

Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process

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ABSTRACT: In the 2009–2010 term, the U.S. Supreme Court will decide if it matters whether a criminal defense lawyer correctly counsels a client about the fact that the client faces deportation as a result of a guilty plea. Under prevailing constitutional norms in almost every jurisdiction, a lawyer does not have a duty to tell her client about many serious but “collateral” consequences of a guilty plea. Yet, in every jurisdiction that has considered the issue, that very same lawyer will run afoul of her duties if she affirmatively misrepresents a collateral consequence—every jurisdiction, that is, except Kentucky. The Supreme Court of Kentucky recently held that when there is no duty to warn about a consequence because it is collateral, misadvice about that same consequence is not a constitutional violation.

The collision of the collateral-consequences rule, which imposes no duty to warn, and the affirmative-misadvice exception, which imposes a duty to give accurate advice where a lawyer chooses to warn, leads to a perverse incentive structure that signals to defense lawyers (as well as to prosecutors and judges) that it is safest to say nothing at all about “collateral” matters. The Kentucky approach that the Supreme Court will review is equally troubling; it allows false information with no sanction or remedy. A cluttered and contradictory jurisprudence of informational rights in the guilty-plea process sits at this intersection of the collateral-consequences rule and affirmative-misadvice exception.

So-called collateral consequences often overshadow the direct penal sentences in criminal cases. In addition to deportation, courts categorize many other

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severe consequences as collateral, including involuntary civil commitment, sex-offender registration, and loss of the right to vote, to obtain professional licenses, and to receive public housing and benefits. These consequences touch upon every important area of a convicted person's life—for the rest of his or her life. They also matter enormously in the United States, which has more than 600,000 individuals exiting the prison system and millions more getting criminal records each year. These individuals enter a society that is struggling to find ways to integrate them despite facing considerable obstacles.

The constitutional rule has not caught up to the current reality of the effect of these consequences on defendants, their families, and their communities. The Supreme Court has the opportunity to overcome the mythical divide between direct and collateral consequences and to protect the constitutional and ethical values which underlie a defendant's right to decide whether to plead guilty based on full knowledge of the material consequences. The Court will consider important issues of professional responsibility, ethics, transparency, and the right to information in the guilty-plea process. This Article exposes the problems with the majority and Kentucky approaches. It argues that only a constitutional mandate that requires a complete and full informational disclosure about the serious collateral consequences of guilty pleas will avoid the problematic incentive structures we have now.

I. INTRODUCTION	122
II. FLAWED EXCEPTION TO THE FLAWED COLLATERAL-CONSEQUENCES RULE: AFFIRMATIVE MISADVICE.....	131
A. FEDERAL AND STATE COURTS ADHERE TO THE COLLATERAL- CONSEQUENCES RULE	131
B. FEDERAL AND STATE COURTS ADHERE TO THE AFFIRMATIVE- MISADVICE EXCEPTION	134
III. IGNORANCE IS EFFECTIVELY BLISS: TROUBLING INCENTIVES FLOW FROM THE COLLATERAL-CONSEQUENCES RULE AND AFFIRMATIVE- MISADVICE EXCEPTION	140
A. THE ETHICAL PROBLEM: THE AFFIRMATIVE-MISADVICE RULE ENCOURAGES SILENCE ABOUT COLLATERAL CONSEQUENCES.....	140
B. NON-CONSTITUTIONAL FACTORS INFLUENCING ATTORNEY BEHAVIOR ALSO SANCTION SILENCE.....	145
1. The Realities of Criminal Practice	146
2. Rules of Criminal Procedure.....	148
3. Professional Discipline Under State Ethics Codes	152
4. Professional Standards.....	155
5. Local Practice and Office Guidelines	162
6. Reputational Effects.....	163

- 7. Malpractice164

- IV. THE VARIOUS RATIONALES FOR THE AFFIRMATIVE-MISADVICE
EXCEPTION ALSO APPLY TO THE FAILURE TO WARN.....167
 - A. *THE BRIGHT LINES OF THE COLLATERAL-CONSEQUENCES RULE AND
AFFIRMATIVE-MISREPRESENTATION EXCEPTION ARE DOCTRINALLY
UNSOUND*167
 - B. *THE COSTS OF THE COLLATERAL-CONSEQUENCES RULE AND THE
AFFIRMATIVE-MISADVICE EXCEPTION OUTWEIGH ANY PERCEIVED
BENEFITS*178
 - 1. Effect on Defendants178
 - 2. Collateral Consequences and Innocence.184
 - 3. Legitimacy of the Criminal Justice System.....191

- V. CONCLUSION193

I. INTRODUCTION

Paul Russell was twenty-three years old when he pleaded guilty to possession of marijuana and to carrying an unlicensed handgun, both misdemeanors.¹ He was a lawful permanent resident of the United States, but remained a citizen of Jamaica.² As Russell served his month-long jail sentence, federal immigration authorities began deportation proceedings against him. As soon as Russell became aware of this, he moved to withdraw his guilty pleas.³ Ultimately, the U.S. Court of Appeals for the District of Columbia Circuit granted Russell's motion on the grounds that the prosecutor had stated incorrectly during the guilty-plea colloquy that a misdemeanor conviction would not make Russell eligible for deportation.⁴ In arriving at this conclusion, the Court made a rather disturbing statement:

We reach this holding, of course, because the prosecution chose to speak [about deportation], and spoke incorrectly. Had the government stood mute this would be a more difficult case. It is extremely troublesome that deportation has never been considered a direct consequence of guilty pleas of the sort that must be brought to the defendant's attention before his plea may be considered voluntary under Rule 11.⁵

Russell was "lucky" to have been misadvised. Although the plea withdrawal remedy simply put him back in the position of facing all of the original felony and misdemeanor charges, this time around Russell could make the decision about whether to plead guilty or go to trial with knowledge of the deportation consequences. But for a brief remark by the prosecutor, Russell would have been unable to withdraw his guilty pleas.⁶ These two misdemeanor guilty pleas would have subjected him to deportation to a country he had not lived in for nearly a decade.⁷

Jose Padilla was not as lucky, but not because the facts of his case differed much from those of Russell. Rather, he had the misfortune of receiving erroneous information about the deportation consequences of his

1. *United States v. Russell*, 686 F.2d 35, 36–37 (D.C. Cir. 1982).

2. *Id.* at 36; *see also* 8 U.S.C. § 1101(a)(20) (2006) ("The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant.").

3. *Russell*, 686 F.2d at 37 (noting how Russell moved to withdraw his plea only four days later).

4. *Id.* at 41.

5. *Id.*

6. *Id.* (quoting the prosecutor as saying during guilty-plea allocution: "We haven't explored it thoroughly, but it would appear that if Mr. Russell were convicted under the felony count, marijuana again, that he might be subject to deportation, which would not be the case if he took the misdemeanor.").

7. *Id.* at 38 (noting how, under immigration law, "criminal conviction[s] lead[] often, and sometimes automatically, to deportation" (footnote omitted)).

guilty plea from his own lawyer in Kentucky.⁸ In his case, the Kentucky Supreme Court recently held a defendant's Sixth Amendment right to the effective assistance of counsel is not violated—or even implicated—when his lawyer advises him incorrectly, so long as the advice pertains to a consequence that is “collateral” to the actual penal sentence handed down by the criminal court judge.⁹ Since the Kentucky Supreme Court previously categorized deportation as a collateral event, Padilla's lawyer's incorrect immigration advice had no effect on the validity of Padilla's guilty plea. Thus, despite living for decades in the United States and having served in the military during the Vietnam War, Padilla faced mandatory deportation for his marijuana-trafficking conviction.¹⁰

Only the U.S. Supreme Court stands between Padilla and his deportation to Honduras. The Kentucky decision created a split in authority that persuaded the Supreme Court to hear Padilla's appeal on an important issue of constitutional informational rights in the guilty-plea context.¹¹ Its decision will likely have a broad and lasting impact on a number of areas relating to the consequences of criminal convictions—including client counseling, guilty-plea allocutions, and plea-bargain negotiations—implicating both Sixth Amendment effective-assistance-of-counsel and due-process standards.

The *Russell* and *Padilla* courts' different approaches are both cause for concern. The *Russell* court's rule encourages prosecutors, judges, and defense lawyers to remain silent about the existence or severity of collateral consequences, lest they give incorrect information and thereby undermine the finality of the guilty plea or risk being branded an ineffective attorney. The opinion in *Padilla*, on the other hand, effectively permits a defense lawyer to “induce his or her client to plead guilty through deception or

8. *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008), *cert. granted*, 129 S. Ct. 1317 (2009).

9. *Id.* at 485.

10. *See id.* (reinstating Padilla's conviction); Petition for a Writ of Certiorari, *Padilla v. Kentucky*, No. 08-651 (U.S. Nov. 14, 2008), 2008 WL 4933628, at *i (“[B]ecause the offense was an aggravated felony, Petitioner's deportation is mandatory.”); *see also* 8 U.S.C. § 1101(a)(43) (2006) (defining “illicit trafficking in a controlled substance” to be an aggravated felony); *id.* § 1227(a)(2)(B)(i) (including marijuana trafficking on list of deportable drug offenses); *id.* § 1229b(a)(3) (excluding aggravated felonies from the extremely limited list of convictions that might qualify for discretionary relief from deportation from the Attorney General); 21 U.S.C. § 812(c)(10), (17) (listing marihuana and tetrahydrocannabinols as Schedule I controlled substances).

11. *Padilla*, 253 S.W.3d 482. Padilla was originally given a split sentence of five years prison followed by five years probation. *Id.* at 483. He has finished serving the prison term, and his deportation has been stayed pending the Supreme Court's decision. Telephone Interview by Erin Creaghe with Richard Neal, Attorney for Jose Padilla, in Louisville, Ky. (Feb. 20, 2009). The Court heard oral arguments on October 13, 2009. Adam Liptak, *Justices Seem Sympathetic to Defendant Given Bad Legal Advice*, N.Y. TIMES, Oct. 14, 2009, at A18, available at http://www.nytimes.com/2009/10/14/us/14scotus.html?_r=1&sq=padilla.

outright incompetence related to a ‘collateral’ matter without undermining the validity of the plea.”¹²

This perverse incentive structure should lead the Supreme Court to reject the approaches of both courts. Instead, the Court should formally acknowledge the existence of evolving professional norms, which in recent years have developed into a more robust, affirmative duty to warn defendants about collateral consequences in criminal cases.¹³ Effective-assistance-of-counsel jurisprudence gauges attorney competence against prevailing professional norms,¹⁴ and it is time for the constitutional jurisprudence to catch up to these heightened standards. The Court should reject the artificial, ill-conceived divide between collateral and direct consequences and find that only a rule of full information about any severe consequences of a criminal conviction can adequately protect the constitutional values surrounding guilty pleas, including the right to an informed, voluntary process and the assistance of an effective lawyer.

This divide is rooted in the so-called “collateral consequences” rule. Lower federal and state courts have created this rule, stating that an individual’s guilty plea is constitutionally valid even if that person was unaware of his conviction’s “collateral” consequences. In other words, the individual pleading guilty need only be informed about the “direct,” or penal, sanctions—such as jail or prison time, probationary period or a fine—which will result from the conviction.¹⁵ Courts have labeled many consequences “collateral,” including deportation, sex-offender registration, post-sentence involuntary civil commitment as a “sexually violent predator,” the loss of voting rights, and the loss of housing and employment opportunities.¹⁶ A defendant’s right to know about such consequences, and

12. Petition for a Writ of Certiorari, *supra* note 10, at *15.

13. See *infra* Part III.B.4 (pointing out how professional standards have taken greater account of the growing effects of collateral consequences of criminal convictions but still fall short with respect to making the duty to inform enforceable).

14. See *infra* note 172 and accompanying text (discussing the role of the Sixth Amendment and the standards it imposes on attorneys).

15. Courts use several different tests for distinguishing between direct and collateral consequences. 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, 689–93 (2008) (describing and critiquing the three main tests and listing cases relying upon them). The prevailing definition of “direct consequence” comes from the Fourth Circuit. See *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973) (“The distinction between ‘direct’ and ‘collateral’ consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.”). This Article, for the limited purpose of comparing silence to misadvice, does not accept but rather works within this framework. Thus, this Article’s use of the convenient term “collateral consequence” simply means the consequences that most courts have categorized as collateral.

16. See, e.g., *Moore v. Hinton*, 513 F.2d 781, 782–83 (5th Cir. 1975) (deeming revocation of driver’s license collateral); *Waddy v. Davis*, 445 F.2d 1, 3 (5th Cir. 1971) (“[L]oss of franchise is a result of the conviction, not the plea.”); *Doe v. Weld*, 954 F. Supp. 425, 438 (D. Mass. 1996)

thus to have the full picture about what will or may occur as a result of any guilty plea, is consistent with our criminal justice system's concerns with fairness, transparency, voluntariness, and proportionality. Yet almost all jurisdictions that have considered the issue have found that courts do not have a constitutional duty to ensure that a defendant is aware of the collateral consequences attached to a guilty plea—many of which are severe.¹⁷ What is more, courts have also found that neither due-process nor effective-assistance-of-counsel norms require defense counsel to warn the defendant of collateral consequences.¹⁸ Therefore, courts do not allow defendants to withdraw their guilty plea because their counsel failed to warn them about such consequences.¹⁹ Under the collateral-consequences rule, silence about many severe but non-penal consequences is widely accepted. Yet many collateral consequences are as serious as, or even overshadow, the penal sanction. If informed about serious collateral consequences, defendants would certainly take them into account in deciding whether to enter a guilty plea.

