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Beyond the Right to Counsel: Increasing Notice of Collateral Consequences

Brian M. Murray
Temple University Beasley School of Law

BEYOND THE RIGHT TO COUNSEL: INCREASING NOTICE OF COLLATERAL CONSEQUENCES

Brian M. Murray *

INTRODUCTION

Jason Lawson[1] is a twenty-five-year-old African American male with a criminal record.[2] He is currently unemployed despite possessing a high school diploma and an associate's degree from a local, urban community college, which is more higher education than the vast majority of his neighbors.[3] He plans to earn his bachelor's degree in the evening once he finds steady employment.

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* Abraham Freedman Fellow and Lecturer-in-Law, Temple University, Beasley School of Law; J.D., 2011, *magna cum laude*, Notre Dame Law School; B.A., 2008, Philosophy and Political Science, *summa cum laude*, Villanova University. I would like to express my gratitude for the comments of Professor Rick Greenstein and Professor Jennifer Mason McAward while drafting this article. I also would like to extend a heartfelt thank you to my wife, Katherine, for her unyielding support, my daughter Elizabeth, for her inspiring wonder and curiosity in all things, and my entire family, for their unconditional love, continuous patience, and enduring encouragement.

1. The following account is a fictional scenario based on the author's experience as a practicing attorney in both the criminal defense and employment law contexts.

2. Mr. Lawson, as an African American male, is sadly somewhat average when it comes to his criminal record. Statistics indicate that disproportionate shares of African American males have some type of criminal record, whether that means a conviction or an arrest record. *See* THOMAS P. BONCZAR, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, 5–6 (Aug. 2003), *available at* http://www.bjs.gov/content/pub/pdf/piusp01.pdf. *See generally* Erica Goode, *Many in U.S. Are Arrested by Age 23, Study Finds*, N.Y. TIMES, Dec. 19, 2011, at A16 (noting 30.2% of twenty-three-year-olds surveyed reported having been arrested for "an offense other than a minor traffic violation," compared to 22% who made a similar report in a 1965 study). This has caused the Equal Employment Opportunity Commission ("EEOC") to conclude that some employment practices may have a disparate impact on African Americans and Latinos. EEOC GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012) [hereinafter EEOC, GUIDANCE], *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

3. Only roughly 20% of African Americans over twenty-five possessed a college degree as of 2010. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 151 tbl.229 (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0229.pdf (statistic under the table titled, "Educational Attainment by Race and Hispanic Origin: 1970 to 2010").

Lawson lives in Philadelphia, Pennsylvania. He was born and raised in North Philadelphia, which is one of the poorest areas of the city. The product of a disjointed household, Lawson was a star football player at his high school; however, he did not have the funds to supplement a partial scholarship to a Division I college.[4] As will be explained below, he also had a felony conviction at the age of eighteen. Therefore he did not leave the city, instead trying to pay his way through the local community college.

After Lawson graduated from high school, he spent the summer working odd jobs to earn some money. One of Lawson's co-workers sold marijuana. Lawson purchased some for personal use on a few occasions but never shared it with anyone. On one occasion, while riding in his co-worker's van to the next job, the police stopped the van for running a red light. During the stop, the police learned that the co-worker's driver's license had been suspended due to a prior Driving Under the Influence ("DUI") conviction. Because the driver would be taken into custody, the officers asked Lawson if he could remove the vehicle from the roadway. An urbanite his entire life, Lawson responded that he did not have a license. The officers decided to impound the vehicle and conduct an inventory search.[5] The officers located ten pounds of packaged marijuana in the trunk.

Lawson and his co-worker were arrested at the scene and charged with possession with intent to deliver a controlled substance.[6] Lawson's bail was set at $50,000. Unable to post this amount, he sat in a Philadelphia prison for nine months while his case continued to be re-listed for trial. Without funds to hire private counsel, his overworked, court-assigned public defender[7]

4. *See generally* Jerry Carino, *Athletes, Administrators Debate Scholarship Stipends*, USA TODAY (Sept. 28, 2013), http://www.usatoday.com/story/sports/college/2013/09/28/athletes-administrators-debate-ncaa-scholarship-stipends/2890117/ (describing how even full-scholarship student athletes can face financial difficulty).

5. *See generally* South Dakota v. Opperman, 428 U.S. 364, 372–76 (1976) (describing the proper bases and considerations to justify an inventory search pursuant to arrest); Commonwealth v. Hennigan, 753 A.2d 245, 255 (Pa. Super. Ct. 2000) (citing *Opperman* factors when determining validity of an inventory search).

6. *See generally* 35 PA. CONS. STAT. § 780-113(a)(30) (2013).

7. Charges that result in actual incarceration entitle a defendant to the right to counsel under the United States Constitution. Scott v. Illinois, 440 U.S. 367, 373–74 (1979). In Pennsylvania, the right to counsel is the same as that guaranteed by the Sixth Amendment. *See* Commonwealth v. Arroyo, 723 A.2d 162, 170 (Pa. 1999). For more discussion on the federal right to counsel, see *infra* Part III.

(who changed with each court appearance) sought to negotiate a plea, notwithstanding the glaring suppression and trial issues within the case.[8] One of those attorneys was able to negotiate a time-served guilty plea with two years of probation to follow.[9] Tired of waiting for resolution of his case and anxious to return to his once promising life, Lawson accepted the offer.[10]

At no point during his stay in jail, conversations with his attorney, or colloquy before the judge did anyone mention the collateral consequences of a felony conviction.[11] Unfortunately for Mr. Lawson, neither the individual players involved, nor the system itself, notified him that he will likely struggle to find employment his entire life[12] and that his conviction would categorically bar him from entering certain professions, not to mention pursuing other privileges available to non-felons, such as owning a firearm, voting, or running for political office.[13] Mr. Lawson might struggle to even work as a janitor at a local public school with children under the age of thirteen.[14]

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8. Specifically, whether the inventory search was valid and whether Lawson "knowingly" possessed the marijuana in the trunk.

9. This is a fairly mild sentence for a possession with intent to deliver conviction. Although it does not carry a mandatory minimum sentence in Pennsylvania, unless firearms are involved, sentences can involve multiple years in prison. *See* PENN. COMM'N ON SENTENCING, SENTENCING IN PENNSYLVANIA: 2013 ANNUAL REPORT app. at 128, *available at* http://pcs.la.psu.edu/publications-and-research/annual-reports/2013/view.

10. *See generally* Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 605–07 (1956) (discussing how the lowest-level courts in Philadelphia valued the rapid disposition of cases). While this article is nearly sixty years old, the volume of cases processed in Philadelphia has not decreased.

11. *See generally* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 23 (2013) ("The hidden consequences of a conviction may not ever be explained to the person choosing to plead guilty, leading to unjust results that happen more regularly and more severely than ever before."). Drug crimes carry myriad consequences. *See also* Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002) [hereinafter Chin, *Race*].

12. *See generally* MICHELLE N. RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1–2 (2011), *available at* http://www.nelp.org/page/-/65_million_need_not_apply.pdf?nocdn=1 (indicating that individuals with criminal records will struggle obtaining jobs).

13. *See* Hugh Lafollette, *Collateral Consequences of Punishment: Civil Penalties Accompanying Formal Punishment*, 22 J. APPLIED PHIL. 241, 241–42 (2005).

14. *See* 24 PA. STAT. ANN. § 1-111(e)(2) (1992) (listing felony convictions under "The Controlled Substance, Drug, Device, and Cosmetic Act" as prohibitive under section (a), which includes janitorial positions). The Pennsylvania Commonwealth Court recently announced three decisions impacting the fate of this law. Croll v. Harrisburg Sch. Dist.,

The twin realities of a criminal justice system dominated by guilty pleas and legislatures increasing the consequences associated with a criminal conviction place someone like Mr. Lawson in no-man's land for the rest of his life. Although fairly resourceful up to the point of his conviction and hopeful for a better future, Mr. Lawson is now facing significant uphill battles for a livelihood. In that sense, it is not clear that the punishment fits the crime. Although he possesses a criminal conviction, he is perhaps most guilty of being—through no fault of his own—somewhat legally illiterate when it comes to the non-financial and indirect implications of his felony guilty plea.

The Supreme Court's recent decisions in *Missouri v. Frye*[15] and *Padilla v. Kentucky*,[16] while failing to usher a sea change in right-to-counsel jurisprudence, suggest that the Court is becoming more aware of the costs of a criminal conviction.[17] *Frye* recognizes the prevalence of guilty pleas and the need for adequate representation in the bargaining context;[18] *Padilla* acknowledges that some collateral consequences, like deportation, are significant enough to require a warning for a defendant's counsel to be considered effective.[19] Perhaps most importantly, they solidify developing jurisprudence that recognizes the importance of *notice* within the criminal system, albeit through attorneys.

In the wake of both decisions, many commentators have called for an expansion of the right to counsel, especially for defendants facing charges that do not carry the threat of incarceration, in order to address the myriad collateral consequences associated with a criminal record.[20] The premise of the argument is that counsel is

2012 WL 8668130, at *7, *13 (Pa. Commw. Ct. Dec. 13, 2012) (finding that 24 PA. STAT. ANN. § 1-111(e)(1) violates substantive due process rights guaranteed by Article 1, Section 1 of the Pennsylvania Constitution, but rejecting the argument that it violates the *Ex Post Facto* clause of the Pennsylvania Constitution); Johnson v. Allegheny Intermediate Unit, 59 A.3d 10, 25 (Pa. Commw. Ct. 2012) (finding 24 PA. STAT. ANN. § 1-111(e)(1) unconstitutional as a violation Johnson's substantive due process rights under Article 1, Section 1 of the Pennsylvania Constitution); Jones v. Penn. Delco Sch. Dist., 2012 WL 8668277, at *7, *13 (Pa. Commw. Ct. Dec. 13, 2012) (same finding as *Croll*).

15. 566 U.S. __, 132 S. Ct. 1399 (2012).

16. 559 U.S. 356 (2010).

17. *But see* United States v. Muhammad, 747 F.3d 1234, 1235 (10th Cir. 2014), *cert. denied*, 134 S. Ct. 2741 (2014) (finding "the law does not require a defendant to be informed of the collateral consequences of a plea").

18. *Frye*, 566 U.S. at __, 132 S. Ct. at 1407.

19. *Padilla*, 559 U.S. at 374.

20. *See* King, *supra* note 11, at 36–48.

the silver bullet necessary to craft plea deals that avoid such consequences. A defense counsel driven solution would likely mitigate the number of unknowing—and perhaps unintelligent—pleas, especially for the unrepresented, and conceivably shift the current paradigm. But is it enough? Or do the plea bargain realities of the criminal system demand something more? Furthermore, would expansion of the right to counsel continue to place too much of the burden on already overworked defense attorneys and unknowing defendants, represented or not? Are there other players within the system that can and should help?

This article responds to these questions by focusing on the primary roots of this justice issue, namely the prevalence of guilty pleas and the continued efforts of legislatures to increase the lifelong price of a conviction. Part I begins with a discussion of these practical realities within the criminal justice system. Part II then examines the law of guilty pleas under the Fifth Amendment, including constitutional standards for valid pleas, and how current jurisprudence fails to account for the collateral consequences mentioned in Part I. Part II also discusses the right to effective assistance of counsel under the Sixth Amendment, post-*Padilla* and *Frye*, and concludes that the spirit of both cases is the increased notice of collateral consequences, albeit through defense counsel. Part III describes the current state of the law on the right to counsel and analyzes the merits and shortcomings of expanding the right to counsel in order to address the problem of collateral consequences. Finally, Part IV offers a few solutions that are more systemic in nature, in contrast to total reliance on the attorney-client relationship, and that involve the judiciary and prosecutors. Part IV also proposes new disclosure obligations for the judiciary and the prosecution because any system-wide solution to the growing effect of collateral consequences must include the various players involved.

I. REALITIES OF THE CRIMINAL JUSTICE SYSTEM

The realities of the criminal justice system as they pertain to the effect of a criminal conviction are stark. Guilty pleas are the primary source of convictions, which occur at an incredible rate following the initiation of charges. These convictions result in myriad, immediate, and direct consequences, as well as shadow

consequences that continue to affect offenders for the rest of their lives. Although the number of collateral consequences has increased dramatically over the years, knowledge of their scope and breadth is lost on various players within the system. This section explains how these twin realities, namely the prevalence of guilty pleas and increasing collateral consequences, coupled with widespread consequence illiteracy amongst players within the system, demands a response.

A. *The Prevalence of Guilty Pleas*

Guilty pleas are the norm rather than the exception when it comes to resolving criminal cases. The most recent statistics from the federal government suggest that almost 97% of federal cases result in a plea.[21] The numbers in state systems are comparable: the same percent of felony filings in the seventy-five largest counties in the United States resulted in pleas.[22] These pleas often come early in the process and are disproportionately entered by defendants in custody.[23]

Pleas became commonplace over time. Although the common law was skeptical of bargaining to induce admissions of guilt,[24] the simultaneous effects of over-criminalization[25] and resource scarcity led to the plea becoming the most efficient outcome for all parties in an overwhelmed criminal justice system.[26] The enforcement of broader-reaching statutes resulted in significantly

21. U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2011 3 (2012), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2012/FY11_Overview_Federal_Criminal_Cases.pdf.

22. *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 682 n.59 (2008).

23. ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIM. DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 15 (2011).

24. Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea-Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 7 n.39 (2013).

25. *See* King, *supra* note 11, at 17–18 (discussing how the "broken windows" theory of policing emerged in the 1980s and dramatically reduced police discretion in enforcement of statutes).

