. REV. PENNUMBRA 113, 114 (2011); *see also* State v. Letalien, 985 A.2d 4, 26 (Me. 2009) ("The retroactive application of the lifetime registration requirement and quarterly in-person verification procedures of SORNA of 1999 to offenders originally sentenced subject to SORA of 1991 and SORNA of 1995, without, at a minimum, affording those offenders any opportunity to

At the present time, few jurisdictions have mechanisms in place that provide comprehensive relief from status-generated consequences.[185] New York is the only state that allows courts at sentencing to waive collateral penalties to permit defendants who are not prison-bound to avoid eviction and keep their jobs.[186] As to post-sentence relief, even in the heyday of rehabilitative sentencing, no U.S. jurisdiction ever adopted anything comparable to the concept of "rehabilitation" in the French Criminal Code[187]

ever be relieved of the duty as was permitted under those laws, is, by the clearest proof, punitive, and violates the Maine and United States Constitutions' prohibitions against ex post facto laws."); Doe v. Sex Offender Registry Bd., 882 N.E.2d 298, 309 (Mass. 2008) ("[T]he retroactive imposition of the registration requirement without an opportunity to overcome the conclusive presumption of dangerousness that flows solely from Doe's conviction, violates his right to due process under the Massachusetts Constitution."). The *Padilla* Court pointed out, respecting pre-1996 immigration law, that "'preserving the possibility of' discretionary relief from deportation . . . 'would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.'" Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) (quoting INS v. St. Cyr, 533 U.S. 289, 323 (2001)). It emphasized that the law no longer provides for such discretionary relief, either from the courts or from the executive, so that deportation in a case like Padilla's is now "practically inevitable." *Id.* at 1480.

185. *See* MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE ix–xiii, 6–17 (2006).

> While every jurisdiction provides at least one way that convicted persons can avoid or mitigate the collateral consequences of conviction, the actual mechanisms for relief are generally inaccessible and unreliable, and are frequently not well understood even by those responsible for administering them. Relief mechanisms of the same nominal type (e.g., pardon, expungement, sealing, set-aside) vary widely in effect and availability from state to state, and there is no national model to which state or federal authorities seeking guidance may refer. There is also no central clearinghouse of information about state and federal restoration of rights mechanisms, so that authorities in one state have little or no information about law and practice even in their neighboring states. Often officials responsible for administering one type of relief are unaware of alternatives available in their own state for mitigating or avoiding collateral consequences. Federal regulatory schemes sometimes give effect to state pardon and expungement remedies, apparently without considering their wide variation. Few jurisdictions provide information about avenues of relief from collateral disabilities to offenders leaving prison or completing probation, even where the law requires that this be done. It is often unclear what if any relief may be available for persons with convictions from other jurisdictions. The scope or effect of relief is also not well-understood, either by those seeking it or by those responsible for administering it.

Id. at x.

186. *See* MARGARET LOVE & APRIL FRAZIER, CERTIFICATES OF REHABILITATION AND OTHER FORMS OF RELIEF FROM THE COLLATERAL CONSEQUENCES OF CONVICTION: A SURVEY OF STATE LAWS 2–6 (2006), *available at* http://meetings.abanet.org/webupload/comm.upload/CR209800/sitesofinterest_files/AllStatesBriefing.Sheet10106.pdf.

187. *See* Damaska, *supra* note 90, at 565 (noting that the French Code process automatically "vacates the judgment of conviction and puts an end to all disqualifications flowing therefrom").

or "expiry" in the English Rehabilitation of Offenders Act of 1974.[188] And, as collateral penalties have ratcheted up over the past twenty years, what relief mechanisms there were have atrophied.[189] The pardon power is rarely used even in jurisdictions where it is the sole form of relief,[190] and expungement and other mechanisms that depend upon concealment have become increasingly unreliable in light of modern technology and pervasive background checking.[191] While a number of states have laws regulating consideration of conviction in employment and licensing decisions, few have an effective enforcement mechanism.[192] The recent official interest in providing certain kinds of support to former prisoners reentering the community has not yet extended to providing convicted persons, including those who left prison years ago or who never went to prison at all, with some realistic hope of restoring their legal status and reputation. Understanding the reasons for this "studied official ignorance about and indifference to collateral consequences" is essential to overcoming it.[193]

188. *See* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 224 (1989). England has not been immune from the recent trend toward more restrictive laws. *See* Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 603 (1997) (reporting on the "clear trend" in English law for employment disqualifications "to increase in number and complexity").

189. *See generally* Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1707–15 (2003) (providing historical background).