In *Russell*, and in almost every state and federal jurisdiction that has considered a case involving misadvice, there is another layer to the thorny ethics and incentive issues posed by the collateral-consequences rule. These courts all adhere to an “affirmative misadvice” or “misrepresentation” exception to the rule: while silence is permissible, if the court, defense counsel, or prosecution tries to warn about the same consequence yet provides the defendant with erroneous information, the plea will violate due-process standards which require that defendants knowingly and

(“[E]ntering the guilty plea without knowledge of the potential for [sex-offender] registration and community notification does not render his plea involuntary and, thus, does not violate the Constitution.”).

17. See, e.g., *Steele v. Murphy*, 365 F.3d 14, 17 (1st Cir. 2004) (finding that “the possibility of commitment for life as a sexually dangerous person is a collateral consequence of pleading guilty”); *State v. Paredez*, 101 P.3d 799, 803 (N.M. 2004) (“Each federal circuit that has directly considered the issue has held that deportation is a collateral consequence of pleading guilty so that the trial court is not required to inform the defendant of the immigration consequences of his or her plea.”).

18. See, e.g., *Broomes v. Ashcroft*, 358 F.3d 1251, 1257 (10th Cir. 2004) (“[D]eportation remains a collateral consequence of a criminal conviction, and counsel’s failure to advise a criminal defendant of its possibility does not result in a Sixth Amendment deprivation.”).

19. See, e.g., *Steele*, 365 F.3d at 16. Consideration of the collateral-consequences rule generally arises in the context of guilty pleas, when a defendant seeks to withdraw his guilty plea based on a lack of information about a consequence. However, the right to information also applies when a defendant rejects a plea-bargain offer or the opportunity to plead guilty to the charges against him. Here, the relevant consideration would be the defendant’s right to be aware of the potential consequences he would face should he be convicted after trial. See generally *Boria v. Keane*, 99 F.3d 492, 495 (2d Cir. 1996) (finding ineffective assistance of counsel where lawyer failed to counsel defendant “that, although he never even suggested such a thought to [his client], it was [defense counsel’s] own view that his client’s decision to reject the plea bargain was suicidal” (footnote omitted)).

voluntarily enter guilty pleas.²⁰ If the misrepresentation comes from defense counsel, it may also constitute a violation of the Sixth Amendment's effective-assistance-of-counsel guarantee.²¹ The affirmative-misadvice exception "is apparently the rule in every Federal circuit, the District of Columbia, and twenty-one states."²²

Taken together, the collateral-consequences rule and its affirmative-misadvice exception send a troubling message to parties involved in the guilty-plea process: it is better to say nothing to a defendant about consequences that are "collateral" to a conviction than to attempt to provide information and risk being wrong. Most state and federal courts that have examined the issue agree there is no right to a warning about *any* collateral consequence, effectively placing a constitutional stamp of approval on silence. Under this rubric, an individual who must decide whether to plead guilty or proceed to trial never receives information that is often central to his decision.

There are some court rules, professional standards, and ethical codes that require warnings about at least some collateral consequences.²³ Yet while these and other factors can influence criminal-justice-system actors to warn defendants about some of the more serious collateral consequences, the prevailing constitutional bottom line is that guilty pleas are immune from attack if a defendant remains ignorant of the collateral consequences.

This scenario is worrisome, especially at a time when the United States finds itself dealing with the enormous and complex issues related to the annual reentry of 600,000 former prisoners into society.²⁴ These individuals'

20. See U.S. CONST. amends. V, XIV; see also *Brady v. United States*, 397 U.S. 742, 748 (1970) (applying due-process norms to guilty pleas).

21. U.S. CONST. amend. VI; see also *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985) (applying right-to-counsel norms to guilty pleas). While erroneous information may lead to an invalid plea under due-process principles, an ineffective-assistance claim requires that a defendant show both incompetent lawyering (the erroneous advice) and prejudice (a demonstration that, without the erroneous advice, there is a reasonable probability that the defendant would have chosen to go to trial rather than pleading guilty). *Id.*

22. Petition for a Writ of Certiorari, *supra* note 10, at *13. The Petition further noted that between 1979 and 2008:

[A]ll jurisdictions that have considered the question have also concluded that even though the subject was a "collateral" matter for which the defendant was not entitled to representation—such as deportation, parole eligibility, suspension of driving privileges, etc.—flagrant misadvice by counsel may constitute ineffective assistance which renders the plea involuntary.

Id. at *12 (footnote omitted).

23. See *infra* Part III.B (discussing these non-constitutional sources of regulation).

24. See JOAN PETERSILIA, *WHEN PRISONERS COME HOME* 3 (2003) ("One of the most profound challenges facing American society is the reintegration of more than 600,000 adults—about 1,600 a day—who leave state and federal prisons and return home each year."); see also Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 81 (Jan. 20, 2004). President Bush stated:

criminal records will affect them, their families, and their communities at large in ways that many surely never imagined when they were convicted. The same consequences apply to the millions of men and women who receive criminal convictions each year but spend no actual time in prison. Most convicted individuals and former prisoners will find it difficult to get work because of either formal statutory or regulatory bars on hiring individuals with criminal records²⁵ or the stigma associated even with non-violent convictions.²⁶ They will struggle to find housing and to get an education.²⁷ If the person has a sexual-offense conviction, the post-sentence consequences will affect every facet of his life, ranging from the possibility of lifelong involuntary civil commitment in a prison or prison-like facility²⁸ to

[T]onight I propose a 4-year, \$300 million prisoner reentry initiative to expand job training and placement services, to provide transitional housing, and to help newly released prisoners get mentoring, including from faith-based groups. America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.

Id. at 88.

25. See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 250.006 (Vernon 2007) (listing numerous criminal convictions that are a permanent or five-year bar to employment in facilities serving the elderly, disabled, or terminally ill).

26. See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 956 (2003) (noting how employers often use an applicant's criminal record as a screening mechanism). The use of criminal records has become such a bar to employment that some jurisdictions have adopted "ban the box" initiatives, under which applicants for government jobs no longer have to fill in a box asking if they have been convicted of a crime. Minnesota recently enacted such a statute, under which most public employers "may not inquire into or consider the criminal record or criminal history of an applicant . . . until the applicant has been selected for an interview." Omnibus Public Safety Policy Bill, ch. 59, art. 5, § 11, 2009 Minn. Sess. Laws Serv. 278, 297 (West) (to be codified at MINN. STAT. § 364.021). However, an agency will still conduct a background check on any person offered a job and any statutory bars to employment will remain in effect. *Id.* These initiatives recognize the discrimination that individuals with criminal records face in simply getting an initial interview. See Gene C. Johnson, 'Ban The Box' Movement Gains Steam, L.A. WAVE, Aug. 15, 2006, available at http://news.newamericamedia.org/news/view_article.html?article_id=99ce5ed2c12c489351589891334e720f (describing "ban the box" rules in Los Angeles County and in the cities of Boston, Chicago, and San Francisco).

27. For example, a plea to simple drug possession results in ineligibility for, or termination of, federal student loans, see 20 U.S.C. § 1091(r)(1) (2003) (varying ineligibility periods based on number of convictions), most public housing, see 42 U.S.C. § 13661 (2003), and public benefits in most states, see 21 U.S.C. § 862a (2003).

28. See, e.g., KAN. STAT. ANN. § 59-29a07(c) (2005 & Supp. 2007) (describing how individuals subject to the "Sexually Violent Predator Act" can be confined by the Secretary of Corrections so long as they are "housed and managed separately from offenders in the custody of the secretary of corrections, and except for occasional instances of supervised incidental contact, [are] segregated from such offenders").

Internet postings of his photo, address, and workplace²⁹ to local laws that restrict where sex offenders may live and work.³⁰

It is not necessarily the case that misadvice about deportation made Mr. Russell's or Mr. Padilla's pleas less voluntary, knowing, or intelligent than a total lack of advice. It is quite easy to imagine that in either scenario—no warning, or an erroneous lulling of their concerns—Mr. Russell or Mr. Padilla would have made a different decision about whether to plead guilty had they known that the plea could be the basis for deportation. The amount of information that someone in Mr. Russell's or Mr. Padilla's position ultimately gets from the judge, defense counsel, and prosecutor may well be determined by the potential effects the rules have on the behavior of these relevant actors in the criminal justice system. All of these actors might offer—or fail, intentionally or otherwise, to offer—advice on the issue. The actor most likely to be in this position is, of course, the defense attorney, with her constitutional duty to counsel her client about the merits and drawbacks of any plea offered.³¹

Defense counsel owes a constitutional duty of effective assistance to a client considering whether to enter a guilty plea.³² This duty would be meaningless if the attorney's counseling about the pros and cons of a plea

29. See, e.g., Tex. Dep't. of Pub. Safety, Public Sex Offender Registry, https://records.txdps.state.tx.us/DPS_WEB/SorNew/PublicSite/index.aspx (last visited Nov. 11, 2009) (listing both home and work addresses of registered sex offenders in Texas).

30. See, e.g., *Sex Offenders Living Under Miami Bridge*, N.Y. TIMES, Apr. 8, 2007, at A22 (describing how local laws restricting where convicted sex offenders may live forced five men to live under a bridge and how they “must stay at the bridge from 10 p.m. to 6 a.m. because a parole officer checks on them nearly every night”).

31. See *Boria v. Keane*, 99 F.3d 492, 496–97 (2d Cir. 1996); Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 847–48 (1998) (noting how *Boria* “held that the Constitution requires that defense counsel provide an informed opinion on whether to plead guilty or go to trial”); see also *In re Resendiz*, 19 P.3d 1171, 1178 (Cal. 2001). In *Resendiz*, the court stated:

We recognize that it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain. Thus, . . . [t]he defendant can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial.

Id. (quoting *In re Alvernaz*, 830 P.2d 747, 753 (Cal. 1992)).

The trial court will also be involved, but in a much more limited role as judge of the voluntariness of any guilty plea as well as a potential conduit for information about collateral consequences, should that discussion happen in open court. The prosecutor might be involved, but only if there is discussion in open court or in the less likely event that she offers information about collateral consequences directly to a pro se defendant during plea negotiations.

32. See *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (“Where . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice ‘was within the range of competence demanded of attorneys in criminal cases.’” (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970))).

versus a trial did not have meaningful content. It is beyond dispute that counsel must ensure that her client understands the maximum criminal penalty that he will face if convicted.³³ Courts recognize that individuals cannot make an intelligent and voluntary decision about pleading guilty without information about the potential consequences of the plea, and they also recognize that people need the assistance of a trained professional to understand such information.³⁴

This reasoning behind the constitutional recognition of the need for counseling about the penal consequences of a criminal conviction also applies to many collateral consequences. This is particularly true of both serious collateral consequences (such as deportation³⁵ or civil commitment) and collateral consequences that overshadow any criminal penalty on a case (such as loss of public housing or a professional license for a misdemeanor conviction that carried no jail time). Surely the cost of a serious collateral consequence is one that any reasonable person would carefully weigh against any benefits of a negotiated settlement when deciding whether to plead or go to trial. The lower courts' majority approach to this issue fails to recognize the critical nature of this aspect of counseling content.

This Article builds on a previous article, which proposed a reasonableness test to determine when courts should require warnings about a particular consequence under a due-process analysis. Thus, a defendant would have the right to receive "warnings whenever 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."³⁶ The proposed two-part test for determining the "significance" of a consequence considered: (1) the severity of the consequence, and (2) the likelihood that the consequence would apply to the defendant. Under the primary factor of severity, "[i]f reasonable people would treat as significant a

33. See *supra* note 15 and accompanying text (explaining the different definitions used for distinguishing between "direct" and "collateral" consequences); see also *Brady v. United States*, 397 U.S. 742, 756–57 (1970) (discussing how Brady was advised by competent counsel as to possible penalties based on existing law).

34. See *Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("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.").

35. In 1997, Congress renamed proceedings to expel an illegal immigrant from the country, changing "deportation" to "removal" in federal immigration law. *Illegal Immigration Reform and Immigration Responsibility Act of 1996* § 308, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.). This Article relies on the older, more descriptive, and widely understood term. See Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 166 n.7 (2008) ("By replacing a word ('deport') that requires a human object with another ('remove') that is usually applied to an inanimate object, Congress opted for sanitizing language that embodies an attitude toward unauthorized migration fully consistent with rhetoric that describes unauthorized immigrants as 'illegal.'").

36. *Roberts*, *supra* note 15, at 674.

severe consequence when making a decision as serious as a guilty plea, courts should require pre-plea warnings before concluding that the plea is ‘knowing.’”³⁷ Under the secondary factor of likelihood, even where the “consequence is not at the highest end of the severity scale, warnings would still be mandatory when the mere fact of the criminal conviction makes it certain that the consequence would apply.”³⁸ This is because “[i]t is reasonable to require warnings about the limited number of such automatically applicable consequences.”³⁹

The first article concentrated on a due-process analysis. This Article takes the next step and focuses on defense counsel’s duties under the Sixth Amendment’s guarantee of effective assistance of counsel. It explores how the intersection of the collateral-consequences rule and the affirmative-misrepresentation exception affects counsel’s behavior, and thus affects the flow of information to a defendant pleading guilty. The two factors from the proposed due-process test—severity of the consequence and likelihood of its application—are relevant to both prongs of the U.S. Supreme Court’s existing structure for ineffective-assistance-of-counsel claims: reasonable attorney competence and prejudice to the defendant.⁴⁰ Under a proper Sixth Amendment analysis, defense counsel would have an affirmative duty to warn about severe consequences, such as civil commitment, because it would be unreasonable to fail to warn about matters of such central importance in a defendant’s decision-making process. Counsel would also have a duty to warn defendants about consequences such as mandatory deportation or non-discretionary, automatic, lifetime sex-offender registration based on the particular conviction because the list of these consequences is limited and manageable. The prejudice prong, which requires a defendant who pleaded guilty to show a reasonable probability that without the incompetent attorney behavior he would have chosen trial over a plea,⁴¹ would be relevant to consequences that are serious or likely, yet perhaps not on the far end of the severity or certainty spectra. For example, the likely loss of a professional license as a consequence of a conviction would require a court to consider whether under the particular facts and circumstances of the defendant’s employment history and strength of the criminal case, it is reasonably probable that the defendant would have declined to plead guilty had he known of the potential loss of the license.