26. *See* Foote, *supra* note 10, at 643–44 (recognizing efficiency as the primary reason for the adjudication of low-level offenses). Several years before, by the Great Depression, as one commentator has noted, plea-bargaining emerged as a crucial response to the overwhelmed system. Dervan & Edkins, *supra* note 24, at 10.

more criminal defendants in low-level prosecutions, thereby taxing local courts and forcing prosecutors and criminal defendants to act expeditiously.[27] In 2006 alone, roughly 10.5 million misdemeanor prosecutions occurred.[28]

While pleas became the common practice on the ground, by the second half of the nineteenth century they also received the imprimatur of notable institutions. The American Bar Association ("ABA") sought to justify the paradigm shift by highlighting how pleas allowed courts to focus their energies on cases where the presumption of innocence actually mattered.[29] While that point may be true on a theoretical level, the shift also had the effect of inverting the otherwise well-known burden of proof within the criminal system.[30] The system began to expect defendants to plead rather than exercise their trial rights. In fact, exercising the procedural protections afforded to defendants would likely result in mass upheaval within the system.[31] Perhaps unknowingly,

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27. *See* Dervan & Edkins, *supra* note 24, at 9 ("As the number of criminal statutes—and, as a result, criminal defendants—swelled, court systems became overwhelmed."); *see also* K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 281 (2009) (comparing New York City's 86,000 non-felony arrests in 1989, prior to the introduction of the city's strategy of Zero Tolerance Policing, with the 176,000 non-felony arrests in 1998, after the strategy had been implemented); King, *supra* note 11, at 20 ("As the numbers have increased over the past few decades, the tension has increased: 'broken windows' policing has led to more arrests, which has led inexorably to more prosecutions, which has led in turn to larger caseloads on prosecutors, defense lawyers, and judges.").

28. ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIM. DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009).

29. Dervan & Edkins, *supra* note 24, at 11 (quoting AM. BAR ASS'N, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (1967) ("[T]he limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence.")).

30. *See* ERIK LUNA & MARIANNE L. WADE, THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 22 (2012) (noting how the crime control model "begins from a presumption of guilt and an overriding faith in the administrative processes that precede the bringing of the formal charge in court").

31. King, *supra* note 11, at 21 ("If every defendant charged with a misdemeanor were to insist meaningfully and fully on her rights—not only to counsel and a trial, but also to the presumption of innocence, compulsory process, confrontation rights, and all of the other formal procedural safeguards to which she is entitled—the system of criminal prosecution would have to undergo enormous change in response."); *see also* Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1155–56 (2005) ("The distinction between substance and procedure pervades academic thinking all the way down to the foundations. . . . [i]n trial-level courthouses, however, the distinction fades, as the defendant trades his procedural rights for

the Supreme Court of the United States helped to codify the "necessity" of plea-bargaining in *Brady v. United States*, which outlined the operative standard for determining the legitimacy of pleas.[32] The sentencing guidelines used by federal and state courts, designed to rectify sentencing disparities, also indirectly contributed to the culture of pleas because prosecutors could essentially manipulate charges to reach a desired sentencing range.[33] Prosecutors also could determine sentencing recommendations based on whether a defendant chose to take a plea or pursue a trial, often resulting in a trial penalty.[34]

Modern scholarship has shed light on perhaps the most troubling aspect of the plea culture: the willingness to admit guilt, despite innocence, due to extraneous factors. In other words, the plea has become the rational choice irrespective of the merits of the actual criminal case, simply by virtue of the fact that fighting charges results in various types of costs to a criminal defendant, not the least of which could be his or her liberty pre-trial.[35] The once sacrosanct assumption that trials provided the ultimate backstop for determining truth has met actual practice.

In a careful study conducted by Lucian E. Dervan, roughly six out of ten innocent study participants took a plea deal.[36] More than half of the innocent participants would take the deal regardless of the leniency of the sentence, which suggests that additional factors, such as time, reputation, and other anterior interests motivate guilty pleas.[37] The system seems to recognize the risk-averse nature of criminal defendants and turns the plea into a

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reductions in his substantive liability.").

32. 397 U.S. 742, 757 (1970); *see infra* Part II.A.

33. *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 17 (2003); *see also* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1128 (2011) [hereinafter Bibas, *Regulating the Plea-Bargaining Market*] ("A range of possible overlapping charges can fit a single transaction or episode, and prosecutors have discretion to choose among them to reflect their own senses of justice, their desires to achieve pleas, or any number of reasons.").

34. *See* Dervan & Edkins, *supra* note 24, at 14–15 n.88–89.

35. *See* Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 450 (2011) ("When the deal is good enough, it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilt beyond a reasonable doubt, and regardless of whether one is factually innocent.").

36. Dervan & Edkins, *supra* note 24, at 33–34.

37. *See id.* at 36–38.

self-reinforcing, rational expectation for new defendants entering the system.[38] Refusing to plead guilty can become the irrational choice, especially to defendants who are unaware of indirect consequences down the road.[39]

B. *Increasing Collateral Consequences*

A collateral consequence, as defined by courts and commentators, is a ramification that is indirect, inexplicit, or implicit, and a result of the "fact of conviction rather than from the sentence of the court."[40] Some collateral consequences are automatic, such as in the case of mandatory registration of sex offenders.[41] Others are discretionary, such as additional barriers to obtaining a professional license.[42] Direct consequences, by contrast, are penal sanctions stemming directly from the guilty plea.[43] Examples include incarceration, fines, probation, and parole, which are all controlled by the sentencing court.[44] Most circuit courts connect direct consequences to the range of a defendant's punishment, which contrasts with the effect of a conviction post-punishment.[45]

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38. *See id.* at 38 ("[O]ne needs to be concerned not only that significant sentencing differentials might lead felony defendants to falsely condemn themselves through plea bargaining, but also that misdemeanor defendants might be pleading guilty based on factors wholly distinct from their actual factual guilt."); *see also* Alexandra Natapoff, *Misdemeanors*, 85 S. CALIF. L. REV. 1313, 1328 (2012) (noting how early guilty pleas are especially troubling because they are not subject to the "adversarial testing" that should drive criminal adjudication: "a police officer's bare decision to arrest can lead inexorably, and with little scrutiny, to a guilty plea").

39. *See, e.g.*, Russell Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 79 & n.19, 80 (2009) ("[P]lea bargains will be most generous (and therefore most frequently accepted) in cases involving misdemeanors and other less serious offenses. The process costs expended by defendants will be particularly high relative to penalty costs where only minor penalties are involved."). Interestingly and relevant to the next part of this article, Covey appears to be talking only about direct consequences.

40. Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634 (2006) (describing the nature of collateral consequences); *see e.g.*, People v. Ford, 657 N.E.2d 265, 268 (N.Y. 1995) (describing collateral consequences as peculiar and often imposed by agencies).

41. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 9799.13 (2012).

42. *See, e.g.*, 63 PA. CONS. STAT. ANN. § 559 (2014) (barber license); *id.* § 124.1 (dental hygienist); *id.* (real estate broker); *id.* §§ 1909, 1911 (social worker); *id.* § 2408(c) (taxi driver).

43. Roberts, *supra* note 22, at 672–73.

44. *Id.* at 672, 689–93.

45. Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973). One hundred and seventy-seven decisions cite *Cuthrell* for this understanding. Roberts, *supra*

One particularly astute commentator has emphasized how the distinction between direct and collateral consequences is mythical, especially when one considers that a significant number of collateral consequences are automatically inflicted.[46] In other words, the line between an automatic collateral consequence, such as mandatory sex offender registration or a driver's license suspension, and a direct consequence, such as a fine, is hard to decipher when both stem from the fact of a conviction and occur by operation of law.

Perhaps the only thing rivaling the significance of collateral consequences for a defendant is their quantity. Generally speaking, legislatures have increased the number of collateral consequences in the past thirty years or so.[47] Cataloguing these consequences has become a national project.[48] Legislatures have limited re-entry options in terms of employment eligibility, undermined custody rights, narrowed access to public benefits such as welfare and housing, and imposed barriers to political participation.[49] The result is that a significant percentage of ex-offenders continue to feel the effects of their convictions in ways that rival,

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note 22, at 690 n.93

46. *See* Roberts, *supra* note 22, at 689–93; *see also* Bibas, *supra* note 33, at 1130 ("The neat walls between criminal and civil, and between direct and collateral consequences, have steadily eroded in recent years.").

47. *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 9 (2003); LEGAL ACTION CTR., AFTER PRISON: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 8 (2004), *available at* http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf; *see also* Chin, *Race*, *supra* note 11, at 259–60 (describing several consequences under the federal code).

48. AM. BAR ASS'N, NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION [hereinafter ABA, NICCC], *available at* http://www.abacollateralconsequences.org/ (last visited Apr. 3, 2015).

49. PETERSILIA, *supra* note 47, at 9 ("Since 1980, the United States has passed dozens of laws restricting the kinds of jobs for which ex-prisoners can be hired, easing the requirements for their parental rights to be terminated, restricting their access to public welfare and housing subsidies, and limiting their right to vote."); *see also* LEGAL ACTION CTR., *supra* note 47, at 10 (noting how thirty-seven states allow discrimination in employment due to *arrest* records, even if the individual was never convicted). Many commentators would prefer a significant reduction in the volume of collateral consequences in any given jurisdiction. This article proceeds from the assumption that collateral consequences are unlikely to be significantly reduced by legislatures anytime soon given that they have grown exponentially in the past half century. Thus, the article seeks to propose a framework for alleviating their effect through the adjudication process, which contains the major actors that determine the circumstances that ultimately lead to an offender encountering such consequences.

if not exceed, the direct consequences felt at the time of the actual plea.[50]

1. Employment

The most significant collateral consequences—both for the individual defendant and in terms of societal costs—are arguably the barriers to employment that ex-offenders face after pleading guilty. The ability to work is at the heart of citizenship and being a member of the community.[51] While many state laws limit the ability of employers to consider criminal records,[52] enforcement of such laws is minimal.[53] Furthermore, for every law regulating employer hiring and decision-making practices, there are myriad laws barring ex-offenders from consideration for certain positions.[54] Countless others provide employers with extra discretion

50. *See* Nora Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) ("[C]ollateral sentencing consequences have contributed to exiling ex-offenders within their country, even after expiration of their maximum sentences."); *see also* King, *supra* note 11, at 23 ("These collateral consequences often constitute a far more serious form of punishment than the direct consequences of a conviction, especially for the many people convicted of low-level crimes who are never sentenced to incarceration.").

51. *See* JUDITH SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 63–64 (1991) (discussing the importance of being an "earner" to be a citizen).

52. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 9125(b) (2012). This statute prohibits employers from considering felony and misdemeanor convictions unless they are related to the applicant's suitability for employment, or in other words, are related to the job at issue. *Id. See also* CAL. LAB. CODE § 432.8 (2014); COLO. REV. STAT. § 24-72-702 (2015); CONN. GEN. STAT. ANN. §§ 46a-79, 46a-80 (2015); GA. CODE ANN. § 42-8-63 (2010); HAW. REV. STAT. § 378-2.5 (2014); IND. CODE ANN. § 10-13-3-27 (2014); KAN. STAT. ANN. § 22-4710(f) (1997); MD. CODE ANN., CRIM. PROC. § 10-109 (2001); MASS. ANN. LAWS ch. 21-151B, § 4(9); MO. REV. STAT. § 561.016 (1979); MONT. ADMIN. 24.9.1410 (1998); N.M. STAT. ANN. § 28-2-2 (1978); N.Y. CORRECT. LAW. §§ 23-A752, 753 (2007); OHIO REV. CODE ANN. §§ 2953.32, 2953.33, 2953.55 (2014); VA. CODE ANN. § 19.2-389 (2014); WASH. ADMIN. CODE § 162-12-140 (2000); WIS. STAT. ANN. §§ 111.32 *et seq.*, 111.335(1)(c)(1)-(2) (2010).

53. For example, there is only one reported case for the above-cited law that directly corresponds to the suitability for employment issue. *See* Cisco v. United Parcel Serv. Inc., 476 A.2d 1340, 1343 (Pa. Super. Ct. 1984). Lack of enforcement, either through private right of actions, or by state agencies, remains a problem. *See Employment Rights of Workers with Criminal Records*, NAT'L EMP'T LAW PROJ., *available at* http://www.nelp.org/content/content_issues/category/employment_rights_of_workers_with_criminal_records (last visited Apr. 3, 2015) ("Although employers may (to varying legal degrees) consider a worker's criminal history as part of the application process, employers often fail to comply with a range of federal and state laws that provide fundamental protections against abuse of criminal background checks."). Considering that most ex-offenders are struggling to make ends meet, it is not surprising that few have pursued costly litigation under an unsettled statute.

54. *See* CMTY. LEGAL SERV., INC., LEGAL REMEDIES AND LIMITATIONS ON THE

to deny applicants.[55] Coupled with federal and state statutes that require criminal background checks and the quick and easy availability of such information, the scarlet letter that is a conviction becomes more permanent and brighter for all to see.[56] Furthermore, such consequences have societal costs as well: they can slant measurements used to determine societal well-being, such as the unemployment rate.[57]

Pennsylvania law,[58] like that in most states, lists offenses or types of offenses that will preclude employment in a particular field. For example, the Older Adult Protective Services Act contained lifetime bans due to certain prior convictions.[59] Various occupations with licensing boards are given broad discretion to refuse licenses to an applicant with a felony or misdemeanor conviction.[60] These same boards are often required by law to consider convictions and sometimes are prohibited from issuing a li-

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EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS IN PENNSYLVANIA 9–12 (updated May 2014) [hereinafter CLS] (noting how individuals with certain types of convictions cannot seek employment as airport employees, at banks, insurance company employees, in long-term care facilities, in certain security positions, and at schools, even for custodial positions).

55. *Id.* at 13–19 (discussing various fields that may be off limits to those with convictions, including accountancy, architecture, barbering, working in casinos, dental hygiene, funeral directing, working in horse stables, car dealing, taxi driving, and social work).

56. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 287 nn.40–45 (2011). Stories of old criminal convictions coming back to haunt ex-offenders who have steadily rebuilt their lives are becoming more well-publicized. *See, e.g.*, Alfred Blumstein & Kiminori Nakamura, Op-Ed, *Paying a Price, Long After the Crime*, N.Y. TIMES, Jan. 9, 2012, *available at* http://www.nytimes.com/2012/01/10/opinion/paying-a-price-long-after-the-crime.html?_r=0 (describing an employer's refusal to hire an applicant due to a twenty-five year-old conviction).

57. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 69–70 (2006).

58. Because the scenario in the beginning of this article was set in Philadelphia, this section will focus its attention on the collateral consequences related to employment in Pennsylvania. Although these consequences are unique to this jurisdiction, other state laws mirror those in the books in Pennsylvania. *See supra* note 52 (identifying a Pennsylvania conviction-related statute along with similar laws from several other states).