190. *See* LOVE, *supra* note 185, at 18–38.

191. If scholars and practitioners have in the past questioned expungement as "too costly in both moral and legal terms," Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 735 (1981), nowadays the greater concern is that remedies premised on concealment ignore the technological realities of the information age, Pierre H. Bergeron & Kimberly A. Eberwine, *One Step in the Right Direction: Ohio's Framework for Sealing Criminal Records*, 36 U. TOL. L. REV. 595, 609 (2005) ("[T]he individual may have to live the rest of his life with a cloud over his head and hope that his secret is never revealed."). *See also* Bernard Kogon & Donald L. Loughery, Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 378, 389 (1970) (criticizing expungement on grounds that it precludes necessary reconciliation between a criminal offender and the community harmed).

192. *See* LOVE, *supra* note 185, at 62–84 (noting that only a handful of states include conviction in their fair employment practices laws).

193. *Id.* at 15.

> [T]here is a certain level of studied official ignorance about and indifference to collateral consequences, even among those responsible for helping people with convictions reenter the community. This is largely because collateral consequences have traditionally been regarded as civil and regulatory rather than penal in nature, so that the process of avoiding or mitigating them has not been thought of as part of the criminal process, or even as any business of the justice system. Researchers and practitioners have pointed out the impact of this indefinite exposure to collateral penalties on recidivism rates, but this has evidently

To summarize, the ABA Standards specify three key reforms that are necessary to implement the *Padilla* decision in a practical and efficient way: they 1) ensure that all parties to a criminal case can understand what those consequences are so that they can be factored into the overall penalty; 2) limit the range of consequences that occur automatically as a result of conviction and require case-by-case consideration of the conduct underlying the conviction; and 3) require that the court (or an administrative body) be able to waive them in a "timely and effective" manner. These three reforms would minimize the extent to which a plea agreement necessarily implicates consequences over and above the sentence imposed by the court, leaving the parties free to negotiate over the disposition of charges without the distraction represented by harsh categorical sanctions that frequently bear little relationship to the crime. In this fashion, *Padilla*'s requirements could be more efficiently satisfied, and a fairer outcome would be assured for defendants. Not least among the advantages of these reforms would be to justify any limitations on convicted persons' ability to function in society in both moral and utilitarian terms.

CONCLUSION

Once in a generation a Supreme Court decision transforms the landscape of criminal defense. In 1963 it was *Gideon v. Wainwright*,[194] in 1984 it was *Strickland*,[195] and in 2010 it was *Padilla*. The *Padilla* Court imposed a degree of constitutional discipline on the guilty plea process, evidently recognizing that a guilty plea is "no longer a negligible exception to the norm of trials; it is the norm."[196] *Padilla* also recognized that criminal defendants considering a guilty plea are exposed to a range of collateral penalties about which they may know little or nothing when they come to the bargaining table, but which may change their lives forever, and not for the better. As *Padilla* is interpreted and applied in the lower courts, it is becoming clear that its logic cannot be easily restricted to the immigration context. *Commonwealth v. Abraham* vividly illustrates how the modern regime of collateral consequences distorts the criminal justice system and threatens to destabilize the plea process on which that system has come to depend. The case thus offers more than just an opportunity to clarify defense counsel's Sixth Amendment advisement obligations in the plea process and to contrast them with the court's more limited obligations under the Due Process Clause. It also offers the other

made little impression on elected officials, who tend to avoid any issue that may expose them to criticism for being soft on crime and criminals.

Id.

194. 372 U.S. 335 (1963).

195. 466 U.S. 668 (1983).

196. Bibas, *supra* note 4, at 1138.

branches of government an opportunity to consider whether they have gone too far in applying collateral penalties in a categorical and unduly punitive way.

Because the parties to plea negotiations must be able to deal with the immediate issues presented by the criminal case without the distractions represented by a defendant's concerns about the collateral consequences of conviction, *Padilla* will in time lead away from the punitive model illustrated by the pension forfeiture in *Abraham* toward an administrative law model, where penalties are reasonably related to the criminal conduct, and more flexibly applied. When prosecutors find it harder to craft acceptable plea offers because of collateral sanctions, when defendants are willing to risk going to trial to avoid them, and when judges are moved to set pleas aside because the agreed-upon deal later seems unfair, the system of collateral consequences that traps so many in a degraded social status must change. As Professor Bibas has argued respecting the procedural aspects of the plea process,[197] substantively too the move toward a consumer protection model now seems inevitable. The result will be a fairer, safer, and more efficient justice system.

197. *See id.* at 1153–59.