Part II of this Article explores the current constitutional distinction in the lower courts between affirmative misrepresentations and the total failure

37. *Id.*

38. *Id.*

39. *Id.* at 674–75.

40. *See supra* note 21 and *infra* note 64 and accompanying text (describing the Supreme Court’s two-prong ineffective-assistance-of-counsel test).

41. *See supra* note 21 (describing the prejudice prong of the ineffective-assistance-of-counsel test).

to warn. It also points out problems of interpretation and implementation that courts are likely to encounter should the dichotomy stand. Part III advances the central claim of this Article. It focuses on the current rule's disturbing incentive structure, which excuses a total failure to warn defendants about collateral consequences yet carves out an exception for misadvice. Part III also discusses how non-constitutional regulation, such as court rules and professional standards, may require such warnings. Ultimately, it concludes that while such regulation, standing alone, constitutes a weak influence over information-sharing behavior in the guilty-plea context, it would be meaningful if incorporated into Sixth Amendment jurisprudence. Part IV explores the potential rationales underlying the current constitutional rules and concludes that they do not outweigh the high costs, identified in Part III, at the intersection of the rule and exception. Part IV also critiques the doctrinal soundness of a rule that distinguishes between silence and misadvice.

II. FLAWED EXCEPTION TO THE FLAWED COLLATERAL-CONSEQUENCES RULE: AFFIRMATIVE MISADVICE

The constitutional law behind the collateral-consequences rule and affirmative-misadvice exception is rooted in the jurisprudence governing guilty pleas, which encompasses both the Sixth Amendment right to effective assistance of counsel and the due-process right to a knowing and voluntary plea. While the doctrinal origins of the collateral-consequences rule are questionable,⁴² it is the majority approach to both a court's and defense counsel's duty to warn. This Part briefly explores the state and lower federal courts' reliance on the rule and exception.

A. FEDERAL AND STATE COURTS ADHERE TO THE COLLATERAL-CONSEQUENCES RULE

Almost all jurisdictions follow the collateral-consequences rule, even in situations involving the harshest consequences that can flow from a conviction. For example, in twenty states a court can involuntarily commit an individual to a secure facility as a "sexually violent predator" after he completes his prison sentence.⁴³ Despite the extreme liberty deprivation at stake, and the fact that commitment can last for the remainder of the individual's life, courts have deemed the consequence collateral and have

42. See Roberts, *supra* note 15, at 684–89 (questioning the lower federal and state courts' reliance upon *Brady v. United States*, 397 U.S. 742 (1970), in fashioning the collateral consequences doctrine).

43. See Adam Deming, *Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics*, 36 J. PSYCHIATRY & LAW 439, 441–43 (2008).

thus held there is no constitutional right to know about it prior to pleading guilty.⁴⁴

The same holds true for the severe consequence of deportation. As one court recently noted, “Each federal circuit that has directly considered the issue has held that deportation is a collateral consequence of pleading guilty so that the trial court is not required to inform the defendant of the immigration consequences of his or her plea.”⁴⁵ In addition, most of the state high courts that have considered the collateral-consequences rule have accepted it.⁴⁶ There are exceptions. The most notable example is the New Mexico Supreme Court, which recently held as a matter of federal constitutional law that defense lawyers must warn their clients about the immigration consequences of any guilty plea.⁴⁷

The United States Supreme Court has never decided, as a matter of either due process or effective assistance of counsel, whether a defendant has a right to information about particular collateral consequences prior to entering a plea of guilty.⁴⁸ The doctrinal basis for the lower courts’ development of the collateral-consequences rule, however, resides in the Supreme Court case of *Brady v. United States*. The issue of the right to pre-

44. See, e.g., *Steele v. Murphy*, 365 F.3d 14, 17–18 (1st Cir. 2004) (holding that a defendant does not need to be informed that he might be involuntarily committed for life, as a “sexually dangerous person,” following release from prison).

45. *State v. Paredez*, 101 P.3d 799, 803 (N.M. 2004) (citation omitted) (citing cases from numerous Circuit Courts of Appeal finding deportation to be a collateral consequence). Although there are various court and ethical rules and professional standards which may require or recommend advisement about certain consequences (usually immigration), in most jurisdictions no one is constitutionally obligated to give a defendant this critical information—not the court, prosecutor, nor even defense counsel. Consequently, there is no uniformity in the distribution of information about collateral consequences to defendants. See *infra* Parts II.B.2–5 (discussing such rules and standards).

46. See Brief of Amici Curiae Criminal and Immigration Law Professors, Capital Area Immigrants’ Rights Coalition, Washington Lawyers’ Committee for Civil Rights and Urban Affairs, and Western Kentucky Refugee Mutual Assistance Society, Inc. in Support of Petitioner at 11–12, *Padilla v. Kentucky*, No. 08-651 (U.S. Jan. 21, 2009), 2009 WL 164242 [hereinafter *Padilla Amici Cert. Petition*] (noting how, under federal constitutional rulings, “[t]en federal circuits and seventeen states hold that defense lawyers are under no obligation” to warn clients about deportation prior to a guilty plea and how three state courts have come to the opposite conclusion, also applying federal constitutional norms).

47. See *State v. Paredez*, 101 P.3d 799, 805 (N.M. 2004); see also *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987) (“When defense counsel in a criminal case is aware that his client is an alien, he may reasonably be required to investigate relevant immigration law.” (citing *People v. Soriano*, 194 Cal.App.3d 1470, 1481–82 (1987))); *Padilla Amici Cert. Petition*, *supra* note 46, at 12 (listing *Paredez*, *Pozo* and an Ohio intermediate appellate court in stating that “[t]hree courts . . . have recognized that, to render effective assistance of counsel, criminal defense lawyers must advise at least some noncitizen clients of the immigration consequences of a conviction”); *infra* notes 99–104, 226–38 and accompanying text (discussing *Paredez*).

48. See *Bustos v. White*, 521 F.3d 321, 325 (4th Cir. 2008) (stating that there is no Supreme Court precedent establishing that defense counsel provides ineffective assistance for failing to warn a client about the consequence of parole ineligibility).

plea information—either about collateral consequences or involving affirmative misrepresentation—was not before the *Brady* Court. The Court did, however, agree with the Fifth Circuit, which stated that a guilty plea was voluntary when, among other things, it was “entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel.”⁴⁹ The lower courts have latched onto this dictum to support their use of a bright line between direct and collateral consequences in both due-process and effective-assistance jurisprudence.⁵⁰

In *INS v. St. Cyr*, the Court noted how “Even if the defendant were not initially aware of [the federal statute governing relief from deportation], competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision’s importance.”⁵¹ Although this more recent Supreme Court dictum has not led the lower federal or state courts to find a duty to warn,⁵² the Court could settle the issue of whether defense counsel has an affirmative, constitutional obligation to warn his or her clients about collateral consequences when it issues a decision in *Padilla v. Kentucky* during the 2009–2010 term.⁵³ It could limit its decision to the narrow consideration of the affirmative-misadvice exception, and whether the Kentucky Supreme Court was correct to deny such an exception. However, the Kentucky Supreme Court’s *Padilla* decision relied significantly on its own ruling in an earlier case that accepted the collateral-consequences rule.⁵⁴ Therefore, it is difficult to disaggregate the rule and exception, both in *Padilla* and when considering the rationales for

49. *Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 242 F.2d 101, 115 (5th Cir. 1957)); see also Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 706 (2002) (citing *Brady* for the proposition that “[t]he Supreme Court created the rule that the Due Process Clause requires the trial court to explain only the direct consequences of conviction” (citing *Brady*, 397 U.S. at 755)).

50. See, e.g., *Steele v. Murphy*, 365 F.3d 14, 17 (1st Cir. 2004) (quoting *Brady* in stating that “a defendant need only be ‘fully aware of the direct consequences’” of a guilty plea (quoting *Brady*, 397 U.S. at 755)). But see Roberts, *supra* note 15, at 684–89 (critiquing lower federal and state courts’ use of *Brady*’s dictum on direct consequences for development of the collateral-consequences rule).

51. *INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001).

52. See, e.g., *State v. Rojas-Martinez*, 125 P.3d 930, 937–38 (Utah 2005) (“The practice standards [on counseling clients about deportation consequences] referenced by the Supreme Court were not accompanied by any language that would suggest that it was the Court’s intention to cloak these practice guidelines in constitutional garb.”).

53. See *supra* note 11 and accompanying text (describing the Supreme Court’s recent grant of certiorari in *Padilla*).

54. *Commonwealth v. Padilla*, 253 S.W.3d 482, 483–84 (Ky. 2008) (citing *Commonwealth v. Fuartado*, 170 S.W.3d 384 (Ky. 2005)) (finding lawyer’s inaccurate advice to client regarding effect of guilty plea on immigration status to be a collateral consequence and therefore outside the scope of Sixth Amendment right-to-counsel protection), *cert. granted*, 129 S. Ct. 1317 (2009); see also *infra* notes 202–20.

such an exception in general. In addition, as explored in Part III, the vexing incentives which flow from both the rule and the exception militate in favor of the Court's full consideration of the doctrine.

B. FEDERAL AND STATE COURTS ADHERE TO THE
AFFIRMATIVE-MISADVICE EXCEPTION

A number of state and federal circuit courts have articulated an affirmative-misadvice or -misrepresentation exception to the general rule barring withdrawal of guilty pleas due to a lack of warning about a collateral consequence. These courts have applied the exception to both of the constitutional claims raised regarding the validity of a guilty plea: due-process violations and ineffective-assistance-of-counsel claims.⁵⁵

The *Russell* decision discussed in the Introduction illustrates the typical reasoning and outcome in a due-process claim, where affirmative misadvice opens the door for the remedy of plea withdrawal.⁵⁶ As for ineffective-assistance-of-counsel claims, the Florida District Court's approach to silence and misinformation in *Roberti v. State* illustrates the typical reasoning and outcome when courts consider claims of violations of the Sixth Amendment effective-assistance-of-counsel requirement. Ronald Roberti pleaded "no contest," was convicted of various sexual offenses, and was sentenced to prison followed by probation.⁵⁷ Later seeking to withdraw that plea, Roberti alleged that his lawyer had told him that, because he would serve his probation out of state, he would not be subject to Florida's Ryce Act.⁵⁸ Under the Ryce Act, a reviewing judge must civilly commit any person found to be a "sexually violent predator," "until such time as the person's mental abnormality or personality disorder has so changed that it is safe for the person to be at large."⁵⁹ An individual's sexual-offense conviction is a critical

55. See, e.g., *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002) (holding that "an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable" and thus "meets the first prong of the *Strickland* test"); *El-Nobani v. United States*, 287 F.3d 417, 422 (6th Cir. 2002) ("Because the government did not misrepresent to petitioner the consequences of his plea, petitioner cannot show that his plea was involuntary and unknowing.").

56. See *supra* notes 1-7 and accompanying text (discussing *Russell*).

57. *Roberti v. State*, 782 So. 2d 919, 920 (Fla. Dist. Ct. App. 2001). A *nolo contendere* plea, also known as a "no contest" plea, has the same force and effect as a guilty plea for the purposes of having a conviction and serving a sentence; the only difference is that such a plea allows the defendant to neither admit nor deny the charges. See *North Carolina v. Alford*, 400 U.S. 25, 36 n.8 (1970).

58. See *Roberti*, 782 So. 2d at 920.

59. FLA. STAT. § 394.917(2) (2006) (stating that civil confinement begins after "incarcerative portion of all criminal sentences"); see also *id.* § 394.912(9) (listing qualifying offenses). The Ryce Act defines "convicted of a sexually violent offense" to include, among other things, both guilty and *nolo contendere* pleas. *Id.* § 394.912(2).

element in any Ryce Act determination,⁶⁰ and thus Roberti's guilty plea put him at risk of civil commitment. As the appellate court later noted, Roberti's counsel's alleged misadvice "is an incorrect statement of the law," since the Ryce Act applies to all individuals sentenced to prison.⁶¹

The *Roberti* court found that civil commitment is a collateral consequence.⁶² However, this was not the end of the analysis. The court went on to hold that Roberti's claim fell under the rule that "[a]ffirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea."⁶³ The court analyzed the affirmative-misrepresentation exception to the collateral-consequences rule under the two-prong test for ineffective assistance of counsel. This test requires a defendant seeking to reverse a conviction or withdraw a guilty plea to show both deficient defense-counsel performance and prejudice.⁶⁴ For example, had Roberti's defense counsel simply failed to say anything at all about potential lifelong civil commitment, Roberti would not have won a hearing on his attempt to prove that he suffered prejudice as a result of incorrect advice and that the court should thus allow him to withdraw his guilty plea.⁶⁵ In short, Roberti "benefited" from the fact that his lawyer gave him incorrect advice.⁶⁶

60. *Id.* § 394.912(9) (listing two requirements for determination that someone is a "sexually violent predator," one of which is a conviction for an enumerated "sexually violent offense").

61. *Roberti*, 782 So. 2d at 920; see also FLA. STAT. § 394.925.

62. *Roberti*, 782 So. 2d at 920. Three years after the *Roberti* decision, the Florida Supreme Court agreed. See *State v. Harris*, 881 So. 2d 1079, 1083–84 (Fla. 2004) (rejecting argument that possibility of involuntary civil commitment under the Ryce Act violated the express terms of a plea bargain which failed to mention civil commitment).