59. 35 PA. STAT. ANN. § 10225.503(a) (2014). Under OAPSA, nursing homes, home health care agencies, and other workers in long-term care facilities, even if not having direct contact with patients, could not have any theft convictions at any time. *See id.* § 10225.103 (2014) (defining "FACILITY" as including the following: "[a] domiciliary care home[,] . . . [a] home health care agency[,] . . . [a] long-term care nursing facility[,] . . . [a]n older adult daily living center[,] . . . [a] personal care home . . ."). This law was struck down as a violation of the Pennsylvania Constitution in *Nixon v. Commonwealth*. 839 A.2d 277, 279 (Pa. 2003). At this time, however, the law has not been amended and enforcement remains subject to the priorities of state agencies. 35 PA. STAT. ANN. § 10225.503(a) (2014).

60. CLS, *supra* note 54, at 13–19.

cense to individuals with certain convictions, irrespective of that individual's rehabilitation post-conviction or the underlying facts in the case.[61] Similar prohibitions exist under federal law,[62] including for employees at airports,[63] banks,[64] ports,[65] and in prisons.[66]

For further examples, one can simply search the ABA's collateral consequences database, which is a project supported by the National Institute of Justice, Office of Justice Programs, and the United States Department of Justice.[67] The website suggests to the interested onlooker that the barriers can seem endless. A simple search of employment consequences under federal law lists nearly six hundred possible ramifications, including the inability to file a claim for adverse action based on a conviction.[68] The same search locates nearly three hundred employment consequences in Pennsylvania,[69] including ineligibility as a dog license processor or warden,[70] or as the manager or participant in the setup of a bingo game.[71] While the number of job seekers for those positions may be small, the law also significantly limits those convicted of various offenses from employment in any school in any position, including after-hours and custodial positions where the amount of potential contact with students may be close to zero.[72]

The available remedies for denials of employment based on a conviction record are limited, although the law is developing at both the federal and state level. Many states attempt to limit employer discretion to some degree by requiring that a conviction, if not barring someone from a specific position, only be considered if

61. *Id.* at 13.

62. *See e.g.* 10 U.S.C. § 986(c)(1) (2000).

63. *See* 49 U.S.C. §§ 44936(b)(1)(B)(xiv)(IX) (2000); *see also* 49 C.F.R. §§ 1542.209(d), 1544.229(d) (2014).

64. *See* 12 U.S.C. § 1829 (2012) (prohibiting employment of anyone with a crime of dishonesty).

65. *See* 46 U.S.C. § 70105(c)(1) (2012); *see also* 49 C.F.R. § 1572.103 (2014).

66. 28 C.F.R. § 105.23 (2012).

67. ABA, NICCC, *supra* note 48, at *Project Description* (describing the history of the National Inventory of Collateral Consequences).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See supra* note 14.

it is related to employment.[73] In Pennsylvania, the analogous statute is fairly untested and the statute does not define how to determine whether a conviction relates to a candidate's suitability for employment.[74]

As for federal standards, many scholars, commentators, and attorneys suggest that individuals with convictions may be able to pursue disparate impact litigation under Title VII of the Civil Rights Act because African Americans and Hispanics are disproportionately represented in the criminal justice system.[75] While this theory has popped up in various courtrooms since the 1970s, very few litigants have succeeded.[76] In fact, after 1990, such claims were often unsuccessful.[77] In a minor victory for future plaintiffs, the United States Court of Appeals for the Third Circuit recognized that employment policies must "accurately distinguish between applicants that pose an unacceptable level of risk and those that do not."[78] Despite judicial unwillingness to develop

73. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 9125(b) (2012); *see also supra* note 52.

74. There are very few reported cases under this statute. *But see* Cisco v. United Parcel Services, Inc., 476 A.2d 1340 (Pa. Super. 1984) (construing statute as allowing employers to *only* consider felony and misdemeanor convictions). Further, no state agency is assigned to enforce the statute, which means that its terms are enforced only through a private lawsuit.

75. *See* Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men With Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 2, 4–5 (2013).

76. *See* Green v. Missouri Pac. R.R. Co., 523 F.2d 1290, 1298–99 (8th Cir. 1975) (holding invalid a blanket disqualification based on convictions); Carter v. Gallagher, 452 F.2d 315, 326 (8th Cir. 1971) (holding that a provision attempting to remedy past discrimination by removing scrutiny based on past misdemeanor and felony convictions was too broad); Dozier v. Chupka, 395 F. Supp. 836, 854 (S.D. Ohio 1975) (holding that the use of arrests and convictions favored white men over black men); Richardson v. Hotel Corp. of America, 332 F. Supp. 519, 521 (E.D. La. 1971) (holding that firing a bellman based on his prior conviction of theft was not racially discriminatory under the argument that more black persons than white have been convicted of various crimes), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972); Gregory v. Litton Sys. Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that an employer's policy of not hiring candidates who have multiple arrests without convictions had a foreseeable effect of denying black applicants an equal opportunity and was hence unlawful), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972); EEOC Decision No. 74-89 (1974); EEOC Decision No. 71-2682 (1971).

77. *See, e.g.*, Matthews v. Runyon, 860 F. Supp. 1347 (E.D. Wis. 1994) (granting summary judgment against plaintiff for failing to establish a prima facie case); Lewis v. Ala. Dep't of Public Safety, 831 F. Supp. 824 (M.D. Ala. 1993) (dismissing due to plaintiff's failure to make requisite statistical showing); Williams v. Scott, No. 92 C 5747, 1992 U.S. Dist. LEXIS 13643 (N.D. Ill. Sept. 9, 1992) (noting that defendant established business necessity to fire employee from "collector" position).

78. El v. S.E. Pa. Transp. Auth., 479 F.3d 232, 245 (3d Cir. 2007) (noting how empirical evidence should support an employer's decision to link a conviction to suitability and

the theory, the Equal Employment Opportunity Commission ("EEOC") recently issued Guidance under Title VII for employers to use when considering criminal records.[79] The Guidance lends credibility to the theory that facially neutral policies could result in a disparate impact.[80] However, pursuit of such litigation is subject to all of the usual procedural and substantive hurdles applicable to Title VII, including difficult burdens of proof for a plaintiff.[81] Furthermore, such litigation would rarely, if ever, provide the type of immediate relief needed by a job applicant with a criminal record.[82]

2. Public Benefits and Privileges

Criminal convictions impact eligibility for public benefits and privileges otherwise available to a member of the community. Convictions can lead to ineligibility for unemployment benefits,[83] loss of retirement benefits for public officials,[84] and disqualification from welfare,[85] cash assistance,[86] and medical assistance.[87]

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possible job performance).

79. EEOC, GUIDANCE, *supra* note 2.

80. The Guidance disfavors across-the-board exclusions, rejections due to arrest information, and calls for a three-part analysis for employers to evaluate convictions, including the nature and gravity of the offense, the time that has passed since the offense, and the nature of the job sought. *Id.*; *see* Part V.B. Furthermore, if an employer seeks to reject a candidate, the Guidance calls for an "individualized assessment" involving several other factors unique to the applicant's situation. *Id.*

81. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (holding that burden shift framework applies to employment discrimination cases). The problems of proof, especially in a disparate impact case, remain for advocates attempting to establish unlawful discrimination on the basis of criminal records. Additionally, it is unclear whether Title VII actually preempts state regulation of employment practices, particularly in this field. Express preemption seems to be off of the table given 42 U.S.C. § 2000e-7 (2012). And whether conflict or obstacle preemption is applicable is a fairly untested area of the law. But even if Title VII were to survive a preemption challenge, the Guidance itself does not maintain the force of law. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 142, 144 (1976) (labeling the EEOC guidelines as "interpretative regulations" whose weight depends "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

82. How many ex-offenders have the time, money, or wherewithal to make a *federal* case of it?

83. 43 PA. STAT. ANN. §§ 802(g), 871(b) (2009).

84. *Id.* § 1313(a).

85. 21 U.S.C. § 862(a)(1)(A) (2012); *see* 55 PA. CODE § 141.21(t) (2015).

86. 62 PA. CONS. STAT. ANN. § 4239 (2010); *id.* § 432.24 (listing eligibility regulations for an individual who has been convicted of a controlled substances offense).

87. 42 U.S.C. § 1320a-7(b)(3) (2012); 55 PA. CODE § 1101.92(c)(1) (2015).

They also can result in forcible eviction from public housing[88] and the inability to live with someone, related or unrelated, who is seeking child custody.[89] The effect of strict housing restrictions is especially difficult for ex-offenders who may need some additional support when transitioning back into living on their own full-time. Even veterans may lose the ability to reside in state-operated residences specifically designed for former service members.[90] Convictions for drug-related offenses can also render student loan assistance unattainable.[91] For the indigent defendant struggling to regain footing, the loss of such public benefits is even more significant. When one considers that the vast majority of ex-offenders must pay back fines, costs, and other penalties after a term of incarceration, or risk being re-incarcerated,[92] the inability to obtain public benefits renders this task even more challenging. The societal costs of ex-offender default can be staggering: additional terms of incarceration that cost taxpayer money and possibly more crime committed by those desperate to make ends meet.

A criminal record also can affect custody of one's children, even if the conviction occurred before someone became a parent. In Pennsylvania, theft crimes automatically render a parent ineligible for participation in a subsidized child-care program.[93] Again, the indigent defendant who is also a parent now may have an additional expense to carry alone, even if the crime that he or she was convicted for occurred prior to becoming a parent. Convictions can also be a reason to justify divorce.[94] Most significantly, criminal histories are often part of the "best interests of the child" analysis conducted by judges when determining custody rights.[95] Few would dispute that a parent's criminal history is relevant to

88. 42 U.S.C. § 13662(a) (2012); *see* 35 PA. STAT. ANN. § 780-167(b) (1995) (detailing the impact of a final criminal conviction in a drug related offense on eviction proceedings).

89. 23 PA. CONS. STAT. ANN. § 5329(a) (2014).

90. 43 PA. CODE § 7.3(b)(6) (2015).

91. 20 U.S.C. § 1091(r) (2012); 26 U.S.C. § 25A(b)(2)(D) (2012).

92. 42 PA. CONS. STAT. ANN. § 9728 (2010).

93. 55 PA. CODE § 3041.189(a)(1) (2015).

94. 23 PA. CONS. STAT. ANN. § 3301(a)(5) (2010).

95. King, *supra* note 11, at 30; 23 PA. CONS. STAT. ANN. §§ 2511(a)(9), 5329(a) (2014).

this calculation; however, it is likely that very few criminal defendants realize that a conviction can affect this calculation for their entire life.[96]

3. Citizenship Status and Political Participation

The web of collateral consequences in most jurisdictions can lead to a permanent separation of ex-offenders from the community regardless of the extent to which a defendant has been rehabilitated.[97] Often referred to as "civil death," ex-offenders permanently lose certain social and fundamental rights.[98]

Specifically, misdemeanor convictions can disqualify one from the right to ever own a firearm[99] or to enter the military.[100] Such convictions also can render one ineligible for student loan and grant assistance.[101] Felony convictions result in automatic deprivation of the right to vote in several jurisdictions.[102] The ability to serve on a jury or as a witness in a trial may also be restricted after a conviction.[103] Put simply, one's ability to live as a normal citizen or resident may be severely hampered following a conviction.

In *Padilla*, the Supreme Court gave one particular collateral consequence credibility: deportation.[104] With each additional legis-

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96. King, *supra* note 11, at 30–31 (describing case in Pennsylvania involving ARD disposition that affected ability to retain custody).

97. *Id.* at 32 ("As large numbers of particular groups are stigmatized and disempowered through the reach of collateral consequences, whole communities are marginalized and excluded from participation in mainstream society."); *see also* Andrew E. Taslitz, *Destroying the Village to Save it: The Warfare Analogy (or Dis-analogy?) and the Moral Imperative to Address Collateral Consequences*, 54 HOW. L. J. 501, 511–12 (2011).

98. *See, e.g.*, Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1046–49, 1059–64 (2002); *see also* Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18, 18–21 (2005) (analyzing whether those with convictions may be a protected class due to the variety of barriers that come with a conviction).

99. 18 U.S.C. § 922(g)(9) (2012) (prohibiting firearm ownership for individual convicted of misdemeanor domestic violence crime); *see also* 18 PA. CONS. STAT. ANN. § 6105 (2014).

100. *See* AM. BAR ASS'N, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS 18 (2009).

101. *See, e.g.*, 24 PA. CONS. STAT. ANN. § 5158.2(a)(1) (2006).

102. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 1301(a) (2014).

103. *See id.* § 59112 (2013) (stating that a conviction can be shown for credibility purposes).

104. *See generally* Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L.

lative reform, Congress has adopted stringent standards related to convictions resulting in broader exclusions for those convicted of certain offenses.[105] In contrast, from 1917 until 1990, "there was no such creature as an automatically deportable offense."[106] Rather, sentencing judges exercised broad discretion to not deport by issuing judicial recommendations against deportation ("JRAD").[107] Congress, through a series of reforms in the 1990s, eliminated both this sentencing discretion and the Attorney General's discretion to block deportation.[108]

While rendering deportation automatic was a sea change, broadening the class of convictions that can result in that consequence is another. Whereas serious, aggravated felonies and heinous crimes of moral turpitude were not tolerated from the start, the list of offenses has grown. Crimes that do not carry a jail sentence, such as minor controlled substance offenses, can lead to deportation.[109] As a result, the number of conviction-triggered deportations has skyrocketed.[110] Whether these measures are appropriate as matters of public policy is beyond the scope of this article, but their existence has serious implications for due process concerns for the unknowing criminal defendant who decides to plead guilty.

1299, 1301 (2011) (noting how after *Padilla*, deportation is no longer a "purely civil" proceeding).

105. *See* Padilla v. Kentucky, 559 U.S. 356, 360 (2010) ("While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.").

106. *Id.* at 362.

107. *Id.* at 361–62.

108. *Id.* at 363.

109. Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 586 (2011).

110. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FY 2011: ICE ANNOUNCES YEAR-END REMOVAL NUMBERS, HIGHLIGHTS FOCUS ON KEY PRIORITIES INCLUDING THREATS TO PUBLIC SAFETY AND NATIONAL SECURITY (Oct. 18, 2011), *available at* http://www.ice.gov/news/releases/fy-2011-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities. Nearly 36,000 noncitizens were deported for DUI convictions. *Id.*

C. *Legal Literacy*

As John D. King notes, "[T]he collateral consequences of low-level convictions often catch convicted misdemeanants by surprise."[111] They are also unapparent to players within the system, such as prosecutors and defense attorneys, who are often overburdened with caseloads and working within a process-oriented adjudicatory system.[112] And if counsel is not present because counsel is not required, no one within the system has the responsibility to explain such consequences to the unknowing defendant.[113] That defendant will more often than not consider it rational to take a plea offer with direct consequences that are tolerable at the time. As King relays, "Faced with the choice between leaving court with a small fine and a conviction, and facing a trial weeks or months in the future with the possibility of six months of incarceration, most people would quickly take the non-jail alternative and consider the matter closed."[114]

But the scope of the literacy problem extends beyond the defense. Aside from defense counsel and defendants, judges tend to know some information about collateral consequences, but not much.[115] A nationwide survey conducted in the last decade suggests that while discussion of collateral consequences does appear in state courtrooms, it happens inconsistently and unevenly.[116] In fact, over 70% of judges who participated in the study stated that they mention collateral consequences "sometimes" with 38% percent stating that they "rarely" or "never" mention them.[117] In the

111. King, *supra* note 11, at 24.

112. *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 272–74 (1979).

113. *See* King, *supra* note 11, at 4.

114. *Id.* at 3–4. The fact that this type of decision is made by defendants without the assistance of counsel is why many have called for expansion of the right to counsel. *See infra* Part III.

115. *See generally* Alec C. Ewald & Marnie Smith, *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, 29 JUST. SYS. J. 145, 152–56 (2008) (discussing the results of a survey of state judges).

116. *Id.* at 148, 152 ("Most judges report that some party—prosecutor, defense attorney, defendant—raises the issue of collateral consequences at least occasionally in their courtroom.").

117. *Id.* at 153. Again, the authors interpret the data to show that roughly 60% of judges mention collateral consequences "sometimes" or more. *Id.* While that may indicate that someone is mentioning consequences, we still do not know what judges are actually mentioning. Specifically, we do not know whether judges are mentioning specific consequences

same survey, 57% of judges admitted that such consequences inhibit reentry.[118] As for prosecutors, the study found that 51% of judges stated that prosecutors rarely or never discuss collateral consequences in the judge's courtroom.[119]

In fairness, this study only covers discussion of collateral consequences generally and in the courtroom. But the fact that the data does not provide more conclusive evidence of knowledge of specific collateral consequences amplifies how this is a systemic literacy issue. Periodic, generic discussions are indeed one aspect of the literacy problem; however, the content and depth of those discussions, when and where they happen, and between whom, is really the type of evidence that is necessary to determine the depth of illiteracy. While the authors in the study concluded that awareness of collateral consequences is more visible than many assume,[120] the study does not offer insight into the depth of that awareness. And if the players within the system only discuss consequences less than half of the time, one can only surmise how informed and specific the discussion is when it happens.

Hence, notice of collateral consequences may be framed as a systemic literacy issue. Unawareness of collateral consequences indirectly supports a criminal system processing countless cases without regard to their broader effect on individuals and communities. In this regard, any response to the problem must be systemic and heighten legal literacy long-term.

II. THE LAW OF GUILTY PLEAS AND COLLATERAL CONSEQUENCES

Because guilty pleas are the primary means by which convictions occur within the criminal system,[121] the legal standards for determining whether a plea is valid are relevant to increasing

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or the idea of collateral consequences generally.

118. *Id.* at 154.

119. *Id.* at 153.

120. *Id.* at 161.

121. *See* SEAN ROSENMERKEL ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1, 25 tbl. 4.1 (2009) (showing that 94% of felony convictions in state courts in 2006 were the result of guilty pleas); UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl. 5.22.2009, *available at* http://www.albany.edu/sourcebook/pdf/t5222009.pdf (indicating that 83,707 out of 86,314 criminal convictions in federal courts in 2009 were the result of guilty or no contest pleas).

awareness of collateral consequences. This section analyzes whether current doctrine surrounding the validity of pleas contains room for notice of the ever-expanding number of collateral consequences.

A. *Basic Guilty Plea Standards*

The seminal case on the validity of guilty pleas is *Brady v. United States*.[122] Under *Brady*, pleas must be voluntary, knowing, and intelligent.[123] Voluntariness is primarily a question of whether coercion—directly or indirectly—is the source of the plea.[124] The knowing and intelligent aspects of a plea, pursuant to *Brady*, hinge on "sufficient awareness of the relevant circumstances and likely consequences."[125] Pleas that are not voluntary, knowing, and intelligent implicate the Due Process Clauses of the Constitution and may be negated by reviewing courts.[126]

In *Boykin v. Alabama*, the Supreme Court held that pleas must be entered in front of a judge.[127] The trial judge is tasked with determining the validity of the plea. As long as the record indicates that the trial court advised the defendant of the rights being waived and asked whether the defendant intends to plead guilty, it is likely that a plea will stand.[128] The guilty plea colloquy is also sufficient for proof of a valid plea.[129] Nevertheless, *Boykin* and its progeny stand for the proposition that the courts are institutional safeguards of the validity of pleas.

Many have tested the meaning of the "knowing" and "intelligent" aspects of pleas. Knowledge of one's rights is one aspect of the analysis; another is awareness of the consequences of a plea. As this article has demonstrated, a conviction comes with certain direct and indirect consequences. But is awareness of collateral

122. 397 U.S. 742 (1970).

123. *Id.* at 748.

124. Bousley v. United States, 523 U.S. 614, 632–33 (1998); *see also, e.g.*, Velez v. New York, 941 F. Supp. 300, 312 (E.D. N.Y. 1996).

125. *Brady*, 397 U.S. at 748.

126. *See* Waley v. Johnston, 316 U.S. 101, 104–05 (1942).

127. 395 U.S. 238, 242–44 (1969).

128. *See, e.g.*, Hill v. Beyer, 62 F.3d 474, 476, 478, 480, 481, 483 (3d Cir. 1995).

129. *See, e.g.*, State v. Garcia, 532 N.W.2d 111, 114, 119 (Wis. 1995).

consequences necessary for a plea to be "knowing" and "intelligent"?

B. *Current Jurisprudence on Guilty Pleas and Collateral Consequences*

Under current constitutional law, advice about collateral consequences, from the court or counsel, is generally unnecessary for a plea to be valid. This rule stems from *Brady*, which considers pleas to be legitimate if "one [is] fully aware of the *direct consequences*, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel."[130] Several lower courts have used this language to deny claims that unawareness of serious collateral consequences should negate a plea.[131] This remains common despite the fact that the reference to direct consequences followed the Court's explication of the voluntariness inquiry, a fact often ignored by courts interpreting the holding of *Brady*.[132] Yet, despite being dicta, the Court's statements have led to the development of an entire body of case law dividing collateral and direct consequences. As a result, most courts do not require advice to the defendant, by the court, about anything but direct consequences.[133] This rule holds despite the difficulty in deciphering the difference between an automatic collateral consequence and a direct consequence that is not incarceration, such as a fine.[134] Despite no constitutional requirement of notice in this area, more than half of the states have adopted statutes or rules that require courts to notify defendants of deportation consequences.[135]

130. *Brady*, 397 U.S. 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)).

131. *See, e.g.*, United States v. Muhammad, 747 F.3d 1234, 1239–41 (10th Cir. 2014), *cert. denied*, 134 S. Ct. 2741 (2014).

132. Roberts, *supra* note 22, at 686.

133. *See, e.g.*, Doe v. Weld, 954 F. Supp. 425, 438 (D. Mass. 1996) ("[E]ntering the guilty plea without knowledge of the potential for registration and community notification does not render his plea involuntary and, thus, does not violate the Constitution."); Meyers v. Gillis, 93 F.3d 1147, 1153 (3d Cir. 1996) (parole eligibility); Moore v. Hinton, 513 F.2d 781, 782 (5th Cir. 1975) (suspension of driver's license); Meaton v. United States, 328 F.2d 379, 380–81 (5th Cir. 1964) (loss of right to vote).

134. Roberts, *supra* note 22, at 679–80.

135. Padilla v. Kentucky, 559 U.S. 356, 382 (2010).

Advocates for expanding constitutional doctrine to include collateral consequences received a small boost with the Supreme Court's recent decisions in *Frye* and *Padilla*. Prior to *Padilla*, advice about collateral consequences from an attorney was unnecessary for effective assistance of counsel in all contexts.[136] *Padilla*'s holding changed the rule for deportation and its logic arguably could be applied to other indirect consequences.[137] *Frye* also was decided in the context of effectiveness of counsel at the time of plea-bargaining.[138] Again, while they do not directly implicate the voluntary, knowing, and intelligent standard of *Brady* and its progeny, both cases suggest the importance of awareness of collateral consequences in the criminal system. But the effect of those decisions is arguably minimal because they occurred in the Sixth Amendment context and the standards mentioned above refer to notice from courts under the Fifth Amendment.[139]

1. *Padilla v. Kentucky*

Padilla gave credibility to the idea that collateral consequences are relevant to determining the legitimacy of a criminal adjudication, albeit in the effectiveness of counsel context. This distinction is critical: the fact that *Padilla* is an ineffectiveness case under the Sixth Amendment severely limits its applicability to unknowing pleas because litigation post-*Padilla* would only come in the form of a collateral attack, which could result in a worse outcome for a defendant.[140]

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136. *Id.* at 376 (Alito, J., concurring) (citing Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002) (noting that more than thirty states and eleven federal circuits did not mandate advice about collateral consequences)).

137. *Padilla*, 559 U.S. at 376.

138. *See* Missouri v. Frye, 566 U.S. __, __, 132 S. Ct. 1399, 1404 (2012).

139. *Frye* and *Padilla* are ineffective assistance of counsel cases, which is a separate issue from whether a plea is knowing and intelligent. *Padilla*, 559 U.S. at 359; *Frye*, 566 U.S. at __, 132 S. Ct. at 1404. Nevertheless, as will be discussed below, both cases recognize the significance of notice of collateral consequences, and by definition, comprehend awareness of collateral consequences as a matter of legal literacy. As discussed *infra* Part IV, this premise should spur legislative and administrative reform to heighten notice through institutional actors in addition to counsel, especially given the litigation difficulties that come with ineffectiveness claims. *See infra* Part III.B.1 (discussing the shortcomings of leaning on expansion of the right to counsel as the primary solution).

140. Because the plea offer could be taken away if the defendant were to succeed on the habeas ineffective assistance of counsel claim. *See Padilla*, 559 U.S. at 372–73.

Nevertheless, it is important to understand the spirit of *Padilla* when determining how to craft an adequate solution to the problems identified above. In *Padilla*, the defendant pled guilty to a drug-trafficking charge after counsel failed to advise him of possible deportation as a result of the conviction and affirmatively stated that he did not have to worry given his long-term residence in the country.[141] Unfortunately for Padilla, the drug conviction made his deportation virtually mandatory.[142]

Justice Stevens, author of the majority opinion, emphasized the unique nature of deportation.[143] While conceding that deportation was a civil sanction, Justice Stevens refused to draw a clear line between direct and collateral consequences within the Sixth Amendment context.[144] Deportation, as a "severe" penalty that was "intimately related to the criminal process," is arguably in a class of its own.[145] Notably, Justice Stevens suggested that the "automatic" nature of the penalty contributed to its uniqueness.[146] These aspects of deportation, coupled with its increased incidence due to broader statutes and diminished executive discretion, "confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[147]

The majority proceeded to explain what is required of counsel in a similar situation, ultimately concluding that professional norms dictate that defense counsel advise a defendant that deportation is likely when the statute is clear in defining the consequences of the conviction.[148] If the law is unclear, the duty is only to advise of possible immigration consequences as a result of the plea.[149] Notably, this rule seems to place a significant burden on

141. *Id.* at 359.
142. *Id.*; *see also* 8 U.S.C. § 1227(a)(2)(B)(i) (2012).
143. *See Padilla*, 559 U.S. at 357.
144. *See id.* at 365–66.
145. *Id.* at 365.
146. *See id.* at 366.
147. *Id.* at 363–64.
148. *Id.* at 368–69.
149. *Id.* at 369.

counsel who may not possess the requisite expertise in immigration law necessary to decipher which situation is applicable to a particular defendant.[150]

Justice Alito's concurring opinion suggested a slightly modified constitutional rule. For Justice Alito, the Sixth Amendment only requires an attorney to refrain from providing incorrect advice or to warn of possible adverse consequences without offering specific recommendations.[151] Justice Alito's rationale for this lower standard for counsel is that the complexity and breadth of collateral consequences, even beyond the immigration context, weigh against placing additional demands on counsel:

> Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.[152]

Justice Alito enumerated several other collateral consequences that could be labeled "serious," such as loss of voting rights and difficulty finding employment.[153] The logic of the majority opinion could be extended to those consequences as well, which could overwhelm counsel. Justice Alito, despite proposing his modified constitutional rule, seems to long for non-constitutional remedies in the form of statutes and court rules.[154] Such prophylactic measures would relieve the burden placed on counsel by a constitutional rule and exist outside of the Sixth Amendment context, thereby mitigating the need for future litigation.[155]

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150. For a discussion of this issue beyond the immigration context, see *infra* Part III.B.1.

151. *Padilla*, 559 U.S. at 375 (Alito, J., concurring).

152. *Id.* at 376.

153. *Id.* It is important to keep in mind that "serious" is a relative term in this context. A defendant's particular situation will often determine the ability to accept collateral consequences that might be insignificant to another individual.

154. *Id.* at 382. The majority's rule inadvertently stifles "more promising ways of addressing the underlying problem—such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences." *Id.* At the time of *Padilla*, twenty-eight states and the District of Columbia had already adopted rules, plea forms, or statutes requiring *courts* to advise criminal defendants of possible immigration consequences. *Id.*

155. *Id.* at 387.

2. *Missouri v. Frye*

In *Frye*, the Court held that the right to effective assistance of counsel extends to the plea-bargaining process[156] and that counsel is required to convey offers to a defendant.[157] Frye, charged with driving with a revoked license for the fourth time, never received two plea offers conveyed to his counsel.[158] He ultimately submitted an open guilty that resulted in three years of incarceration.[159] Upon learning that his counsel had received an offer that would have resulted in only ninety days of incarceration, he filed a petition for post-conviction relief, claiming ineffective assistance of counsel.[160]

Frye, like *Padilla*, arises in the ineffectiveness of counsel context and therefore deals primarily with Sixth Amendment standards rather than the validity of guilty pleas or the legitimacy of collateral consequences.[161] It also contains significant limitations given the demands of *Strickland v. Washington* for habeas relief.[162] But it reinforces and lends credibility to the notion that legal standards—constitutional or not—should be cognizant of the reality that guilty pleas dominate the criminal system.[163]

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156. Missouri v. Frye, 566 U.S. __, __ 132 S. Ct. 1399, 1405 (2012) (holding that the right applies to "all 'critical' stages of the criminal proceedings" including plea bargaining); *see also* Argersinger v. Hamlin, 407 U.S. 25, 34 (1972) (finding that the guilty plea is a critical stage).

157. *Frye*, 566 U.S. at __, 132 S. Ct. at 1408.

158. *Id.* at 1404.

159. *Id.* at 1404–05.

160. *Id.* at 1404.

161. *See id.* at 1404, 1406 (explaining that the challenge was not to advice pertaining to the accepted guilty plea, but rather other aspects of the representation); Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (explaining that the Sixth Amendment controls regardless of whether deportation is or is not a collateral consequence).

162. 466 U.S. 668, 687 (1984) (requiring the defendant to prove that counsel's performance was deficient and the deficient performance prejudiced the defense).

163. *Frye*, 566 U.S. at __, 132 S. Ct. at 1407 ("The State's contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. . . . The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages."). The Court proceeded to cite Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992) ("That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system."). *Id.*

The primary issue in *Frye* was whether counsel might be deficient for not conveying the terms of a plea offer to a defendant, especially if those terms are favorable.[164] The Court answered in the affirmative because the plea-bargaining realities of the criminal system make an informed plea, with the aid of counsel, essential to the legitimacy of the process.[165] As Justice Kennedy concluded, "In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always *the* critical point for a defendant."[166]

Thus, *Frye* reinforces the significance of notice and how its absence can lead to a viable habeas claim under the Sixth Amendment. In this sense, it follows the theme of notice running through *Padilla*. Both cases suggest that effectiveness of counsel and the legitimacy of pleas hinge on how well-informed a defendant is, by counsel, when making a decision about whether to plead guilty.[167] Hence, both decisions constitutionalized notice.[168] In *Padilla*, notice was linked to collateral consequences, albeit only with respect to immigration.[169] In *Frye*, notice is linked to the plea bargaining process itself.[170] Because both cases concede the heightened significance of the guilty plea to the administration of the criminal system and involve effectiveness of counsel claims, commentators and scholars have called for an expansion of the

164. *Frye*, 566 U.S. at __, 132 S. Ct. at 1404.

165. *Id.* at 1407–08.

166. *Id.* at 1407 (emphasis added). Justice Kennedy also states: "[C]riminal defendants require effective counsel during plea negotiations. 'Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him.'" *Id.* at 1407–08 (quoting Massiah v. United States, 377 U.S. 201, 204 (1964)). As Stephanos Bibas notes, *Padilla* marked the first time that the Court began to regulate plea bargaining as the main aspect of the criminal justice process instead of the right to a jury trial. *See* Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 33, at 1118–19.

167. *See Frye*, 566 U.S. at __, 132 S. Ct. at 1408 ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."); Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 33, at 1120 ("With *Padilla*, the Court has now begun to interpret due process and the Sixth Amendment right to counsel to impose meaningful safeguards on the plea process.").

168. *See* Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 33, at 1118 (noting how *Padilla* "marks a watershed in the Court's approach to regulating plea bargains"). Justice Scalia, in his dissent in *Frye*, suggests the same idea, when criticizing the Court's methodology: "[I]t does present the necessity of confronting the serious difficulties that will be created by constitutionalization of the plea-bargaining process." *Frye*, 566 U.S. at __, 132 S. Ct. at 1413 (Scalia, J., dissenting).

169. Padilla v. Kentucky, 559 U.S. 356, 359–60 (2010).

170. *See Frye*, 566 U.S. at __, 132 S. Ct. at 1404.

right to counsel to ensure legitimate pleas, regulate the plea-bargaining market, and alleviate unforeseen collateral consequences.[171] Part III evaluates these claims to determine whether expansion of the right to counsel, alone, is sufficient to alleviate the effect of collateral consequences on the pleading defendant.

III. THE RIGHT TO COUNSEL AS A SOLUTION

A criminal justice system dominated by the twin realities of guilty pleas and increasing collateral consequences has led to ample calls for expansion of the right to counsel.[172] Some have called for an expansion of current constitutional doctrine, whereas others have focused their efforts on legislative action.[173] The assumption underlying these efforts is that counsel is the silver bullet necessary to alleviate the significant effects of such consequences.[174] Counsel, it is said, will not only increase the likelihood that a defendant knows the indirect ramifications of taking a plea deal, but will possibly manage to obtain a better plea deal altogether.[175]

In order to evaluate the merits of this position, this section will begin with a discussion of current doctrine regarding the right to counsel. After discussing the federal standard as well as a few notable state standards that go beyond the federal minimum, this section will evaluate the likelihood that the right can be expanded, either doctrinally or statutorily. Additionally, it will analyze the claim that expansion of the right to counsel, alone, will mitigate the effect of collateral consequences, especially in a post-*Padilla* world.

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171. *See, e.g.*, King, *supra* note 11, at 47.

172. *See generally id.* at 2–3, 22 (noting that because 70% of misdemeanor defendants plea guilty and the collateral consequences of a misdemeanor conviction have increased, the right to effective assistance of counsel should be extended to those defendants as well).

173. *See id.* at 342 (arguing for an expansion of the constitutional doctrine); Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 33, at 1120 (stating that legislation is necessary).

174. *See generally* Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 33, at 1120, 1158 (contending that, even with the necessity of legislation to regulate the plea bargain process under a model of consumer protection law, the advice of counsel remains of vital importance).

175. *See* King, *supra* note 11, at 24, 34, 44–45.

A. *The Scope of the Current Right to Counsel*

The right to the assistance of counsel finds its origin in the Sixth Amendment of the United States Constitution, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defence."[176] There is support to the idea that the original intention of the Sixth Amendment was to afford the right to retain counsel at one's own expense.[177] Notably, the guarantee was broader than the English common law, which actually disallowed the assistance of a lawyer for serious crimes.[178]

1. Federal Constitutional Standards

The current rules regarding the right to counsel under the Federal Constitution stem from *Scott v. Illinois*, which generally held that the right to counsel extends to defendants charged with offenses that result in actual incarceration.[179] Decades prior to *Scott*, the Court began explicating the content of the right to counsel in *Powell v. Alabama*.[180] In *Powell*, nine African American men charged with rape, a capital offense at the time, were not appointed counsel; all were convicted at trials that occurred in one day.[181] The Court held that due process required the presence of counsel in state capital cases because the absence of counsel left the unrepresented defendant helpless in the hyper-technical field of law.[182]

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176. U.S. CONST. amend. VI.

177. *See, e.g.*, Scott v. Illinois, 440 U.S. 367, 370 (1979) ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense."); Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 41–42 (1991).

178. JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL 4 (2002) ("The assistance of counsel was seen as an impediment to efficient and successful prosecution and punishment.").

179. *Scott*, 440 U.S. at 373.

180. 287 U.S. 45, 50 (1932).

181. *Id.* at 45–46, 49–50.

182. *Id.* at 68–69, 71 ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not

A few years later, the Court opted for a bright-line rule in the federal context, holding that the federal government had to provide counsel to any defendant facing criminal charges.[183] It took three decades for this right to extend to state criminal proceedings beyond the guarantees in *Powell*. Of course, that occurred in the seminal case of *Gideon v. Wainwright*, which established the right to government-provided counsel in any serious case.[184] The doctrine rested on the idea of reciprocal fairness: a fair trial, given the "vast sums of money to establish machinery to try defendants accused of crime," required the presence of counsel.[185] The court maintained that the right to counsel was "fundamental and essential to a fair trial."[186] Despite this strong language in *Gideon*, the contours of the right remained unknown until a decade later.[187]

The Court extended the right to counsel to misdemeanor prosecutions involving actual incarceration in *Argersinger v. Hamlin*.[188] For the Court, extension of the right to counsel to such criminal prosecutions placed the protection on the same plane as the rest of the Sixth Amendment guarantees, which departed from English common law in their breadth.[189] For the Court, ensuring a fair trial through the presence of counsel was just as important in so-called petty cases, stating that "[w]e are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more."[190] Interestingly, Justice Powell foresaw many of the conceptual difficulties confronting the narrow rules outlined by the

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guilty, he faces the danger of conviction because he does not know how to establish his innocence.").

183. Johnson v. Zerbst, 304 U.S. 458, 463 (1938) ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.").

184. 372 U.S. 335, 344 (1963) ("[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). Notably, *Gideon* involved a felony charge, a trend continued in the cases to follow. *Id.* at 336–37.

185. *Id.* at 344.

186. *Id.* at 342 (quoting Betts v. Brady, 316 U.S. 455, 465 (1992)).

187. *See* King, *supra* note 11, at 11 (describing how states adapted differently to the *Gideon* decision).

188. *See* 407 U.S. 25, 37 (1972).

189. *See id.* at 27–30.

190. *Id.* at 33.

Court in the right to counsel cases.[191] Justice Powell favored a more flexible approach that was cognizant of a variety of consequences beyond incarceration.[192] Indeed, Justice Powell suggested the importance of collateral consequences: "The consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails *or the effect of a criminal record on employability*, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty.'"[193]

Despite Justice Powell's alternative approach, the Court reaffirmed the *Argersinger* holding in *Scott*, which involved a misdemeanor theft prosecution that resulted in a $50 fine for the defendant and no period of incarceration.[194] Justice Rehnquist, who had concurred with Justice Powell in *Argersinger*, wrote the majority opinion.[195] For the Court, counsel only needed to be appointed in cases that resulted in actual incarceration because the loss of liberty was an especially unique consequence.[196] Notably, Justice Rehnquist chose not to mention collateral consequences in his opinion despite his earlier concurrence with Justice Powell in *Argersinger*.[197] Nevertheless, "the decision in *Scott* essentially froze the evolution of the right to appointed counsel."[198]

From a doctrinal perspective, the right to counsel jurisprudence contains serious deficiencies. As Justice Brennan noted in his dissent, it is quite odd to ask judges to decide in advance of

191. *See* King, *supra* note 11, at 13 (noting how Justice Powell's opinion "is prescient for its focus on the potential impact of the collateral consequences of a criminal conviction and for its argument that courts should account for these consequences in evaluating 'seriousness' in the context of the Sixth Amendment right to counsel").

192. *See Argersinger*, 407 U.S. at 447–48 (Powell, J., concurring).

193. *Id.* (emphasis added); *see also id.* at 48 n.11 (noting collateral consequences such as stigma, loss of a driver's license, loss of public office, disqualification from a profession, and loss of pension rights).

194. Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

195. *Id.* at 367; *see also Argersinger*, 407 U.S. at 44.

196. *Scott*, 440 U.S. at 373–74. Justice Powell concurred, albeit reluctantly, and emphasized the flexible approach that he called for in *Argersinger*. *See id.* at 374 (Powell, J., concurring). Justice Brennan authored a vehement dissent that labeled the majority opinion as inconsistent with precedent and perversely incentivizing the judicial system to play legislature. *See id.* at 375–76 (Brennan, J., dissenting).

197. *See id.* at 373. ("[W]e believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.").

198. King, *supra* note 11, at 15.

trial whether incarceration *will be* the penalty.[199] Further, drawing a line at incarceration appears arbitrary given the text of the Sixth Amendment, which refers to "*all* criminal prosecutions."[200] It is arguably more difficult to apply than drawing the line at the *threat* of incarceration, which is governed by legislative decision-making. The Court also dismisses the significance of fairness in lower-level cases despite the fact that the actual prosecution of such a case can be nearly the same procedurally.[201] But most significantly for the collateral consequences issue, the jurisprudence fails to account for the myriad effects that a petty offense conviction can have on an unrepresented defendant. The increased effect of collateral consequences since *Scott* has magnified this oversight.[202]

2. Right to "Effective" Counsel

Although the right to counsel guaranteed by the Sixth Amendment is defined by the imposition of actual incarceration and thereby only exists for a subset of criminal defendants, the right more broadly contains the guarantee of "effective" counsel.[203] In other words, an attorney must adequately prepare the case, whether for trial, in plea negotiations,[204] or some other aspect.

The Court's holding in *Strickland* governs whether counsel may be considered effective or not. *Strickland*, by its facts, involved counsel's actions at trial and in capital sentencing proceed-

199. *Scott*, 440 U.S. at 383 (Brennan, J., dissenting); *see also* King, *supra* note 11, at 15 ("Like the Queen of Hearts in *Alice in Wonderland*, judges in low-level cases are invited to decide in some respect the sentence before the trial.").

200. U.S. CONST. amend. VI (emphasis added).

201. *See* King, *supra* note 11, at 15–16 ("With rare exception, the rules of evidence and procedure are the same, and the complexity of trials is not necessarily different.").

202. *See id.* at 17 (describing how the "era of greatly expanded collateral consequences" followed *Scott*, which was precisely the worst time given how right to counsel jurisprudence was frozen).