63. *Roberti*, 782 So. 2d at 920 (citations omitted).

64. See *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (finding the *Strickland* test applicable in guilty-plea context); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (announcing the two-prong ineffective-assistance test).

65. See *Hill*, 474 U.S. at 59 ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (footnote omitted)); *Roberti*, 782 So. 2d at 920 (stating that to fulfill the prejudice requirement, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"). A prejudice-prong analysis is hard enough to apply in a typical claim of ineffectiveness in the guilty-plea context, where a court must decide, *ex post facto*, if some piece of information would have made a difference in a trial that never happened. The *Hill* court explained:

[T]he determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Hill, 474 U.S. at 59. To build on one of *Hill's* examples, if counsel failed to investigate a potential alibi defense before the client pleaded guilty, any post-conviction reviewing court

A number of decisions applying the affirmative-misadvice exception illustrate how much disagreement there is over its actual application to case facts. For example, some courts have applied a per se attorney-incompetency finding to misrepresentations about deportation. The Second Circuit recently held that “an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively

would have to determine whether the alibi evidence would have made a difference given the evidence that the prosecution might have put forth had there been a trial.

Such an analysis does not even apply when the ineffectiveness claim relates to misadvice about a collateral consequence. For example, civil commitment would certainly factor largely into a person’s decision about whether to plead guilty, but it is not information that would be evidence at a trial. Thus, it would not lend itself to a determination of whether counsel would have changed his recommendation about the plea due to a prediction that the trial outcome would have been different. Courts could attempt to examine the strength of the evidence that was never admitted in a trial in order to discern whether the person weighing the pros and cons of a plea versus a trial would have still pleaded guilty with correct information about the collateral consequence in the equation. However, this would lead to an even more convoluted inquiry than that which now exists in a non-collateral-consequences case. Instead, courts should simply determine whether the defendant credibly demonstrated that he would have taken his chances at trial had he known about, say, the mandatory deportation consequences of his guilty plea. *See, e.g.,* *People v. Soriano*, 240 Cal. Rptr. 328, 334 (Cal. Ct. App. 1987) (describing Defendant’s affidavit, which stated that his attorney specifically advised him that his guilty plea would neither prevent him from obtaining citizenship nor lead to his deportation: “Based on these assurances, I entered my plea of guilty. . . . Had I known that I was exposing myself to deportation by pleading guilty, I would never have entered such plea.”).

66. Obviously, Roberti would have benefited more from correct advice the first time around. However, given the post-conviction position that he was in, misadvice gave him an evidentiary hearing where silence would not. In any case, according to the electronic docket of the Manatee County Clerk of Circuit Court, the court denied Roberti’s motion to withdraw his guilty plea on remand. Denial of Motion for Evidentiary to Show Defendant Was Misadvised, *Roberti*, 782 So. 2d 919 (Fla. Dist. Ct. App. 2001) (No. 168). According to the Florida Department of Corrections, Roberti remained incarcerated until his death in custody on February 2, 2009. Fla. Dep’t of Corrs., Inmate Release Information Search, <http://www.dc.state.fl.us/InmateReleases/search.asp> (enter “Roberti” into the “Last Name” field, enter “Ronald” into the “First Name” field, enter “S06276” into the “DC Number” field, and click “Submit Request”) (last visited Nov. 11, 2009).

The affirmative-misrepresentation exception to the collateral-consequences rule is not unique to the Ryce Act (sexually violent predator) context in Florida. Various lower Florida state-court decisions have also applied it with respect to the consequences of potential deportation, citizenship applications, sentence enhancements and the right to vote. *See* *Alguno v. State*, 892 So. 2d 1200, 1201 (Fla. Dist. Ct. App. 2005) (citing Florida cases addressing affirmative misrepresentations about these consequences). In addition, the affirmative-misrepresentation exception applies to prosecutors and judges as well as defense lawyers, since guilty pleas based on misinformation violate the due process knowledge and voluntariness standards. *See, e.g.,* *United States v. Russell*, 686 F.2d 35, 36 (D.C. Cir. 1982) (finding that, since the “record on appeal makes it clear that the prosecution made misrepresentations concerning the deportation consequences of the defendant’s plea . . . , we must vacate the defendant’s guilty plea”); *United States v. Briscoe*, 432 F.2d 1351, 1354 (D.C. Cir. 1970) (“Calculations of the likelihood of deportation may thus rightly be included in the judgment as to whether an accused should plead guilty, and any actions by Government counsel that create a misapprehension as to that likelihood may undercut the voluntariness of the plea.”).

unreasonable.”⁶⁷ Other courts complicate this determination under *Strickland*’s attorney-competence prong, distinguishing between a defense lawyer’s “patently erroneous” advice and simple “competent, good faith advice which later turn[ed] out to be incorrect,”⁶⁸ or requiring a defendant to demonstrate that his “attorney blatantly misstate[d]” a consequence of a conviction.⁶⁹

One recent ineffective-assistance analysis illustrates the struggles that courts have had, on the same set of facts, in determining whether there was affirmative misadvice or simply a total lack of advice. Before Paul Sambursky pleaded guilty to multiple felony charges, he asked his lawyer “if there was [sic] any statutes, rules, regulations, or policies that govern parole.”⁷⁰ The lawyer called the parole board and reported back to his client that “there were no parolee rights,” that “everything the [Parole Board] do[es] is discretionary,” and that “people that have been convicted of a crime do not have any hard and fast policy rights.”⁷¹ In fact, state law made Mr. Sambursky ineligible for parole until he served eighty-five percent of his sentence.⁷² The North Dakota state courts that reviewed his application to withdraw his guilty plea based on affirmative misadvice regarding his parole eligibility found that “while counsel had failed to inform Sambursky of the 85% minimum service requirement, there was no ‘active misrepresentation.’”⁷³

The reviewing federal court found “troublesome questions” in deciding whether counsel’s response to Sambursky’s parole inquiries qualified as affirmative misadvice.⁷⁴ “This is because [counsel’s] response could have different meanings depending upon the context.”⁷⁵ While the federal court

67. *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002).

68. *Downs-Morgan v. United States*, 765 F.2d 1534, 1539 n.11 (11th Cir. 1985).

69. *Yordan v. Dugger*, 909 F.2d 474, 478 (11th Cir. 1990); *see also Goodall v. United States*, 759 A.2d 1077, 1082–83 (D.C. Cir. 2000) (stating that “representation is constitutionally deficient if counsel provides *materially erroneous* information regarding the parole consequences of a plea, and the defendant relies upon it” (emphasis added)). There are other difficulties with administration of the exception, such as the evidence required to demonstrate misadvice. At least one court would require trial counsel to sign an affidavit admitting to having given his client incorrect advice. *Downs-Morgan*, 765 F.2d at 1538 n.8 (citing *United States v. Santelises*, 476 F.2d 787, 790 n.3 (2d Cir. 1973)). This means that trial counsel would have to admit malpractice, or at least some elements of that tort. *See infra* Part III.B.7 (discussing obstacles to successful malpractice claims against criminal defense lawyers). Such a requirement is especially problematic in a jurisdiction that distinguishes between “good faith” and “patently erroneous” advice where counsel would have to swear to providing patently erroneous advice.

70. *Sambursky v. Schuetzle*, No. 1:08-cv-068, 2009 WL 1259214, at *13 (D.N.D. May 1, 2009).

71. *Id.*

72. *Id.* at *1.

73. *Id.* at *5.

74. *Id.* at *10.

75. *Sambursky*, 2009 WL 1259214, at *12.

denied Sambursky's Sixth Amendment claim based on his failure to adequately demonstrate prejudice,⁷⁶ the other courts' varying analyses show some practical problems of interpretation that arise during the application of the affirmative-misadvice exception.

The Supreme Court has not weighed in to clarify whether affirmative misadvice about a collateral consequence can lead to an invalid guilty plea. It came close, however, in *Hill v. Lockhart*.⁷⁷ William Lloyd Hill claimed that his attorney was ineffective because he provided incorrect information to Hill about his parole eligibility.⁷⁸ The case is best known for establishing the principle that the Court's two-pronged test for ineffective assistance of counsel at trial also applies in the guilty-plea context.⁷⁹ Under the first prong, Hill had to show that his attorney's representation fell below accepted norms of defense-counsel competence by telling him that he was eligible for parole after serving one-third, rather than one-half, of his prison sentence.⁸⁰ The Court, however, never reached this issue. Nor did it consider whether parole eligibility qualified as a direct or collateral consequence, or even if courts should follow such a direct-collateral categorization scheme when applying the two-prong *Strickland-Hill* analysis.⁸¹ Instead, the Court found it "unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of 'prejudice.'"⁸²

76. *Id.* at *5.

77. *Hill v. Lockhart*, 474 U.S. 52 (1985).

78. *Id.* at 54–55 (noting that "[a]ccording to petitioner, his attorney had told him that if he pleaded guilty he would become eligible for parole after serving one-third of his prison sentence," when "[i]n fact, because petitioner previously had been convicted of a felony in Florida, he was classified under Arkansas law as a 'second offender' and was required to serve one-half of his sentence before becoming eligible for parole").

79. *Id.* at 58.

80. *Id.* at 56 (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970), for the proposition that prong one of *Strickland* asks whether the advice at issue was "within the range of competence demanded of attorneys in criminal cases").

81. In the Eighth Circuit's opinion below in *Hill*, the court did find that "[t]he details of parole eligibility are considered collateral rather than direct consequences of a plea, of which a defendant need not be informed before pleading guilty." *Hill v. Lockhart*, 731 F.2d 568, 570 (8th Cir. 1984); *see also* *Bustos v. White*, 521 F.3d 321, 325–26 (4th Cir. 2008) (noting that "the majority of circuits deciding the issue have concluded that parole ineligibility is only a collateral consequence," including the Second, Fifth, Sixth, Eighth, and Eleventh Circuits); *cf.* *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988) (noting how the Sixth Circuit "has yet to decide whether erroneous advice concerning parole eligibility can amount to ineffective assistance of counsel" and citing "other circuits which have held or noted that misinformation concerning parole eligibility can be ineffective assistance of counsel").

82. *Hill*, 474 U.S. at 60. Justice White, in his concurrence, would have denied Hill an evidentiary hearing because paperwork in the case suggested that defense counsel did not know

Although it never reached the issue, the *Hill* decision signals that the Court might treat affirmative misadvice differently from silence, at least with respect to the consequence of defense counsel's advice regarding parole eligibility. The Court noted that it has "never held that the United States Constitution requires *the State* to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary."⁸³ It then went on to point out how, rather than grounding his claim in due process and voluntariness, *Hill* instead "relie[d] entirely on the claim that his plea was 'involuntary' as a result of ineffective assistance of counsel because *his attorney* supplied him with information about parole eligibility that was erroneous."⁸⁴ This suggests that the Court would recognize that a defendant's lawyer has a very different relationship to his or her client than the trial court has to that individual as a defendant entering a guilty plea,⁸⁵ and that it might constitutionalize that recognition of defense counsel's unique role in a Sixth Amendment analysis. The Supreme Court also mentioned misadvice in *Brady v. United States*.⁸⁶ Although the right to pre-plea information was not at issue in the case, in its discussion of the definition of a knowing and voluntary guilty plea, the decision stated that a "'plea of guilty . . . must stand unless induced by [among other things] . . . misrepresentation."⁸⁷ This suggests that the Court might treat affirmative misadvice differently from silence.⁸⁸

* * *

that *Hill* had a prior out-of-state conviction, and *Hill* thus provided no factual basis for the claim that counsel misled him. *Id.* at 61 (White, J., concurring). However, Justice White went on to note that, had *Hill* provided such a factual basis, *Hill* would have provided sufficient allegations of prejudice to win a hearing. He also found that, if a defendant demonstrated affirmative misadvice about parole eligibility, the defendant would satisfy the unreasonable-attorney-behavior prong of the ineffective-assistance test. *Id.* at 62.

83. *Id.* at 56 (emphasis added).

84. *Id.* (emphasis added).

85. See Roberts, *supra* note 15, at 693 (discussing the defendant-attorney relationship).

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

87. *Id.* at 755 (quoting *Shelton v. United States*, 242 F.2d 101, 115 (5th Cir. 1957)); see also *Puckett v. United States*, 129 S. Ct. 1423, 1430 n.1 (2009) (noting how *Brady's* statement about misrepresentation was dictum).

88. In a recent Supreme Court decision, Justice Scalia suggested that—should the Court have occasion to review *Brady's* dictum on misrepresentations—it might take a restrictive view of a defendant's ability to seek a remedy under such circumstances. *Id.* ("[I]t is hornbook law that misrepresentation requires an intent *at the time of contracting* not to perform." (citation omitted)). While it is unclear just what the Court meant in this one-line reference to the *Brady* language, the argument could be made that only intentional misrepresentations qualify for potential plea withdrawal. This would severely curtail the affirmative-misadvice exception as understood in most jurisdictions, and would bar plea withdrawal except in the rare circumstance when defense counsel, the prosecutor, or the judge purposely misled the defendant. Such a restrictive reading, however, seems unlikely in light of *Hill v. Lockhart* and other precedent.

These are just a few examples of the lower courts' flawed, cluttered, and contradictory applications of the jurisprudence of informational rights in the guilty-plea process which currently sits at the intersection of the collateral-consequences rule and the affirmative-misadvice exception. These examples illustrate just some of the problems with a rule that differentiates between silence and misinformation. The next Part discusses the effect of the rule and exception on defense counsel's actual conduct in providing, or failing to provide, information about collateral consequences.