203. *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

204. *See* Hill v. Lockhart, 474 U.S. 52, 57 (1985); Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 33, at 1126 ("The Court put great faith in competent defense counsel as the only substantial safeguard. As long as lawyers offered competent advice, even if they turned out to be wrong in hindsight, defendants supposedly could forecast whether pleas served their self-interests. That romanticized vision, however, ignored the workloads, underfunding, and agency costs that beset defense lawyers and the difficulties of proving incompetence on undeveloped plea records.").

ings.[205] The Court announced two components to the test for effectiveness: poor attorney performance and prejudice to the defendant as a result of the attorney's actions.[206] The first prong, whether an attorney acted deficiently or not, is guided by objective standards of reasonableness.[207] Despite its objective component, courts are required to be deferential to counsel's actions.[208] The second aspect of the test is also difficult to demonstrate. The defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[209] In the plea context, that means the defendant must show that he would not have plead guilty but for attorney incompetence.[210] Post-*Frye*, it also can mean that an attorney was ineffective for failing to convey a good offer or provide proper advice related to the offer.[211]

Because the Sixth Amendment requires "effective" counsel, expansion of the right to counsel necessarily would result in incorporation of all "effectiveness" jurisprudence into the everyday practice of defense counsel. As explained above, in a post-*Padilla* world, "effectiveness" can possibly include collateral consequences.[212] Thus, expansion of the right to counsel would not operate in a vacuum. It may be a prophylactic measure designed to combat pleas that are not cognizant of collateral consequences. But with all of the "effectiveness" jurisprudence coming along as well, is this prophylactic solution the most appropriate way to address the issue? Any evaluation of the possible effect of expansion of the

205. Strickland v. Washington, 466 U.S. 668, 675 (1984).

206. *Id.* at 687.

207. *Id.* at 687–88.

208. *See id.* at 689. As long as an attorney stays somewhat close to professionally responsible conduct, a court is likely to find that the performance was not deficient. *See id.* at 689–91.

209. *Id.* at 694.

210. *See* Hill v. Lockhart, 474 U.S. 52, 59 (1985).

211. *See* Missouri v. Frye, 566 U.S. __, __, 132 S. Ct. 1399, 1407 (2012) (holding that the right applies to "all 'critical stages" of the criminal proceedings, which includes plea bargaining); *see also* Lafler v. Cooper, 566 U.S. __, __, 132 S. Ct. 1376, 1385, (2012) (discussing the *Strickland* "prejudice" standard as it applies to plea offer rejections).

212. *See supra* Part II.B.1. The astute reader will recall that *Padilla* did not decide the question of prejudice for the defendant and, in fact, left it to lower courts to decipher what that actually means in practice in the immigration context.

procedural right to counsel must be cognizant of the requirements of "effectiveness" as a substantive aspect of the right.

B. *Shortcomings as Solution*

1. Litigating Habeas Claims Based on Effectiveness: A Tough Standard to Meet

Padilla was largely considered a victory for criminal defendants.[213] But does it really address the underlying issue of collateral consequences literacy? This section examines whether *Padilla*, by broadening the responsibilities of counsel, will heighten awareness of collateral consequences if it is extended beyond the immigration context.

The first consequence of *Padilla* is that it arguably confined collateral consequence jurisprudence to the effectiveness of counsel arena. While *Padilla* rightfully imposed an additional responsibility on counsel representing a defendant possibly facing deportation, it also laid the groundwork for a piecemeal approach to notice of other collateral consequences through counsel. In other words, because notice of collateral consequences was recognized as an aspect of the Sixth Amendment right to counsel, which in turn is litigated through effectiveness claims, expansion of such notice will likely have to occur within the same constitutional context. As a practical matter, even if counsel were to be required to go beyond *Padilla*, it would take years to determine, piecemeal, how far counsel must go. And assuming that most cases will not reach the Supreme Court, clarity will remain most likely nothing but a desired outcome of the defense bar. That sort of timetable fails to account for the pressing problem that collateral consequences may impose on defendants currently deciding whether to plead guilty. If notice of collateral consequences poses as large a problem as many have indicated, then should the legal system be content to attack the problem through the hyper-technical effectiveness of counsel jurisprudence?

This might be labeled as a pace problem for the development of doctrine. The problem is even more apparent when one considers

213. *See* King, *supra* note 11, at 37 (conferring a right to effective assistance of counsel).

the difficulty of establishing a viable ineffectiveness of counsel claim once a defendant chooses to bring it. The majority in *Padilla* conceded that the test for ineffectiveness in *Strickland* and its progeny is a difficult standard to meet.[214] The Court also did not decide the question of prejudice in *Padilla*, instead opting to remand the case to the lower court, thereby leaving an aspect of the law undeveloped.[215] As noted above, the first prong of *Strickland* is highly deferential to professional norms and the actions of defense counsel; the second component requires clear causation between the actions of defense counsel and the defendant's decision to plead guilty.[216] In fairness, lower courts have extended *Padilla* to a few consequences that were formerly considered by courts to be entirely collateral, such as sex offender registration,[217] and estoppel in a civil suit.[218] But this expansion of the duties of counsel has not necessarily resulted in viable ineffectiveness claims; defendants are still losing those fights.[219] In fact, some courts have allowed guilty plea warnings to mitigate the prejudice necessary to a successful *Strickland* claim.[220]

Thus, using effectiveness of counsel jurisprudence to heighten notice of collateral consequences poses two problems. First, it is an incremental solution, at best, and leaves the addition of significant collateral consequences to the inchworm pace of litigating habeas claims. Second, even if the reasoning of *Padilla* were extended to other consequences, the deferential *Strickland* standard does not guarantee, by any stretch of the imagination, that notice will actually increase. *Strickland* can insulate defense counsel from changing best practices. *Padilla* itself conceded this point

214. *See* Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

215. *See id.* at 374–75.

216. Hill v. Lockhart, 474 U.S. 52, 57–59 (1985).

217. *See, e.g.*, *In re* C.P.H., No. FJ-03-1313-02, 2010 WL 2926541, at *7 (N.J. Super. Ct. App. Div. July 23, 2010) (finding ineffective assistance when attorney failed to advise juvenile about lifetime registration); *see also* State v. Edwards, 157 P.3d 56, 64–65 (N.M. Ct. App. 2007) (finding ineffectiveness when attorney failed to advise about sex offender registration). *Edwards* occurred pre-*Padilla*. Other courts have found the opposite. *See* State v. Emblad, A10-444, 2011 WL 9148 at *3, *5 (Minn. Ct. App. Jan. 4, 2011).

218. Wilson v. State, 244 P.3d 535, 536, 539 (Alaska Ct. App. 2010) (noting ineffectiveness when attorney failed to advise how guilty plea would affect civil liability).

219. *See* Danielle M. Lang, Padilla v. Kentucky: *The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L. J. 944, 975–84 (2012) (noting how in the majority of cases within her study, courts found the plea colloquy to be significant when refusing to find prejudice).

220. *See id.* at 979.

and advocates for increased, system-wide notice of collateral consequences in response to the Court's warning.

2. Complexity of Collateral Consequences and the Practical Demands of *Padilla*

The more obvious problem with relying on the expansion of the right to counsel post-*Padilla* can be characterized as one of volume: how will attorneys possibly know all of the consequences relevant to the defendant before them? As Margaret Love has stated, "*Padilla* recognizes the need to make participants in a criminal case aware of non-criminal 'collateral' penalties that are frequently a crime's most serious punishment."[221] With that, an immense education awaits defense counsel who wish to remain effective, and this would only expand exponentially with new additions to the doctrine.[222] The permutations in the immigration field resulting from pleas to different criminal charges are already complicated.[223] And knowledge of those complexities only comes with time and significant resource expenditures.[224]

In short, "the brunt of the burden . . . falls on defense counsel."[225] It may be more appropriate to say that the entire burden falls on defense counsel. And that burden is heavy indeed. Counsel would be essentially tasked with determining all of the consequences relevant to a particular situation.[226] Comprehensive ad-

221. Margaret C. Love, *Collateral Consequences After* Padilla v. Kentucky: *From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 89–90 (2011).

222. Maureen A. Sweeney, *Where Do We Go from* Padilla v. Kentucky? *Thoughts on Implementation and Future Directions*, 45 New ENG. L. REV. 353, 357 (2011) ("There is a very large educational task ahead as a result of *Padilla*.").

223. *Id.* at 358–59 (describing several examples of how different charges would dramatically alter immigration consequences).

224. *Id.* at 361 ("The implications of the decision are nonetheless clear: immigration-related advice is required; that advice is complex and will require significant resources be devoted to it; and those resources *must* be devoted."). Some public defender associations have taken to hiring immigration attorneys or assigning current attorneys to become experts in the field of immigration consequences. The more likely result is that under-resourced legal aid organizations will attempt to coordinate with defense counsel, which presents its own challenges. *Id.* at 361–62.

225. *Id.* at 361.

226. *See generally* Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1067 (2004).

vice would require research beyond the traditional capability of an individual attorney.[227]

However, many public defenders are already overburdened due to the sheer volume of cases requiring attention. Maximum caseload standards are rare for indigent defense attorneys.[228] This high volume can lead to very serious consequences, like the unnecessary deprivation of a defendant's liberty due to the sheer inability of an attorney to research a minimum sentence or convey an offer to a defendant.[229] It also can drive a wedge between the interests of a defendant and defense counsel.[230] Public defenders' practices are often in triage mode. In an era of overburdened defense counsel, is it possible that additional responsibilities would actually render it more difficult to notify defendants of the consequences of their pleas?[231] When conceptualized as a systemic issue, attempting to increase notice solely through counsel is questionable at best.

The National Institute of Justice's attempt to catalogue collateral consequences by jurisdiction is one response to this problem.[232] Spearheaded by the Criminal Justice Section of the ABA, the project attempts to build an "inventory of any provision in the state constitution, statutes, and administrative rules that create collateral sanctions and authorize disqualifications with citations

227. *See* Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 685 (2011) [hereinafter Chin, *Making Padilla Practical*].

228. THE CONST. PROJECT, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 67 (Apr. 2009) [hereinafter JUSTICE DENIED].

229. *Id.* at 68–69.

230. Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L. J. 1179, 1180 (1975) (examining the core assumption that the presence of defense counsel adds legitimacy to pleas and concluding that the "current conceptions of the defense attorney's role are often more romanticized than real"). Alschuler's seminal article on the practices of overburdened defense attorneys shed light on how defense counsel, while often helpful in the administration of justice, also can be complicit in the unjust aspects of a plea-bargaining market. He describes how too often it is the case that defense counsel plays the role of the professional pleader in a system that provides opportunities for dishonest lawyers. *See id.* at 1185–98.

231. Derek Wikstrom, *"No Logical Stopping Point": The Consequences of* Padilla v. Kentucky*'s Inevitable Expansion*, 106 NW. U. L. REV. 351, 354–55 (2012) ("If *Padilla* warnings are ultimately required for all collateral consequences of a guilty plea, criminal lawyers will have a difficult time effectively assisting any of their clients.").

232. *See* ABA, NICCC, *supra* note 48, at Project Description.

and short descriptions."[233] The project aims to allow states to comply with the protections of the Uniform Collateral Consequences of Conviction Act.[234] That act recognized the disorganized nature of collateral consequences in the federal code and state laws, which rendered awareness nearly impossible for defense counsel and other participants in the criminal justice system.[235] The result of the project is an online, searchable database that lists the collateral consequences, whether automatic or discretionary, implicated by a particular criminal charge.

The ABA's project is commendable and will undeniably assist defense attorneys in particular circumstances, and over time. But while more resources may be available, the volume problem will always remain as legislatures continue to enact new collateral consequences and courts expand *Padilla*. The burden will rest almost entirely on defense counsel and unaware defendants will rely entirely on the competence and zeal of defense counsel.[236] Other actors within the system will not be made any more aware of the collateral consequences that should affect calculations of due process in a system dominated by pleas.

3. Budgetary and Resource Issues

Even if the doctrinal and practical issues identified above could be addressed, resource deficiencies remain and expansion of the right to counsel would remain subject to the political will within legislatures. The Court has not expanded the constitutional right to counsel since *Scott*.[237] This leaves expansion to legislatures and state constitutions. While a few states already go beyond the re-

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233. *Id.*

234. *See id.* (indicating that the project helps states save time and money); *see, e.g.*, Missouri v. Petterson, 780 S.W.2d 675, 678 (Mo. Ct. App. 1989) (range of punishment); Deutscher v. Nevada, 601 P.2d 407, 414 (Nev. 1979) (ability to waive the right to counsel); Wilkins v. Maryland, 245 A.2d 80, 84 (Md. Ct. Spec. App. 1968) (right to counsel). Notice how the sentencing information relates to direct consequences. While a defendant's in-person presence at an arraignment often can be waived, or his appearance entirely, the information must find its way to the defendant.

235. *See* ABA, NICCC, *supra* note 48, at *Project Description* ("Of particular relevance in the present context is the fact that collateral consequences are scattered throughout the codebooks and frequently unknown even to those responsible for their administration and enforcement.").

236. *See* Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 150 (2012) [hereinafter Bibas, *Incompetent Plea Bargaining*].

237. *See* King, *supra* note 11, at 6, 15.

quirements of *Scott* and afford a broader right to counsel,[238] implementation of the federal guarantees remains a work in progress.[239] The right heralded in *Gideon* remains, to some degree, an unfunded mandate and there is no guarantee that doctrinal expansion of the scope of the right would change that reality.[240] Yet there are few, if any, public defender organizations that would refuse additional resources.

Generally, financial support for indigent counsel in America lags behind that in other developed countries.[241] Twenty years after *Gideon*, only 1.5% of total expenditures for the entire criminal justice system went to defense services.[242] Funding has increased, but remains insufficient.[243] In 2005, the fifty states combined spent $5.3 billion on indigent defense.[244] This funding is spent in vastly different ways because the Court has not mandated how the right to counsel must be implemented.[245] In most states, the state government funds a particular indigent defense program.[246] A substantial number still shift financial burdens to counties within the state, which can result in local inequities based on per capita income.[247]

Unsurprisingly, indigent defense is not the most popular project to fund, especially in a time of economic uncertainty. Thus, funding sources are often specialized, which also results in un-

238. *See, e.g.*, OR. CONST. art. I § 11; Gaffey v. State, 637 P.2d 634, 636 (1981) (indicating that the right to counsel exists for any criminal defendant regardless of whether imprisonment is imposed, even including a right to counsel for minor traffic infractions).

239. Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After* 'Gideon,' ATLANTIC (Mar. 13, 2013 11:09 AM) http://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/ ("Over the intervening half-century, Congress and state lawmakers consistently have refused to fund public defenders' offices adequately. And, as it has become more conservative since 1963, the United States Supreme Court has refused to force legislators to do so.").

240. *See* Norman Lefstein, *In Search of* Gideon's *Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 843 (2004).

241. *See id.* at 922–24 (comparing legal aid in England with the United States); *see also* AM. BAR ASS'N, CRIMINAL JUSTICE IN CRISIS: A REPORT TO THE AMERICAN PEOPLE AND THE AMERICAN BAR ON CRIMINAL JUSTICE IN THE UNITED STATES: SOME MYTHS, SOME REALITIES, AND SOME QUESTIONS FOR THE FUTURE 39–44 (1988).

242. *See* AM. BAR ASS'N, GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING 1 (1983).

243. *Id.* at 7.

244. *Id.* at 7–8.

245. *Id.*

246. *See* JUSTICE DENIED, *supra* note 228, at 54.

247. *Id.* at 54–55.

predictability.[248] Funds also can be collected by increasing costs elsewhere in the criminal system, which can lead to crippling financial collateral consequences for the indigent.[249] Furthermore, expansion of the right to counsel in non-criminal contexts has unfortunately drained resources that were once allocated for criminal defense services.[250]

The political will to financially support defense programs has deteriorated as the economy has struggled.[251] Several states decreased the amount of financial support in the mid-2000s.[252] In 2009, twenty-two of thirty-seven states facing budget shortfalls were solely responsible for funding statewide defense programs.[253] When the belt must be tightened, defense programs are one of the first programs to go by the wayside.[254] Most significant for this article is the reality that the inequities between budgets for professional prosecutors and for defense programs remain despite funding difficulties overall, which renders the Court's statements in *Argersinger* about fairness somewhat hollow.[255]

4. Summary: More "Represented" Defendants, but the Problems and Burdens Remain

There is no question that expansion of the right to counsel would allow more defendants to receive counsel. Expansion also would, by definition, incorporate effectiveness of counsel jurisprudence into the equation. As combating collateral consequences illiteracy is the main objective, it is arguable that forging a path solely through the Sixth Amendment is inadequate. Defense programs are already overwhelmed with bloated caseloads and insufficient funding. Mandating expansion of the right to counsel does not resolve this resource problem, and perhaps could exacerbate

248. *Id.* at 57 & n.50 (describing how Wisconsin created a program earmarking funds for indigent defense, with a projection of $7 million, and raised less than $100,000).

249. *See id.* at 57–58.

250. *Id.* at 74.

251. HOLLY R. STEVENS ET AL., STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008 6–7 (2010).

252. *See id.* at 59.

253. *Id.*

254. *Id.* at 59–60 (describing state programs that sacrificed staff and other resources due to trimmed state budgets).

255. *Id.* at 61–62 (discussing significant disparities in overall budget, grants, and salaries in various states); *see also* Argersinger v. Hamlin, 407 U.S. 25, 33–37 (1972).

it. In other words, an expanded right could simply result in an unfilled promise.

But even assuming that the funding and resource deficiencies could be addressed, attempting to increase notice of collateral consequences through expansion of *Padilla* is tantamount to attacking an iceberg with a single ice pick. While many are hopeful for the expansion of *Padilla* to other collateral consequences, the process will be incremental at best. Differences of opinion between circuits and states will remain. Clarity is unlikely. And even if *Padilla* is expanded, the heightened *Strickland* standard potentially mitigates any gains.

These realities expose reliance on *Padilla* and its progeny as the primary means for combating unawareness of collateral consequences. At its root, the issue is one of legal illiteracy that is present throughout the criminal system amongst various participants involved in crafting justice. Therefore, any solution to the problem must go beyond the guarantees of the Sixth Amendment to reach other components of the justice system. Expansion of the right to counsel as a prophylactic measure is a step in the right direction, but it is not enough and exempts too many players, all while increasing burdens on perpetually overwhelmed defense counsel. Hence, a broader solution is necessary: notice must be extended *beyond* the duties of counsel in order to effectively educate prosecutors, judges, defendants, defense counsel, police officers, and any other individuals that are involved in crafting justice. Extending notice also will bring additional obligations for these players. The next section suggests possible avenues for beginning this task and calls for further study, specifically drawing on solutions to illiteracy in other fields.

IV. SYSTEMIC SOLUTIONS THAT ENSURE NOTICE OF COLLATERAL CONSEQUENCES

Because expansion of the right to counsel is likely insufficient for combating the problem of collateral consequences illiteracy, any solution must account for the various players involved in the administration of criminal justice. This part argues for increased involvement from the two most visible players: judges and prosecutors. Because prosecutors are essentially the "architects" of

criminal proceedings,[256] it is only fitting that they contribute to greater awareness of indirect consequences for individual defendants, the system, and themselves. Furthermore, with the exception of the rare case that proceeds to trial and requires judicial gatekeeping, trial judges are heavily involved in the processing of guilty pleas.[257] As vital guardians of due process, they are in a unique position to contribute to systemic literacy. Because both prosecutors and judges do not relate to the defendant in terms of advocacy, this article calls for disclosure-like obligations from both at various stages of the process that already exists.

A. *Formalizing Notice from the Judiciary*

In a system dominated by pleas, there are two encounters between judges and defendants that are ripe for notice of collateral consequences: arraignment and the moment of the entry of a guilty plea. Both command undivided attention from the defendant, primarily because they represent the beginning and the end of a prosecution.

1. Arraignment

Arraignment, whether preliminary or formal, is the moment when a defendant appears before a judge and is apprised of pending charges filed against the defendant.[258] It involves an acknowledgment of jurisdiction, information about the offenses charged, and a request for entry of a plea. Again, notice is the primary undercurrent at this stage, which is a "critical stage" of the prosecution.[259] Most state arraignment procedures require judges to inform a defendant of certain rights, such as the right to counsel, as well as possible sentences.[260]

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256. Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

257. *See, e.g.*, FED. R. CRIM. P. 11(c)(3)–(5) (addressing the involvement of a trial judge in the acceptance or denial of a plea agreement).

258. *See generally Arraignment in the Court of Common Pleas*, DEL. STATE CTS., http://courts.delaware.gov/help/proceedings/ccp_crarraignment.stm (last visited Apr. 3, 2015).

259. Hamilton v. Alabama, 368 U.S. 52, 53 (1961).

260. *See, e.g.*, Missouri v. Petterson, 780 S.W.2d 675 (Mo. Ct. App. 1989) (range of punishment); Deutscher v. Nevada, 601 P.2d 407 (Nev. 1979) (right to counsel); Wilkins v. Maryland, 245 A.2d 80 (Md. Ct. Spec. App. 1968) (right to counsel). Notice how the sentencing information relates to direct consequences. While a defendant's in-person presence

The information received by a defendant at arraignment—whether in person or after waiving an appearance—can make a defendant aware of what may result in the event of a conviction. Hearing the possible collateral consequences from a judge and including them in court paperwork attached to the charging documents can heighten individual literacy and cause a defendant to become aware, from the start, of considerations that should be part of the guilty plea calculus. In other words, notice of collateral consequences provides an additional frame for the defendant to view the case through. Such notice would likely provoke conversations with defense counsel that may otherwise not occur due to the difficulties that were articulated above. Defendants—especially those encountering the system for the first time—would have information that allows them to be proactive rather than reactive given the likelihood of a plea offer in the pipeline. Having this information come from the court also adds an element of legitimacy to the reality of those consequences. It self-informs the judge and also may inform a prosecutor who happens to be present. The information can become a vital aspect of a defendant's thought process simply by being more present.

Admittedly, one criticism of adding notice to this phase of the process is that arraignments have become largely rote procedures.[261] While they may be rote for some, they certainly are not for all, especially the defendant unfamiliar with the criminal system and who retains awe for the judiciary. Furthermore, rote or not, it is undeniable that the current aspects of the arraignment process have heightened literacy with respect to the right to counsel and the right to a trial. It is not unreasonable to suppose that notice of collateral consequences would result in a similar effect across the board.

Another possible criticism is that it is impossible to predict the number of collateral consequences applicable to a particular defendant at this phase of the game. But this criticism mistakes the judicial role at the time of arraignment. Judges are not tasked with giving individual advice; rather, they are tasked with giving

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at an arraignment often can be waived, or his appearance entirely, the information must find its way to the defendant.

261. K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 295 (2009).

individuals information. And information about collateral consequences is often charge-based rather than individual-based.[262] In other words, technological advancements make it possible to index consequences as they relate to *charges*. While the number may be high and render in-person notice administered by a judge potentially impractical, it is foreseeable that a catalog of the possible consequences could be attached to the charging information.[263]

A related criticism stems from the fact that some collateral consequences are automatic and others are discretionary,[264] thereby making it too difficult to provide notice in a particular situation. Admittedly, this is a more difficult problem to grapple with than the former. However, it also assumes too much responsibility for a judge. Rather, arraignment could be reserved for mentioning those collateral consequences that could result by operation of law. Notice as to discretionary collateral consequences, such as in the field of employment, could be present, but less specific. Because the goal is heightening systemic literacy, mere mention of the discretionary consequences will likely raise a defendant's eyebrow as he or she approaches resolution of the case. Put simply, heightening awareness of collateral consequences at the arraignment phase plants the seed for future consideration of those consequences. It also will increase judicial awareness, which could be helpful when a judge is evaluating the due process standards associated with a plea that occurs later in the case.

2. Inclusion of "Automatic" Consequences in Pleas

As described above, courts are already tasked with ensuring that guilty pleas meet certain due process standards under the

262. *See supra* notes 213–17 and accompanying text.

263. *See* Chin, *Making* Padilla *Practical*, *supra* note 227, at 685 ("[I]t is perfectly reasonable to anticipate that the legal system, somehow, will see to it that research is done that can be shared with all participants in the criminal justice system."). The "index" could be fully disseminated in the charging documents or court paperwork given to the defendant. An abbreviated version that identifies the most prevalent collateral consequences associated with particular charges could be delivered in person by the judge. *Which* consequences to include in the in-person communication would be jurisdiction specific and based on analyses conducted on that subject in each jurisdiction. In other words, each state could study which charges are most frequently resulting in convictions and which collateral consequences correlate to those charges.

264. *See* ABA, NICCC, *supra* note 48, at Project Description.

Fifth Amendment. Adding notice of consequences at the time of a plea can have similar effects to increased notice at the time of arraignment because defendants will be reminded of the consequences of their decision prior to formalizing and living with it beyond the withdrawal period.

Jenny Roberts suggested as much when considering the practicability of adding notice to pleas:

> Courts are already charged with ensuring that a guilty plea is knowing, voluntary, and intelligent. Just as defense counsel are able to ask a few more questions to determine if counseling about one or more collateral consequences is necessary, so too can the courts make minor adjustments to their plea allocution processes to protect such important rights.[265]

In other words, guilty plea colloquies—both written and with the judiciary—can be instruments of increasing literacy. Interestingly, this arguably might heighten literacy and the knowingness of pleas at a lower cost than leaning on defense counsel.[266] More importantly, post-*Padilla*, it would recognize the complementary guarantees of the Fifth and Sixth Amendments.[267] Whereas defense counsel can level the playing field strategically, the judiciary can at least ensure that all parties are as informed as they should be. *Padilla* resisted importing the collateral consequences rule into the Sixth Amendment context; if awareness of such consequences truly is a systemic literacy issue, it makes sense to involve courts in the effort.

Recall that Justice Alito, in his concurring opinion in *Padilla*, suggested as much when referring to creative, legislative ways to address the issue.[268] In fact, the ABA standards already urge courts and legislatures "to make notice of particular sanctions a condition of a valid plea."[269] And at the time *Padilla* was decided,

265. Roberts, *supra* note 22, at 699.

266. Wikstrom, *supra* note 231, at 370 & n.131 (citing Justice Scalia's dissent for the proposition that the Court could have leaned on Due Process Clause of the Fifth Amendment to require notice of collateral consequences in the guilty plea colloquy).

267. *See* Lang, *supra* note 219, at 952–54.

268. *See* Padilla v. Kentucky, 559 U.S. 356, 382–83 (2010) (Alito, J., concurring).

269. Love, *supra* note 221, at 118, 119 & n.164; AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 28 (3d ed. 2004).

some states had added notice of immigration consequences to the plea colloquy.[270]

Aside from the due process aspect of this proposal, tasking judges with notice will contribute to systemic literacy. Like at the arraignment phase, judges will become more aware. Similarly, whereas prosecutors may be absent at arraignment, they are never absent from the moment a plea is entered. Hearing judges announce the pertinent collateral consequences, on the record, as they relate to a particular charge, will cumulatively heighten prosecutorial awareness and possibly lead to more appropriate plea offers depending on other considerations related to a case.[271]

In fairness, many of the same criticisms that apply to adding notice requirements at arraignment apply to adding them to guilty plea colloquies.[272] The volume, depth, and mechanical problems are the same, although arguably linking consequences to charges rather than individual circumstances avoids the issue in most cases.[273] That approach also would preserve the distinction between the judiciary's informative role and defense counsel's advocacy role. Blurring those roles would be inappropriate.[274] To be clear, this proposal does not ask a judge to advise; instead, it calls

270. Lang, *supra* note 219, at 962–63.

271. *See* Love, *supra* note 221, at 117 n.158 ("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.").

272. *See* Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1401 (2004) ("[A]ny participant in the criminal justice system knows that the colloquy between the judge and the defendant is scripted, ritualistic, perfunctory, pro forma, and quite meaningless."); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 460 (2008) ("[I]n many cases, the rituals surrounding plea acceptance and sentencing lack real significance as decision making processes. . . . Procedural justice in these contexts may thus appear an empty formality and serve only to highlight the absence of procedural justice in reaching the plea deal.").

273. *See* Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 33, at 1158. ("Checklists or computer programs could flag typical collateral consequences of which defense lawyers must warn, based on each defendant's charges, jurisdiction, immigration status, address, and job.").