III. IGNORANCE IS EFFECTIVELY BLISS: TROUBLING INCENTIVES FLOW FROM THE COLLATERAL-CONSEQUENCES RULE AND AFFIRMATIVE-MISADVICE EXCEPTION

Judicial decisions that incorporate the collateral-consequences rule and affirmative-misadvice exception deliver the following message to lawyers and judges: it is better to say nothing than take the risk of saying something wrong, particularly in an area that is likely not within the direct expertise of the lawyer or judge. Part III.A examines this claim. Part III.B explores the various non-constitutional factors, including state statutes and professional standards, which influence counsel's approach to advising about the collateral consequences of guilty pleas. These other sources of regulation have made important advances in recognizing the need for counseling about certain serious non-penal consequences. The enforcement mechanisms attached to such sources, however, are either non-existent or seriously flawed, negatively impacting their ability to regulate behavior. With the lower courts' current majority approach rendering defense counsel's failure to warn largely immune from attack, the imprimatur on silence remains strong. It is time for the Supreme Court to recognize the evolved (and evolving) standards requiring advisement about collateral consequences and to incorporate these sources into the constitutional structure. This would give real meaning to the right to effective assistance of counsel in the decision-making process leading up to any guilty plea.

A. *THE ETHICAL PROBLEM: THE AFFIRMATIVE-MISADVICE RULE ENCOURAGES SILENCE ABOUT COLLATERAL CONSEQUENCES*

As it stands in most state and federal jurisdictions, the constitutional norm governing advisement about collateral consequences is that silence is permissible and misinformation is a violation. This standard encourages criminal-justice-system actors to keep quiet about collateral consequences. The dichotomy also unfolds against a backdrop of a strong, systemic desire for, and overvaluing of, two facets of plea bargaining (and the criminal justice system more generally): finality and efficiency.

All cases must have an end point or the criminal justice system would suffer in at least two respects: (1) its ability to handle cases and (2) public perception. Many criminal-justice-system actors, however, overvalue finality

to the detriment of constitutional protection,⁸⁹ and stubbornly resist change on the theory that any inroad will threaten to topple our high-volume system.⁹⁰ This dynamic furthers what is an already troubling incentive structure fostered by the collateral-consequences rule and affirmative-misadvice exception.

For example, if the prosecution has reason to believe that defense counsel has not advised his client about the involuntary, post-sentence civil commitment as a “sexually violent predator” that might follow a proposed guilty plea, the current constitutional rules encourage the prosecutor to remain silent. A prosecutor might base this belief on the fact that defense counsel in a particular case did not attempt to negotiate a plea to a non-qualifying offense, or negotiate a lower prison sentence in recognition of the fact that the particular defendant would likely be committed after serving his prison sentence. The prosecutor can be assured that the guilty plea will stand so long as no information is offered to the client on the commitment consequence. He may also believe that the plea deal will fall apart should the defendant learn of the potential for lifelong involuntary commitment.⁹¹ Judges have similar incentives and may feel the pull of finality even more strongly because they do not want their name on a decision reversing a conviction. Therefore, the bottom line is that if no one says anything about any collateral consequence to an individual pleading guilty, then the current majority approach will protect the finality of that plea.

Efficiency, an important component of any high-volume justice system, is perhaps an even stronger and more overt influence on what happens in a criminal case leading up to a guilty plea.⁹² Using the preceding example, if a

89. See Roger Fairfax, *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 *FORDHAM L. REV.* 2027, 2030–31 (2008) (critiquing the Court’s failure to include jury-trial rights in the exceptions-to-harmless-error law for “structural” problems).

90. Justice Stevens has voiced his concern that:

Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.

United States v. Timmreck, 441 U.S. 780, 784 (1979) (quoting United States v. Smith, 440 F.2d 521, 528–29 (7th Cir. 1971) (Stevens, J., dissenting)).

91. This belief may be unfounded, or at least exaggerated. See *infra* text accompanying note 295 (explaining how any collateral consequence will play a lesser role in most defendants’ decision-making process when the prosecution has strong evidence of guilt and thus a conviction after trial is highly likely).

92. See THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE’S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES 39–52 (2006), available at <http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroup>

defendant learns that he might be involuntarily committed for life as a result of the conviction that will follow his plea, the delay resulting from the exploration between the defendant and his lawyer of this serious consequence may prolong the resolution of the case. That extra time could be viewed—at least in the short-term view—as hampering speedy processing in our high-volume criminal courts.⁹³

One would hope that competent and conscientious defense lawyers would warn their clients, at a minimum, about the more serious and likely collateral consequences. While not all defense lawyers are directly invested in the finality of guilty pleas and rapid movement of cases through the system, there are significant pressures to take these things into account even for the most competent and conscientious. Such institutional pressures will be particularly strong for those who are appointed to criminal cases by judges or through an “assigned counsel” plan.⁹⁴ These indigent defense lawyers are not part of a larger defender organization, and are likely to have private criminal or civil matters that compete for their time and attention, often receiving a disproportionate amount of that time.⁹⁵ While there are certainly high-quality lawyers in this group, there is also enormous pressure to avoid advocacy that might be perceived as thwarting efficiency, which in the overburdened criminal justice system means a severe tilt towards practices resulting in swift, final dispositions.⁹⁶ There is a disincentive to take the time to learn about collateral consequences, especially when there is often inadequate time to devote to other aspects of the assigned cases that may be more pressing and constitutionally valued (i.e., a looming hearing or trial). There is also a disincentive to introduce anything into the plea-bargaining equation—such as the need for the defendant and the

Report.pdf [hereinafter SPANGENBERG STUDY] (describing, in report on state of indigent defense in New York State, overarching concern with cost and efficiency).

93. This is a short-term view because over the full life of a criminal case it is more efficient to offer more information up front so that defendants do not later have—and pursue—claims of ineffective assistance of counsel or a due-process violation based upon the failure to warn about a serious consequence.

94. See, e.g., N.Y. COUNTY LAW § 722(3) (McKinney 2004 & Supp. 2009) (describing assigned counsel plan as “[r]epresentation by counsel furnished pursuant to a plan of a bar association in each county or the city in which a county is wholly contained whereby the services of private counsel are rotated and coordinated by an administrator, and such administrator may be compensated for such service”); see also AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION’S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS 2* (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> [hereinafter *GIDEON’S BROKEN PROMISE*] (listing various state indigent defense systems lacking independence from the judiciary).

95. *GIDEON’S BROKEN PROMISE*, *supra* note 94, at 10.

96. See, e.g., *id.* at 16–19 (discussing factors influencing minimal representation); see also SPANGENBERG STUDY, *supra* note 92, at 39–52 (describing the sometimes overt pressures on defenders to keep representation cheap).

prosecutor to consider any collateral consequences that may flow from the conviction—that might delay what could otherwise be a guilty plea taken at or shortly after the defendant’s initial appearance in court.

Similar pressures exist for public defenders. Although working in an office with other defenders may mitigate those pressures—by office policy and by the potential to influence local practice due to the number of cases handled—public defenders are also repeat players within a system that rewards rapid case processing. In many jurisdictions, defenders are appointed or elected, bringing political pressure to bear and putting efficiency at the forefront.⁹⁷ Indeed, some public defenders are “restricted . . . from providing representation in any non-criminal areas that relate to a case” and may in any case “lack sufficient knowledge and training in th[at] area.”⁹⁸

Most courts have failed to see the problematic incentives set up by a constitutional counseling structure that accepts both the collateral-consequences rule and the affirmative-misadvice exception. They have also failed to see how systemic pressures can exacerbate these incentives. The New Mexico Supreme Court is a rare exception to this myopia. In *State v. Paredes*, Ramon Paredes moved to withdraw his guilty plea, arguing that, before he pleaded, both the trial judge and defense counsel told him he “could” be deported based on his conviction when, in fact, deportation was almost certain.⁹⁹ The state high court found that “while it certainly would have been prudent for the district court to have been more specific in its admonition to Defendant or to inquire into Defendant’s understanding of the deportation consequences of his plea,” the trial judge “was not constitutionally required to advise Defendant that his guilty plea . . . almost certainly would result in his deportation.”¹⁰⁰ The court then immediately noted that its ruling on the trial judge’s advisement obligations did not absolve defense counsel of the constitutional obligation to correctly *counsel* the client with respect to that same information. It went on to hold that both affirmative misadvice and the total failure to warn about immigration consequences of pleading guilty by counsel violated Sixth Amendment principles.¹⁰¹

97. See SPANGENBERG STUDY, *supra* note 92, at 39–52 (“While a lack of independence from the counties exists with all providers, it is perhaps most true for the public defenders who are appointed and serve at the pleasure of the [N.Y.] counties.”).

98. *Id.* at 89.

99. *State v. Paredes*, 101 P.3d 799, 801 (N.M. 2004).

100. *Id.* at 803.

101. *Id.* at 805 (“[D]efense attorneys are obligated to determine the immigration status of their clients. If a client is a non-citizen, the attorney must advise that client of the specific immigration consequences of pleading guilty, including whether deportation would be virtually certain.”). It is important to note that under the *Paredes* ruling, a defendant does not win plea withdrawal simply by demonstrating misadvice (although even this is no simple task, *see supra* notes 67–76 and accompanying text). He must also prove prejudice, a formidable barrier given

Under this ruling, which was based on federal constitutional law, the right to effective assistance means that defense counsel must provide clients with correct pre-plea advice about the immigration consequences of any guilty plea. In declining to draw a distinction between misadvice and non-advice, *Paredes* reasoned that to do so “would ‘naturally create a chilling effect on the attorney’s decision to offer advice,’ because if the attorney’s advice regarding immigration consequences is incorrect, the attorney’s representation may be deemed ‘ineffective.’”¹⁰² The *Paredes* court also recognized the problems that arise when Sixth Amendment right-to-counsel jurisprudence differentiates between direct and collateral consequences, and correctly identified the relevant issue as whether “the defendant did not receive information sufficient to make an informed decision to plead guilty.”¹⁰³ Finally, the *Paredes* court noted that a rule which allowed attorneys to remain silent about such an important consequence as deportation “would ‘place[] an affirmative duty to discern complex legal issues on a class of clients least able to handle that duty.’”¹⁰⁴

Unfortunately, most jurisdictions fail to take these issues—which highlight both counsel’s critical informational role in the guilty-plea process and defendants’ related difficulties in understanding the full consequences of any plea without assistance—into account and instead mechanically adhere to the direct–collateral divide. Defense counsel in most jurisdictions thus operates in a constitutional world which explicitly encourages silence. As a result, counsel takes a risk when she wades into the sometimes complex and often unfamiliar territory of advising a client about the non-penal consequences of a guilty plea, which may involve issues ranging from immigration to public benefits to professional licensing. The risk is that the advice will be incorrect and that counsel will be the “ineffective” lawyer who allowed this to happen.

the courts’ demonstrated willingness to find lack of prejudice even in situations where the requisite “reasonable probability” of a different outcome, *see* *Strickland v. Washington*, 466 U.S. 668, 694 (1984), seems clear to any trial lawyer. *See, e.g., State v. Franklin*, 89 S.W.3d 865, 872 (Ark. 2002) (finding no prejudice despite counsel’s failure to properly inform defendant of his right to testify, file any discovery or evidentiary motions; request a limiting instruction, object to gunshot residue testimony, and present any mitigating evidence at the sentencing phase of a murder trial); *McFarland v. State*, 928 S.W.2d 482, 505–06 (Tex. Crim. App. 1996) (finding no prejudice where defense attorney slept during death-penalty trial because McFarland failed to show when or for how long attorney slept, or if the jury took note of it, and because co-counsel’s “decision” to let counsel sleep might have been a strategic move to gain jury sympathy). Although the high prejudice hurdle makes ineffectiveness claims difficult to prove, even in cases involving affirmative misadvice, defense counsel still operates in the shadow of such standards and is thus influenced by them.

102. *Paredes*, 101 P.3d at 805 (quoting John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 36 U. MICH. J.L. REFORM 691, 726 (2003)).

103. *Id.*

104. *Id.* (quoting Francis, *supra* note 102, at 726) (alteration in original).

The message is clear: counsel can avoid the “ineffectiveness” label, through either a right-to-counsel or a due-process violation, by simply remaining silent about any and all collateral consequences. Clearly, this is not the message that courts should send.

B. NON-CONSTITUTIONAL FACTORS INFLUENCING ATTORNEY
BEHAVIOR ALSO SANCTION SILENCE

The preceding discussion in this Article has focused on the federal constitutional law governing advisement about collateral consequences that developed in the lower state and federal courts. There are also a number of non-constitutional regulatory forces that can influence whether defense counsel will offer advice about collateral consequences.¹⁰⁵

Recent Supreme Court dictum, discussing a criminal defendant’s interest in knowing whether relief from deportation would be available following a guilty plea, highlights these non-constitutional norms. In *INS v. St. Cyr*, the Court stated: “[C]ompetent defense counsel, following the advice of numerous practice guides, would have advised [the defendant] concerning the provision’s importance.”¹⁰⁶ The real question is whether counsel has the incentive to follow such guides and other similar sources. This section explores that issue, as well as a number of other non-constitutional regulatory forces which, when combined with a constitutional rule encouraging silence, might push defense counsel to choose silence over the risk of misadvice. These forces include: the realities of high-volume criminal practice; the various statutes, rules, and standards related to advisement; a professional disciplinary proceeding against counsel under state ethical rules; local custom and practice with respect to advisement;

105. State constitutional law mandating advisement about collateral consequences is another potentially large influence on behavior. *See, e.g.*, *State v. Bellamy*, 835 A.2d 1231, 1238 (N.J. 2003) (holding that “when the consequence of a plea may be so *severe* that a defendant may be confined for the remainder of his or her life [under New Jersey’s Sexually Violent Predator Act], fundamental fairness demands that the trial court inform defendant of that possible consequence” (emphasis added)). Although *Bellamy* held that the judge, not defense counsel, must provide warnings, such a constitutional mandate will clearly have an effect on the attorney–client conversation. Unlike New Jersey, however, most states simply track established federal constitutional law in interpreting their own constitutions, *see* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.7(a) (3d ed. 2008), or do not—for various reasons—even analyze duty-to-warn cases under state constitutional provisions. *See, e.g.*, *Commonwealth v. Padilla*, 253 S.W.3d 482, 484–85 (Ky. 2008) (applying federal constitutional law), *cert. granted*, 129 S. Ct. 1317 (2009). There are thus very few state constitutional decisions extending a duty to warn about non-penal consequences.

106. *INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001). Although *St. Cyr*’s admonishment was only dictum, it suggests that the Court—at least as constituted in 2001—might be receptive to establishing a duty to warn defendants about immigration consequences under a Sixth Amendment analysis.

negative reputational effects for a provider of incorrect information; and a malpractice tort action against counsel who misadvised.¹⁰⁷

Taken together, these forces have a potentially strong effect on whether defense counsel will attempt to warn a defendant about a collateral consequence or will instead remain silent. The sections below explore how each of these forces, either directly or indirectly, does not encourage full disclosure about such consequences and may actually discourage the defense lawyer who tries but fails to warn correctly.

1. The Realities of Criminal Practice

It is important to situate the ethical critique of the intersection of the collateral-consequences rule and affirmative-misadvice exception in the reality of criminal practice. It may be comforting to assume that defense lawyers will not shy away from providing information for fear of an ineffectiveness label and to believe that trial-level judges are not so concerned about the finality of guilty pleas and efficiency of case management that they will remain silent about collateral consequences. Unfortunately, this is not always—or perhaps even usually—the case. Nationwide, about eighty percent of defendants cannot afford to hire an attorney.¹⁰⁸ Most of these defendants' cases are handled by lawyers working under crushing caseload conditions,¹⁰⁹ often struggling to undertake even the most basic tasks on their cases.¹¹⁰ Indeed, the head of the busy Miami-

107. As one commentator has noted, “[T]here are essentially three levels on which to assess poor lawyering: the constitutional level, the civil level, and the disciplinary level.” Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 5. These mechanisms are all “separate, each relies upon the satisfaction of different legal tests, and the fact that a criminal defense attorney’s misconduct has been conclusively established in one setting will not inevitably dictate the same result in a proceeding in one of the other venues.” JOHN M. BURKOFF, *CRIMINAL DEFENSE ETHICS: LAW & LIABILITY* § 1:8 (2d ed. 2008).

108. See U.S. Dep’t of Justice, *Indigent Defense Statistics*, <http://www.ojp.usdoj.gov/bjs/id.htm> (last visited Nov. 11, 2009) (stating that in 1999, in the nation’s most populous one hundred counties, public defenders handled 82% of the 4.2 million cases); see also Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 34 (Nat’l Bureau of Econ. Research, Working Paper No. 13187, 2007) (finding, in a sample of 115, 415 federal criminal cases from 1997–2001, that 72.9% of defendants qualified as indigent for the purpose of having counsel assigned).

109. See *GIDEON’S BROKEN PROMISE*, *supra* note 94, at 17–18 (finding that public defenders’ offices and criminal defense lawyers operate under caseloads that are far above recommended numerical standards, and some offices have even been forced to withdraw from representation due to such overload).

110. See Jane Fritsch & David Rohde, *Two-Tier Justice: Lawyers Often Fail New York’s Poor*, N.Y. TIMES, Apr. 8, 2001, at A1 (focusing, in first of three articles addressing the problems facing criminal defendants in New York City courts, on 137 homicide cases handled by court-appointed lawyers in 2000, and describing their failure to employ even the most basic trial strategy, including the failure to inform a defendant of his right not to testify). See generally Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 746–74 (1987) (describing poor lawyering practices of New York

Dade County Public Defender's Office recently "took the witness stand . . . to make the case that his office is so underfunded his attorneys must refuse to take hundreds of cases" because "his attorneys are already overburdened and can't do their constitutional duty for any new clients."¹¹¹

A constitutional norm that encourages the cost- and time-cutting measures of avoiding any and all imparting of information about collateral consequences may well have the effect of advancing silence on such issues. In effect, it guides attorneys in making hard choices about how to allocate scarce resources. Such difficult triage decisions are an unfortunate part of the indigent-defense landscape.¹¹² Collateral consequences, however, have recently grown both in scope and severity and often overshadow the criminal case itself, particularly when the case involves minor charges.¹¹³ In many cases, exploring the potential collateral consequences of a particular guilty plea with a defendant and counseling him about what may really happen as a result of the plea are just as important as, or more important than, something as basic as investigation of the case.

For example, if a person faces charges of misdemeanor drug possession, there may be relatively little investigation to do in the case. It would be critical, however, to ask the person about his immigration status, whether he or his family live in public housing, whether he is receiving or is about to receive federal student loan assistance, and to be aware of how these and other civil liabilities might affect that person. In short, the constitutional rule has not caught up to the current reality of the effect of such consequences on defendants, their families, and their communities, and thus may lead to a misguided allocation of scarce resources.

The intersection of the collateral-consequences rule and the affirmative-misadvice exception may also discourage the various parties from educating

City indigent defense-panel attorneys studied in mid-1980s, including attorneys' failures to file discovery motions and investigate, even in most homicide cases).

111. Susannah A. Nesmith, *Dade Public Defender: Caseload Is Untenable; Miami-Dade's Public Defender Testifies About How Overworked His Office Is in a Bid to Reduce His Caseload*, MIAMI HERALD, July 31, 2008, available at <http://www.nacdl.org/public.nsf/defenseupdates/Florida085> ("Several other public defenders around the state [of Florida] have refused to take some cases because of underfunding . . .").

112. See generally Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004) (arguing that underfunding of indigent defense is a long-term reality, and attorneys and judges must thus make conscious decisions about the allocation of scarce resources); John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215 (1994) (suggesting an ethical approach to the allocation of scarce defense resources among indigent criminal defendants); cf. Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1089-90 (2004) (discrediting argument that requiring defense counsel to give warnings about applicable collateral consequence imposes too great a burden on defense counsel's limited time resources).

113. See *supra* notes 25-30, *infra* notes 256-58 and accompanying text (discussing growth in collateral consequences).

themselves about the increasingly complex web of collateral consequences. These span across immigration, employment, housing, public benefits, and a number of other areas, and can be situated in federal and state laws, regulations, and local ordinances. The increasing severity and pervasive nature of collateral consequences has led to a corresponding growth in available information and trainings on a variety of related topics.¹¹⁴ However, if the bottom line is that advisement of such information is not required as part of the process leading up to the plea, busy lawyers have little incentive to avail themselves of these critical educational opportunities. If lawyers and judges are not educated about collateral consequences, they will not be able to warn defendants; indeed, they will be even less likely to warn defendants since erroneous information may threaten the finality of any guilty plea or have other negative consequences.

2. Rules of Criminal Procedure

State statutes and rules of criminal procedures are part of the body of rules that regulate attorney (and judicial) conduct in the criminal justice system,¹¹⁵ and are one factor that affects whether defense counsel provides information about collateral consequences to clients. “[A]t least two dozen jurisdictions by court rule or statute require advisement of potential deportation to those pleading guilty.”¹¹⁶ However, only a few states require

114. See, e.g., GA. PUB. DEFENDER STANDARDS COUNCIL, NEW ATTORNEY TRAINING AND MENTORING PLAN (2006), available at http://training.gpdsc.com/tilpp/mentoring_plan.pdf [hereinafter GA. PUB. DEFENDER STANDARDS] (listing sentencing training that includes “Collateral Consequences” and “Immigration Consequences & Ethical & Professional Considerations”); Reentry Net: Serving People from Arrest to Reintegration, <http://www.reentry.net/> (last visited Nov. 11, 2009) (listing training opportunities and other resources about collateral consequences of criminal convictions).

115. Certainly, attorneys and judges can adhere to norms that rise above the minimum requirements set out in the governing body of rules. This is particularly likely to happen when an attorney practices in an environment that emphasizes a particular area or strives to a generally high standard of practice. For example, there are defender offices that work to incorporate collateral consequences and reentry into daily practice by understanding the critical need to address these issues both up front—before any disposition of the criminal case—and after the individual has served his sentence or has been convicted. See *infra* note 178 (describing such offices).

116. UNIF. ACT ON COLLATERAL CONSEQUENCES OF CONVICTIONS § 5 cmt. (Draft 2008), available at http://www.law.upenn.edu/bll/archives/ulc/ucsada/2008_amdraft.pdf; see also Brief of Petitioner at 17, *Padilla v. Kentucky*, No. 08-651 (U.S. May 25, 2009), 2009 WL 1497552 (stating that a “solid minority of states (23 plus the District of Columbia) by statute or rule require judges to warn noncitizens of the immigration consequences of guilty pleas”); cf. Brief of the National Association of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner at 20, *Padilla v. Kentucky*, No. 08-651 (U.S. June 2, 2009), 2009 WL 1567356 at *20 (“Thirty jurisdictions including the District of Columbia and Puerto Rico have statutes, rules, or standard plea forms that require a defendant to receive notice of potential immigration consequences before the court will accept his guilty plea.”). For a survey of the various rule-based approaches that states have taken with respect to the duty to advise on immigration

warnings on other consequences, such as loss of the right to lawfully possess a firearm,¹¹⁷ the loss of federal benefits,¹¹⁸ or civil commitment as a “sexually violent predator.”¹¹⁹ Under the Federal Rules of Criminal Procedure, federal judges have no duty to warn (or ensure that defense counsel has warned) a defendant about any collateral consequence prior to accepting a guilty plea.¹²⁰

Most such advisement rules—usually located in a state’s procedural rules governing the entry of guilty pleas—only regulate judges’ conduct, and fail to address defense counsel’s duty to warn clients about collateral consequences. As some courts have recognized, “Defense counsel is in a much better position to ascertain the personal circumstances of his client so as to determine what indirect consequences the guilty plea may trigger.”¹²¹

consequences prior to guilty pleas, see Attila Bogdan, *Guilty Pleas by Non-Citizens in Illinois: Immigration Consequences Reconsidered*, 53 DEPAUL L. REV. 19, 49–58 (2003).

117. See, e.g., TENN. CODE ANN. § 40-14-109(b) (West 2007) (requiring trial court accepting guilty plea to warn defendant that “from the moment of conviction for a domestic violence offense the defendant will never again be able to lawfully possess or buy a firearm of any kind” and allowing plea acceptance only if “defendant clearly states on the record that the defendant is aware of [this] consequence”).

118. See, e.g., IND. CODE ANN. § 35-35-1-2(a)(4) (West 2008) (firearms); WYO. R. CRIM. P. 11(b)(1) (requiring trial court accepting guilty plea to advise defendant that a controlled substance conviction may result in loss of federal benefits).

119. See MASS. R. CRIM. P. 12(c)(3)(B) (requiring trial judge to inform defendant on the record “of any different or additional punishment based upon . . . sexually dangerous persons provisions of the General Laws”); see also FLA. R. CRIM. P. 3.172(c)(8) (requiring that judges inform defendants of deportation consequences of guilty pleas); *Steele v. Murphy*, 365 F.3d 14, 19 n.2 (1st Cir. 2004) (noting Massachusetts requirement to warn about civil commitment but stating that “[f]ailure to follow this state procedural rule does not affect our analysis of *Steele*’s federal constitutional claim”).

120. FED. R. CRIM. P. 11; see also *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988) (“Rule 11 does not require a sentencing court to explain ‘collateral’ consequences of a guilty plea to a defendant.”). There is no Rule 11 duty to warn about immigration despite recommendations, at hearings to amend the rule, that such warnings be given. Advisory Comm. on Criminal Rules, Minutes of the Advisory Committee on Federal Rules of Criminal Procedure 9 (Apr. 28–29, 2003), available at <http://www.uscourts.gov/rules/Minutes/Min4-2003.pdf> (detailing 5–6 vote that failed to pass “an amendment to Rule 11 that would require the court to inform an alien who is pleading guilty of the possible collateral consequences that might result, i.e., deportation”); see also *United States v. Del Rosario*, 902 F.2d 55, 61 (D.C. Cir. 1990) (Mikva, J., concurring). In his concurrence to *Del Rosario*, Judge Mikva noted:

I would hope that the Rules Committee of the Judicial Conference would consider amending Rule 11 . . . to require a judge taking a guilty plea to inform an alien that pleading guilty might result in deportation—at least when the judge is made aware of the defendant’s alien status before accepting his plea.

Id.

121. *Michel v. United States*, 507 F.2d 461, 466 (2d Cir. 1974); see also *State v. Paredez*, 101 P.3d 799, 803–04 (N.M. 2004) (“Our conclusion that the district court did not err in its admonition to the Defendant does not mean that Defendant’s attorney was relieved from informing him that he almost certainly would be deported if his guilty plea was accepted by the court.”).

A *pro forma* warning from a judge in court also comes too late in the process of a criminal case—namely as a defendant is actually entering the guilty plea—to realistically allow for the individual to integrate this critical new information into his decision.¹²² Still, imposing a duty upon judges to warn might affect defense counsel's behavior, at least with respect to the consequences set out in the advisement statute.¹²³

However, even when state law requires advisement about a collateral consequence, most of those jurisdictions lack an enforcement mechanism for failure to follow the rule. For example, New York state judges accepting a guilty plea to a felony offense must inform a defendant that if he is not a United States citizen, his guilty plea “may result in . . . deportation, exclusion from admission to the United States or denial of naturalization.”¹²⁴ Yet the same statute goes on to say that any failure to follow this advisement law “shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction.”¹²⁵ Several other states also have an explicit bar to plea withdrawal written into their guilty-plea-advisement statutes for immigration consequences.¹²⁶ In other states, courts have found that failure to follow state law requiring pre-plea warnings does not necessarily invalidate the plea.¹²⁷

That “a defendant . . . has little need to hear a ritual recitation of his rights by a trial judge” obviously does not imply the contrary proposition, that a defendant to whom a court has read a *pro forma* advisement . . . cannot profit from competent legal advice about that advisement or concerns it may raise, under the circumstances, for that particular defendant.