274. *See* Lang, *supra* note 219, at 986 ("A judge cannot satisfactorily investigate the defendant's individual situation, gauge the importance of plea consequences to the defendant, and advise the defendant based on that information. That is the province of an attorney: the defendant's advocate."); *see also* Ewald & Smith, *supra* note 115, at 155 (discussing how judges in the survey firmly believed that it is the responsibility of counsel to advise).

on judges to issue notice at various stages of the process to remind all parties involved (defense counsel, defendant, and prosecutor) of anterior considerations when crafting justice.[275]

The form of notice would consist of additional warnings specific to the most prevalent collateral consequences related to a particular charge in the particular jurisdiction. These warnings would exist in the written and verbal colloquies. In the courtroom, the judge would notify the defendant of the most prevalent, automatic consequences that stem from a particular charge, ask the defendant whether he has discussed the import of those consequences with counsel, and, if not, allow the defendant time to do so before formally entering the plea. Because the plea colloquy would contain those same consequences, defense counsel would, as a matter of best practice, likely begin discussing those consequences with a defendant before appearing in front of the judge. But regardless of whether the discussion with counsel occurs before or after appearing in front of the judge, the defendant receives knowledge that is currently not mandatory prior to entering the plea. Perhaps most importantly, he receives it from multiple sources—the colloquy, the judge, and defense counsel—thereby contributing to institutional literacy.[276]

Determining *which* consequences a court should share at the time a plea is entered is the most difficult conceptual problem, given the myriad consequences that could apply to a particular situation, especially in jurisdictions beyond the specific court.[277] Attempting to craft doctrine that gauges seriousness as it pertains to a defendant's particular circumstances may run into serious "hindsight is 20/20" problems during post-conviction litigation.[278] This is an area where a proposal cannot seek too much at

275. *See* Bibas, *Incompetent Plea Bargaining supra* note 236, at 164 ("The quasi-market forces at work encourage all parties involved to work together to achieve plea bargains that benefit all parties directly involved.").

276. The unique role of the prosecutor is discussed below. *See infra* Part IV.B.

277. Love, *supra* note 221, at 100 ("[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."); *see also* Colleen F. Shanahan, *Significant Entanglements: A Framework for the Civil Consequences of Criminal Convictions*, 49 AM. CRIM. L. REV. 1387, 1392 (2012) (noting the difficulty in determining *which* consequences are worth including and proposing a test that focuses on whether the consequence "significantly entangles" the civil and criminal law).

278. Bibas and Roberts have proposed tests for determining which consequences should

the risk of achieving doctrine that is impossible to institute on the ground. For that reason, inclusion of automatic consequences in guilty plea colloquies is the most viable step. Automatic consequences would include those consequences that operate by the particular state and federal law as a result of a particular conviction for a specific charge; for example, a particular charge may bar entry into a particular field or render someone ineligible for certain benefits. Furthermore, automatic consequences would include any immediate loss or deprivation of a substantive due process right, such as the right to vote. Because those rights are either enumerated or for the most part already explicated by courts, the list would not be endless or run the risk of assessing a defendant's particular situation. If this list remains too long, one solution would be to further qualify the standard to include only those consequences that would likely continue to affect the offender beyond expiration of the direct sentence.[279] Further, the list would also only include the consequences that are particular to the state where the prosecution occurred and under federal law, as qualified above. One can envision how each state might be better suited to determine *which* consequences appear the most, based on *which* charges are the most frequent sources of convictions.[280]

Finally, practically achieving notice of automatic consequences would not be as difficult as some may think: once such consequences are catalogued on a charge-by-charge basis, making them part of written plea colloquies that will be executed in the presence of defense counsel would be possible. And once they are part

be included. Roberts suggests the following standard: "[W]henever a reasonable person in the defendant's situation would deem knowledge of th[at] consequence, penal or otherwise, to be a significant factor in deciding whether to plead guilty." Roberts, *supra* note 22, at 674. Bibas, similarly, suggests the following: "[W]hether [the consequence] is severe enough and certain enough to be a significant factor in criminal defendant's bargaining calculus." Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 33, at 1147.

279. Shanahan develops this concept when she states, "Where a legislature has chosen to make the conviction operate past the imposed sentence of incarceration or fine through another civil consequence, without any additional process, the legislature is likely to have created sufficient entanglement under this framework." *See* Shanahan, *supra* note 277, at 1416.

280. States could determine the quantity of offenders convicted of a particular offense that remain in the state, which would in turn inform *which* consequences within that jurisdiction are likely to be most prevalent. Interestingly, this approach has a nice federalism component to it. States can be laboratories of democracy. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

of the colloquy, defense counsel will be forced to explain them, or at the minimum, answer any possible questions or concerns from defendants. It presents a classic case of "putting things in writing." Judges also would see these colloquies, question the defendant and defense counsel about their contents, and assess the validity of the plea, all things considered.

B. *The Role of the Prosecutor: A* Brady*-Like Solution for Collateral Consequences*

As the Supreme Court conceded in *Brady v. Maryland*, prosecutors are the "architects" of criminal proceedings.[281] *Brady* requires prosecutors to disclose to the defense exculpatory evidence that is material to guilt or innocence.[282] While *Brady* was decided when trials still dominated the Court's jurisprudence in terms of criminal procedure, this assertion remains true in a system dominated by guilty pleas. Arguably, the hands of the prosecutor are even more involved today, given the prevalence of negotiated pleas and the rarity that is a trial. This reality has led to calls for prosecutorial awareness of collateral consequences in order to positively influence the administration of justice.[283] In a largely unregulated bargaining market,[284] it only makes sense that prosecutorial behavior be regulated as it relates to furnishing information about collateral consequences. Considering that such con-

281. 373 U.S. 83, 87–88 (1963).

282. *Id.* at 86–88.

283. Robert M.A. Johnson, *Message from the President*, PROSECUTOR, May–June 2001, at 5 (noting how prosecutors "must consider [collateral consequences] if we are to see that justice is done. How can we ignore a consequence of our prosecution that we know will surely be imposed by the operation of law?"). Commentators often cite professional standards when emphasizing that prosecutors are tasked with seeking justice rather than simply convictions. *See e.g.*, AM. BAR ASS'N, RECOMMENDATION at 4–5 (Feb. 12, 2007) (citing Robert M.A. Johnson, *Message from the President: Collateral Consequences*, THE PROSECUTOR 5 (2001)); NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS § 1-1.1 (3d ed. 2009), *available at* http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf ("The primary responsibility of prosecution is to see that justice is accomplished."); *see also id.* ("The primary responsibility of a prosecutor is to seek justice.").

284. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 33, at 1153 ("It is astonishing that a $100 credit-card purchase of a microwave oven is regulated more carefully than a guilty plea that results in years of imprisonment."). The market also is unregulated in the sense that fifty states administer prosecutions differently. Hence, "there is little organized effort to develop consistent or progressive criminal justice policy." Robert M.A. Johnson, *A Prosecutor's Expanded Responsibilities Under* Padilla, 31 ST. LOUIS U. PUB. L. REV. 129, 129–30 (2011).

sequences are attempts by legislatures to curtail an offender's freedom post-conviction in an indirect way, and prosecutors are tasked with enforcing the criminal law that can lead to those consequences, it follows that prosecutors should contribute to awareness of them.[285]

The Court's decision in *Brady* provides an opening for expansion of the prosecutorial role in this context. In *Brady*, the Court noted how "[s]ociety wins not only when the guilty are convicted but when criminal *trials* are fair; our system of the administration of justice suffers when any accused is treated unfairly."[286] With that holding, *Brady* "launched the modern development of constitutional disclosure requirements."[287]

Fast forward to the administration of a plea-dominated system today, and *Brady*'s disclosure obligations in the evidentiary context related to the right to trial under the Sixth Amendment could be transplanted with respect to awareness of collateral consequences. Coupling *Brady*'s holding with *Padilla*'s recognition that guilty pleas dominate the system allows for an expanded role for prosecutors if fairness in the administration of justice is to remain a priority. Just as prosecutors "shape a trial that bears heavily on the defendant," they also are the primary mover when it comes to resolving cases with a guilty plea.[288] Prosecutors have total authority to adjust charges and to decide which charge to offer as a part of a plea bargain.[289] In this respect, prosecutors could be tasked with informing defendants of automatic collateral consequences when extending plea offers, especially if a defendant is proceeding pro se.[290] In practice, prosecutors could be required to

285. In other words, collateral consequences result from prosecutorial enforcement of the criminal law. Thus, prosecutors, tasked with the administration of justice, should know more about the consequences of their decisions.

286. 373 U.S. at 87 (emphasis added).

287. Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 (2006).

288. Brady v. Maryland, 373 U.S. 83, 88 (1963).

289. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 33, at 1128 ("A range of possible overlapping charges can fit a single transaction or episode, and prosecutors have discretion to choose among them to reflect their own senses of justice, their desires to achieve pleas, or any number of reasons."). This proposal also leaves room for educating police officers about the ramifications of charging in the first place.

290. This is especially important in lower-level misdemeanor prosecutions involving defendants who may not qualify for counsel due to their income or because of the current right to counsel doctrine.

furnish a written plea offer with a list of the automatic consequences pertaining to a particular charge.[291] Dare one say that such an obligation would be too practically difficult. It has already been done post-*Padilla* in the Second Circuit with respect to immigration consequences and notice of potential sentencing enhancements should a defendant re-offend.[292]

The legal basis for such an obligation could come in the form of a constitutional command, à la *Brady*, state-specific legislative efforts, or ethical obligations under the rules of professional conduct for prosecutors. A constitutional command would amplify the seriousness of collateral consequences in the spirit of *Padilla*. However, it would likely take several cases to flesh out the precise meaning and scope of such a command. Hence, an affirmative constitutional obligation, while incredibly forceful, would run the risk of resulting in the same problems mentioned above regarding the development of ineffective assistance of counsel jurisprudence post-*Padilla*.

Because state jurisdictions are the best equipped to determine which collateral consequences under their particular codes are most prevalent, one possibility is jurisdiction-specific legislative action that creates disclosure requirements by statute. Disclosure obligations imposed by statute would heighten awareness immediately and may not be subject to as many "fleshing out" problems that come with a broader constitutional command. On the other hand, such efforts would remain the product of political will and subject to the same budgetary constraints plaguing most local governments. Considering that the plight of criminal defendants rarely serves as persuasive motivation for legislative action, leaning on the possibility of legislative prescriptions might be wishful thinking. A more realistic jurisdiction-specific goal may be advocating for changes in the rules of professional conduct on a state-by-state basis. Expanded ethical obligations could develop from

291. Admittedly, the same cataloguing concerns that are present with notice by the judiciary exist here. However, this author is confident that projects such as that undertaken by the ABA Collateral Consequences Project, plus technology, could make furnishing this information fairly simple with the aid of institutional memory.

292. N.Y.C. BAR ASS'N, *PADILLA V. KENTUCKY*: THE NEW YORK CITY CRIMINAL COURT SYSTEM, ONE YEAR LATER 6 (2011), *available at* http://www2.nycbar.org/pdf/report/uploads/PadillaCrimCtsCJOReportFINAL6.15.11.pdf; *see* United States v. Pimentel, 932 F.2d 1029, 1034 (2d Cir. 1991) (suggesting prosecutors send a letter to the defense explaining how conviction on a particular charge could affect sentencing for a future conviction).

state-driven studies about which collateral consequences are most prevalent in the particular jurisdiction. Because any modification to the rules of professional conduct would likely involve input from many members of the bar, the need for extra-legal literacy efforts would become more apparent to attorneys as well.[293] Hence, a combined approach of heightened ethical obligations for prosecutors and extra-legal literacy measures may be the most realistic and practical solution to heightening literacy institutionally and individually. With the support of state and local government, these efforts could be uniquely tailored to the most commonly felt collateral consequences in the particular jurisdiction.

Regardless of the source of the obligation, the effect of such a requirement cannot be understated in terms of heightening literacy overall. Again, such a practice likely would heighten literacy for all parties and make prosecutors generally more aware of what types of consequences result, thereby allowing for individually tailored offers. Prosecutors, constantly in conversation with defense counsel, would become more aware of consequences generally and more aware of their application in particular circumstances. Prosecutorial disclosure also would assist defense counsel when advising clients, especially if defense counsel was unaware of a particular consequence. Increasing awareness on both sides of the bargain comports with the Court's statement in *Padilla* about creative crafting of plea deals.[294] And in theory, prosecutorial awareness and disclosure could lead to better systemic results for both sides: defendants might receive better plea deals overall and prosecutors may dispose of more cases through the plea process when defendants feel they can maintain a livelihood despite a conviction. Finally, heightened systemic awareness of collateral consequences could result in a deterrent effect

293. Consider how the legal profession could look to health literacy projects that correspond to particular problems in particular places for possible guidance in this field. Just as a particular city may have certain health illiteracy problems, a particular jurisdiction likely has certain legal illiteracy problems.

294. Padilla v. Kentucky, 559 U.S. 356, 373 (2010). When both sides at the negotiating table are aware of what is at stake for the defendant, the underlying facts, and seriousness of the crime, the opportunity for a well-crafted plea is better.

that is not fully felt when such consequences remain in the dark.[295]

CONCLUSION

Awareness of collateral consequences is a systemic literacy issue that requires a multi-player solution. The Supreme Court's admission in *Padilla* and *Frye* that plea-bargaining is now the dominant method of resolving a criminal case led to increased responsibilities for defense counsel to be considered effective. But attacking this literacy problem with only one party mirrors cutting the grass with a pair of scissors. Tasking an already overburdened, under-funded, and ill-resourced defense bar with ensuring notice of such consequences cannot be the only avenue of redress. Increasing the number of cases that require counsel will remain subject to the same legislative will and budgetary issues that currently confront the right to counsel fifty years after *Gideon*. Put simply, more than expansion of the right to counsel is necessary.

Fortunately, the criminal system contains other able-bodied actors that can contribute to eradicating systemic illiteracy of collateral consequences. Judges, who now process pleas significantly more than presiding over trials, can serve informative roles at various stages of a prosecution. Prosecutors, who offer plea bargains and exchange ideas about resolving cases with defense counsel, also can heighten notice in the plea-bargaining context by disclosing indirect consequences linked to specific charges. These repetitive efforts will lead to broader awareness amongst all players, thereby contributing to a fairer administration of justice that comports with the complementary guarantees of the Fifth and Sixth Amendments.

295. Ewald & Smith, *supra* note 115, at 161 ("It is possible that given such variation [in discussion of collateral consequences in courtrooms], these sanctions today are not imposed clearly, publicly, and consistently enough to function as the kind of 'expressive' or 'shaming penalties' some advocates presumably have in mind.").