In re Resendiz, 19 P.3d 1171, 1178 n.5 (Cal. 2001) (citation omitted).

122. See Manuel D. Vargas, *Immigration Consequences of Guilty Pleas or Convictions*, 30 N.Y.U. REV. L. & SOC. CHANGE 701, 709 (2006) (discussing New York's advisement statute).

123. See, e.g., ME. R. CRIM. P. 11 (allowing judge to adjourn plea proceedings after warning about a particular consequence in order to give the defendant time to consult with his attorney).

124. N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2007).

125. *Id.* (noting how failure to advise shall not “afford a defendant any rights in a subsequent proceeding relating to such defendant's deportation, exclusion or denial of naturalization”).

126. See, e.g., MD. R. 4-242(e) (West 2009) (“The omission of advice concerning the collateral consequences of a plea does not itself mandate that the plea be declared invalid.”); R.I. GEN. LAWS § 12-12-22(a) (2002) (mandating immigration warning but stating that “[f]ailure to so inform the defendant at the arraignment shall not invalidate any action subsequently taken by the court”).

127. See *Commonwealth v. Coffin*, No. 04-P-1296, slip op., 2006 WL 374479, at *2 (Mass. App. Ct. Feb. 17, 2006) (denying defendant's motion to withdraw his guilty plea and noting that “[w]hile compliance with the procedures set out in [the state statute requiring notification of the sexually dangerous persons provision for civil commitment] is mandatory, adherence to or departure from them is but one factor to be considered in resolving whether a plea was knowingly and voluntarily made”); see also *Lopez v. State*, 71 S.W.3d 511, 516 (Tex. Ct. App. 2002) (holding that although sex-offender registration is a “serious” consequence, and Texas court rules require a pre-plea warning to defendants about it, defendant has no right to

In some instances, even the ability to withdraw a plea does not mean that an individual will avoid negative collateral consequences. For example, several statutes mandating advisement about immigration consequences allow for plea withdrawal if a defendant who was not warned can demonstrate that he may face immigration consequences based on the conviction.¹²⁸ Yet the 1996 amendments to federal immigration law deem a plea allocution in a criminal case—where the defendant admits to the underlying facts—sufficient for imposing the relevant immigration consequence. Later withdrawal of the plea does not bar immigration officials from proceeding upon the earlier factual admissions.¹²⁹ This underscores the importance of early, comprehensive warnings about collateral consequences of guilty pleas.

While state statutes and rules of criminal procedure have come a long way in recognizing the need for more thorough warnings about particular consequences (even if they are deemed collateral), they still account for only about half of the jurisdictions in the United States. In addition, most of these jurisdictions require warnings only about immigration consequences.¹³⁰ In most instances, even the immigration advisement law is

withdraw his plea for failure to receive this warning because his “substantial rights were not affected by the trial court’s failure to comply”).

Some states do explicitly allow for plea withdrawal for failure to follow an advisement rule. *See, e.g.*, MASS. GEN. LAWS ch. 278, § 29D (2008) (stating that if the court fails to advise about immigration consequences, and if the defendant can later “show[] that his plea and conviction may have or has had one of the enumerated consequences,” the court “shall . . . permit the defendant to withdraw the plea of guilty”); WIS. STAT. ANN. § 971.08 (1)–(2) (West 2008) (requiring trial court to advise about immigration consequences and allowing plea withdrawal upon failure to warn with showing that plea is “likely to result in the defendant’s deportation, exclusion from admission to this country or denial of naturalization”); *State v. Douangmala*, 646 N.W.2d 1, 10 (Wis. 2002) (holding that court’s failure to advise about deportation leads to the right to withdraw plea without regard to harmless-error analysis); *Sango-Dema v. District Director, I.N.S.*, 122 F. Supp. 2d 213, 217 (D. Mass. 2000) (noting how state law mandates pre-plea advisement about deportation consequences and how, “[w]ithout such a notice, the court must vacate the plea”) (citation omitted). However, the majority are silent on the issue of remedy for such a violation. *See, e.g.*, N.C. GEN. STAT. § 15A-1022 (2007); TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (Vernon 2006). In these jurisdictions, the likely outcome will be to deny plea withdrawal, particularly with the constitutional backdrop of a rule allowing silence.

128. *See, e.g.*, R.I. GEN. LAWS § 12-12-22(c) (2002) (allowing a defendant to withdraw a plea after showing that he was not warned and will face immigration consequences).

129. 8 U.S.C. § 1101(a)(48)(A)(i) (Supp. 1997); *see also* *Commonwealth v. Villalobos*, 777 N.E.2d 116, 119–20 (Mass. 2002) (describing how Villalobos would be subject to deportation under federal immigration law based on admission to the underlying facts of the crime, despite fact that court would dismiss all charges upon satisfaction of certain conditions); Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 320–24 (1997) (describing a situation where a defendant is not convicted under state law but is seen as convicted—and thus deportable—under federal immigration law).

130. *See supra* notes 116–20 and accompanying text (listing the few states that require warnings for consequences other than immigration).

basically aspirational. The individual who was not advised, despite state mandate, generally has no remedy within the criminal case.

In short, state laws and rules currently do not do enough to encourage criminal defense lawyers to impart adequate information to their clients who face the possibility of collateral consequences of a criminal conviction. The inadequacy and unenforceability of state law and rules is combined with a constitutional structure in the lower courts that fosters silence. For these reasons, it is critical that the Supreme Court in *Padilla* incorporate these evolving norms of state and local practice into effective assistance constitutional jurisprudence.¹³¹

3. Professional Discipline Under State Ethics Codes

Criminal defense attorneys, like all lawyers admitted to practice in a jurisdiction, are subject to the disciplinary authority of that jurisdiction under its rules of professional conduct. Almost all jurisdictions, pursuant to their high court's inherent authority to regulate its Bar,¹³² have adopted a version of the American Bar Association's Model Rules of Professional Conduct.¹³³ These state ethics codes provide only general guidance for attorney behavior, and unlike some professional standards, state codes do not explicitly address a duty to inform clients about collateral consequences of criminal convictions.¹³⁴ A number of provisions, however, could certainly be interpreted to require such warnings, including the duties to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation";¹³⁵ to stay current on the law;¹³⁶ and of competent representation requiring "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation";¹³⁷ as well as the admonition that a lawyer "may refer not

131. See *infra* notes 172–74 and accompanying text (discussing how effective-assistance jurisprudence uses professional standards and other sources in determining what constitutes competent attorney behavior under the first prong of *Strickland*'s effectiveness test).

132. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (referring to inherent power of federal courts to regulate and discipline those who appear before them).

133. MODEL RULES OF PROF'L CONDUCT (2004). Only California follows another model. CALIFORNIA RULES OF PROF'L CONDUCT (2009), available at http://calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf; see also Am. Legal Ethics Library, Topical Overview, Index of Narratives, <http://www.law.cornell.edu/ethics/comparative/index.htm#1.1> (last visited Nov. 11, 2009) (listing adoption status of Model Rules by state).

134. See *infra* Part III.B.4 (discussing professional standards). However, professional standards such as the American Bar Association's Defense Function Standards "have been relied upon extensively by courts, by state and local bar ethics committees, and by state and local lawyer disciplinary agencies in assessing the appropriate role of criminal defense counsel in particular problematic situations." BURKOFF, *supra* note 107, § 1:5.

135. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2004).

136. R. 1.1 cmt. 6 ("To maintain the requisite knowledge and skill, a lawyer should . . . engage in continuing study and education . . .").

137. R. 1.1. Comment 2 to Rule 1.1 further states:

only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."¹³⁸

The issue of affirmative misadvice arose in at least one disciplinary proceeding. Defense attorney Steven Black came before the Oregon State Bar Association's Disciplinary Board on charges of ethical-code violations for his representation of clients in three separate criminal cases.¹³⁹ One of those cases involved felony drug charges where Black negotiated a plea agreement for a non-citizen client, failed to conduct adequate research into the immigration consequences of the proposed plea, and then erroneously advised the client that the conviction would not result in deportation.¹⁴⁰ The Board found Black "guilty of ineffective and imprecise representation of his clients [and] . . . negligence."¹⁴¹ He thus violated state disciplinary rules requiring "competent representation" to a client and requiring that lawyers refrain from "[e]ngag[ing] in conduct prejudicial to the administration of justice."¹⁴² These violations, combined with various others in two other criminal cases in which Black served as defense counsel, led the Board to impose a one-year suspension from practice.¹⁴³ Black's client, however, was deported,¹⁴⁴ and thus obviously received no relief from the disciplinary proceeding. Indeed, even an admitted violation of state ethical rules will not assure a finding of ineffective assistance of counsel with the remedy of plea withdrawal.¹⁴⁵

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. . . . A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Id. cmt. 2.

138. R. 2.1. While most collateral consequences cannot be categorized as non-legal, there are some that are not located in state or federal law or local regulation. For example, a person who pleads guilty to misdemeanor theft may not be statutorily barred from particular employment, but might live in an area where the local employers' practice is to require "voluntary" fingerprinting of all prospective employees. Under this particular ethical canon, a conviction's effects on that individual's economic well-being should be a factor that a criminal defense attorney is aware of and includes in counseling about the consequences of any guilty plea.

139. *In re* Black, 21 Disciplinary Bd. Rptr. 6, 6–18 (Or. 2007), available at http://www.osbar.org/_docs/dbreport/dbr21.pdf.

140. *Id.* at 14.

141. *Id.* at 15.

142. *Id.* at 7, 16–18.

143. *Id.* at 18.

144. *Black*, 21 Disciplinary Bd. Rptr. at 16.

145. *See, e.g.*, *United States v. Nickerson*, 556 F.3d 1014, 1018–20 (9th Cir. 2009) (finding that defense counsel's admitted ethical code violation, namely contacting a witness she knew to be represented after the witness's attorney told her not to speak with the witness, did not constitute per se ineffective assistance; nor did it constitute ineffective assistance under the

It is difficult to disaggregate the affirmative-misadvice violation from the serious violations in the other two cases in *Black*. However, it is clear that the incompetence and negligence findings arose directly from *misadvice*. Under prevailing federal constitutional standards of advisement about collateral consequences, there would have been no violation if Black had said nothing to his non-citizen client about the immigration consequences of the guilty plea.¹⁴⁶

One commentator noted that “effective assistance of counsel is simply a floor that undergirds the minimum level of competence necessary to pass constitutional muster” and “defense attorneys should look to both their lawyering role and to ethical norms to guide their obligations pertaining to collateral consequences.”¹⁴⁷ Although attorneys are bound to conform their behavior to these state codes, the rules in many instances prove only as effective as the strength and likelihood of their enforcement mechanism. In theory, a criminal defense attorney’s violation of any of the rules could lead to a state bar association proceeding to address the alleged misconduct, with potential sanctions ranging from “no action,” to private reprimand, to disbarment.¹⁴⁸ In reality, the likelihood of such a proceeding or any real sanction is remote. The Oregon proceeding notwithstanding, “not one jurisdiction seems actively to use the disciplinary process to protect criminal defendants from incompetent criminal defense representation.”¹⁴⁹ Even in

traditional two-prong test, because Nickerson failed to demonstrate that the ethical violation prejudiced him).

146. See *supra* Part II.B (discussing how lack of advice is allowed but affirmative misadvice is not). Under Oregon state constitutional law, the result may have been different. This is because Oregon is in the small minority of jurisdictions that require defense counsel to affirmatively warn clients about the deportation consequences of any guilty plea. See *Gonzalez v. State*, 134 P.3d 955, 958 (Or. 2006); see also OR. REV. STAT. § 135.385(2)(d) (2007) (requiring a judge accepting a guilty plea to inform non-citizen defendants that conviction of a crime may lead to deportation and other immigration consequences). However, the Oregon rule applies only to immigration consequences; state constitutional law does not require advisement about other serious collateral consequences. See, e.g., *Rodriguez-Moreno v. State*, 208 Or. App. 659, 664 (2006) (finding defense counsel provided constitutionally adequate assistance despite failing to inform the defendant, prior to a guilty plea, that the guilty plea would require mandatory sex-offender registration).

147. Pinard, *supra* note 112, at 1082–83.

148. See, e.g., JOINT COMM. ON PROF'L SANCTIONS, STANDARDS FOR IMPOSING LAWYER SANCTIONS §§ 2.2–8 (2005), available at http://www.abanet.org/cpr/regulation/standards_sanctions.pdf (setting out potential sanctions); see also MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (2004) (“A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs.”). In addition, the Rules provide that “[a] lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.” *Id.*

149. See generally Duncan, *supra* note 107, at 43 (noting how in the majority of jurisdictions, criminal defense lawyers rarely face any disciplinary sanction where a former client claims ineffective assistance of counsel); see also Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 1 (2007) (noting that state disciplinary agencies formally

the most egregious instances of professional misconduct in criminal cases, state bar associations seem loathe to recommend any meaningful sanction.¹⁵⁰

Finally, because professional discipline does not lead to the ability to withdraw a plea for the misinformed defendant in the criminal case, defendants have relatively little incentive to seek such sanctions against their former attorneys. This leaves enforcement of professional standards governing defense counsel to the judge and the prosecutor. As these two institutional actors often work on a repeat basis with defense lawyers, and could themselves be subject to disciplinary scrutiny from such lawyers, there may be strong cultural resistance to the idea of such enforcement.

4. Professional Standards

A number of organizations, ranging from the American Bar Association (“ABA”) and the National Legal Aid and Defender Association (“NLADA”) to county bar associations and statewide defender offices, have promulgated professional standards for criminal-law practice. Many of those relating to defense practice appear in a *Compendium of Standards for Indigent Defense Systems* that the U.S. Department of Justice commissioned to present “national, state, and local standards relating to five major aspects of indigent defense.”¹⁵¹

Some professional standards speak directly to the issue of advisement about collateral consequences. Such standards are relatively new and continue to develop as the Bar becomes more aware of the existence and effect of the myriad collateral consequences of criminal convictions scattered throughout local, state and federal codes and regulations. Most notably, in 2003, the ABA added the *Collateral Sanctions and Discretionary Disqualification of Convicted Persons* (“the 2003 Standards”) to its *Standards for Criminal Justice*.¹⁵² Unfortunately (and perhaps not purposely), while the

sanction only about 5600 lawyers per year, despite receiving more than 125,000 lawyer discipline complaints per year).

150. See Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 487 (2009) (“On the relatively rare occasion that an errant lawyer receives some form of professional discipline, that form is likely to be the gentlest arrow in the quiver: the admonition or private reprimand.”); see also Duncan, *supra* note 107, at 43.

151. INST. FOR LAW & JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS (Neal Miller & Peter Ohlhausen eds., 2000), available at <http://www.mynlada.org/defender/DOJ/intro.htm>.

152. STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS pts. I–III (3d ed. 2004); see also Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1727 (2003) (stating that the “new ABA Standards on Collateral Sanctions and Discretionary Disqualification are the first effort since the 1970s to address the collateral legal consequences of a conviction in a coherent and comprehensive fashion”). This section focuses on the ABA Standards because it is to those—along with other, non-standard-based practices such as local custom—that the Supreme Court has turned in determining the

2003 Standards have evolved with respect to certain aspects of collateral consequences, they have in other ways weakened both defense counsel's and the court's duty to warn defendants about collateral consequences during the guilty-plea process.

For example, the ABA's 1999 *Standards For Criminal Justice: Pleas of Guilty* ("the 1999 Standards") explicitly include a duty to warn defendants about the collateral consequences of any criminal conviction.

[T]he court *should* . . . advise the defendant that by entering the plea, the defendant may face additional consequences *including but not limited to* the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant's immigration status. The court *should* advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea.¹⁵³

The 2003 Standards appear to dilute this advisement standard in two ways: (1) they distinguish between "collateral" and "discretionary" sanctions, and require warnings only about the former; and (2) they change the manner in which the trial court may discharge its duty to warn defendants, moving from a direct warning to the defendant to a confirmation on the record that defense counsel has, to the extent possible, warned the defendant.

The first way that the 2003 Standards dilute the duty to advise from the 1999 Standards is by narrowing the list of consequences to which the duty now applies. The 1999 Standards provided a non-inclusive list which called

prevailing professional norms for competent defense-counsel behavior when analyzing ineffective-assistance-of-counsel claims. *See infra* notes 172–74 and accompanying text (discussing incorporation of ABA Standards into constitutional jurisprudence). Other standards, however, also address defense counsel's duty to warn about collateral consequences. For example, the National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation's Blackletter Standards state that "[c]ounsel should be familiar with direct and collateral consequences of the sentence and judgment, including: . . . (8) deportation; (9) use of the conviction for sentence enhancement in future proceedings; (10) loss of civil rights; (11) impact of a fine or restitution and any resulting civil liability; [and] (12) restrictions on or loss of license." PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 8.2(b) (Nat. Legal Aid & Defender Ass'n 1995); *see also id.* § 6.2(a) ("In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of: (1) the maximum term of imprisonment and fine or restitution that may be ordered, . . . [and] (3) other consequences of conviction such as deportation, and civil disabilities."); *id.* § 6.3(a) ("Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement, and the advantages and disadvantages and the potential consequences of the agreement.").

153. *See* STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-1.4(c) (3d ed. 1999) (emphases added).

for warnings, as noted above, about consequences that touched on property loss, civil rights, benefits, immigration, and enhanced punishment. Under the 2003 Standards, the duty to warn applies only to “collateral sanctions,” not discretionary sanctions. The 2003 Standards define “collateral sanction” as “a legal penalty, disability or disadvantage, however denominated, that is imposed on a person *automatically* upon that person’s conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence.”¹⁵⁴ The 2003 Standards strive to require that a defendant be “fully informed, before pleading guilty and at sentencing, of the collateral sanctions applicable to the offense(s) charged.”¹⁵⁵

Outside of this small group of consequences are the non-automatic, or “discretionary disqualifications,” defined in the 2003 Standards as “a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to conviction.”¹⁵⁶ There is no duty to warn defendants of these consequences in the 2003 Standards. In short, under the 2003 Standards there is no duty to warn a defendant about most consequences before he enters a plea of guilty because the majority of collateral consequences—even the most serious—

154. STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-1.1(a) (emphasis added). This definition is quite close to the constitutional jurisprudence’s prevailing definition of “direct” consequence. *See, e.g.,* Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973) (“The distinction between ‘direct’ and ‘collateral’ consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.”). The difference is that the ABA definition encompasses even those sanctions “not included in the [penal] sentence.” STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-1.1(a). For further explanation of the difference between “collateral sanction” and “discretionary disqualification,” see Symposium, *ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons: Black Letter with Commentary*, 36 U. TOL. L. REV. 441, 441 (2005).

155. *See* STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-1.2(a) (iv).

156. *Id.* § 19-1.1 (b). As one report explains:

If a medical licensing board by law, regulation or policy “must” deny a license to an applicant with a felony conviction, then it is a collateral sanction, because the effect is automatic. If a medical licensing board “may” deny a license to those with felony convictions, then the regulation or policy is a “disqualification.”

UNIF. COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT § 2 cmt. (Discussion Draft 2006), available at <http://www.law.upenn.edu/bll/archives/ulc/ucsada/2006MarchMtgDraft.pdf>. For an important critique of the ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons from the perspective of holistic defense, see McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 493 (2005).

fall outside the definition of “collateral sanction.”¹⁵⁷ This includes the highly severe consequence of civil commitment as a “sexually violent predator,” which entails a structured process that would place it in the non-“automatic” category.¹⁵⁸

The second way the 2003 Standards dilute the duty to advise about collateral consequences is by displacing the burden—from a direct mandate for the judge, to an indirect task for defense counsel.¹⁵⁹ The 1999 Standards recommended that the judge advise the defendant directly; the relevant section refers to defense counsel only to state that the judge should suggest that the defendant “consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea.”¹⁶⁰ Under the 2003 Standards, the judge’s duty to advise about collateral sanctions may be satisfied merely “by confirming on the record that defense counsel’s duty of advisement under [the 1999 *Standards for Criminal Justice: Pleas of Guilty*] has been discharged.”¹⁶¹ The 1999 Standards state that “[t]o the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to

157. It seems that the ABA drafters had immigration consequences—specifically, deportation—in mind when they drew the “collateral sanction”–“discretionary disqualification” distinction in 2003. Many have argued that, due to the 1996 and later amendments to immigration law, deportation for those convicted of certain crimes is automatic. *See Francis, supra* note 102, at 709 (noting how, under 1996 immigration-law amendments, “a host of deportation consequences to guilty pleas are certain and almost automatic”).

158. Notably, consequences for convicted sex offenders are not expressly listed anywhere in the text of the various ABA Standards. The only mention of civil commitment in the text of the Criminal Justice Standards is in the mental-health section, but this refers to the commitment of convicted individuals in lieu of—and not after having served—the criminal sentence. *See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS* § 7-10.5 (1989). There is mention of sexual offenses more generally in other standards’ commentary.

159. This is not to say that the court is better equipped than defense counsel to warn a defendant about relevant consequences. Indeed, the opposite is true. *See supra* note 121 and accompanying text (describing how some courts have commented on how attorneys are in the best position to inform defendants about consequences). But defense counsel’s warnings will usually (and should) take place outside of the courtroom. The judge’s on-the-record warnings, as set out in the various standards, should be a safety valve, a check on counsel’s effective-assistance duties. If this is bootstrapped back to defense counsel, then it cannot serve its purpose of catching incompetent warnings about consequences and ensuring knowing and voluntary guilty pleas.

160. *STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY* § 14-1.4(c) (3d ed. 1999). Another 1999 Standard speaks to counsel’s duty to warn her client about collateral consequences. *Id.* § 14-3.2(f).

161. *STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS* § 19-2.3(a) (3d ed. 2004) (notification of collateral sanctions before plea of guilty). Although the Standards do not speak to the prosecutor’s role directly, they do note that “[t]he prosecuting attorney, in considering a plea agreement, may agree . . . where appropriate, to enter an agreement with the defendant regarding the disposition of related civil matters to which the government is or would be a party, including civil penalties and/or civil forfeiture.” *STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY* § 14-3.1(c), (c) (iv).

the possible collateral consequences that might ensue from entry of the contemplated plea.”¹⁶² Thus, if it is not “possible” for defense counsel to advise a defendant about particular collateral consequences, the duty to advise is discharged under the 2003 Standards so long as the judge confirms this on the record. The 1999 Standards’ commentary urges defense lawyers to be proactive in educating themselves about the various collateral consequences, and notes that it “strives to set an appropriately high standard” with respect to this advisement provision.¹⁶³ However, the commentary also states that “given the ever-increasing host of collateral consequences that may flow from a plea of guilty or *nolo contendere*, it may be very difficult for defense counsel to fully brief every client on every likely effect of a plea in all circumstances.”¹⁶⁴ The 1999 Standards fail to address a prevalent situation—particularly common with misdemeanors and other low-level charges—where an individual is forced to make a quick decision about a plea bargain after meeting his counsel for the first time. Given the trust barriers that many individuals have with a lawyer they have never seen before, the individual is likely to withhold personal information (such as immigration status) necessary for determining serious or likely consequences. Even if this does not happen, given the time constraints imposed by full court dockets and high defense-counsel caseloads, there will be insufficient time at a first appearance to undertake anything but the most cursory explanation of penal consequences. In such a situation, under the 2003 Standards, one could argue that full warnings are not “possible,” and thus, the failures of the system will drive the rule’s interpretation.

In short, while the ABA Standards on counsel’s duty to warn about non-penal consequences have substance, they also have flaws. More importantly, professional standards, standing alone, lack any mechanism to enforce their mandates. Thus, the ABA has described its organization’s often-cited Standards for Criminal Justice as “a considered collection of ‘best practices’ for the criminal justice system, aspirational targets that an experienced group of prosecutors, defenders and judges have agreed upon.”¹⁶⁵ This deficiency is illustrated by what is perhaps the greatest limitation of the 2003

162. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.2(f). Although this Standard (with its vague “to the extent possible” language) sounds rather weak, the commentary reveals a more rigorous intention. The drafters note how courts distinguish between direct and collateral consequences, and consequently require little in the way of warnings. They go on to state that this provision “strives to set an appropriately high standard, providing that defense counsel should be familiar with, and advise defendants of, all of the possible effects of conviction.” *Id.* § 14-3.2(f) cmt. The commentary specifically mentions, as examples, immigration consequences and consequences of drug and sex-offense convictions. *Id.*

163. *Id.*

164. *Id.*

165. Brief Amicus Curiae of the ABA as Amicus Curiae in Support of Petitioner, *Fellers v. United States*, 540 U.S. 519 (2004) (No. 02-6320), 2003 WL 21673769, at *2.

Standards, namely their explicit rejection of guilty-plea withdrawals when counsel breaches his or her duty to advise.¹⁶⁶ This is similar to the many state statutes and court rules that require a warning and then render it essentially toothless by explicitly exempting the only meaningful remedy.¹⁶⁷ As one commentator noted with respect to this provision, “By carving out such large exceptions to its most powerful mandates, the Standards threaten to doom themselves to irrelevance.”¹⁶⁸ The 1999 Standards had no such express anti-enforcement clause, instead remaining silent on any remedy for a violation of the duty to warn.

In the recently approved *Uniform Act on Collateral Consequences of Convictions* (the Act), the National Conference of Commissioners on Uniform State Laws also explicitly disavowed any enforcement mechanism for failure to follow its advisement mandate.¹⁶⁹ In a section entitled “Limitation on Scope,” the Act unequivocally states that it “does not provide a basis for: (1) invalidating a plea, conviction, or sentence; (2) a cause of action for money damages; or (3) a claim for relief from or defense to the application of a collateral consequence based on a failure to comply with [various sections of the Act, including advisement].”¹⁷⁰ In addition, the Act

166. STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-2.3(b) (“Failure of the court or counsel to inform the defendant of applicable collateral sanctions shall not be a basis for withdrawing the plea of guilty, except where otherwise provided by law or rules of procedure, or where the failure renders the plea constitutionally invalid.”).

167. See *supra* notes 124–27 and accompanying text (describing different state statutes).

168. Smyth, *supra* note 156, at 493 (noting how the Standards’ explicit bar on plea withdrawal as a remedy for failure to warn is a “fundamental exception” which “undercuts their power. . . . With this small provision the Standards replicate the most damaging legal distinction between ‘collateral’ and ‘direct’ consequences”).

169. See UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 3 (Draft for Approval 2009) available at http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009am_approved.pdf (draft approved on July 15, 2009: Press Release, Unif. Law Comm’n, New Act Addresses Consequences of Criminal Sentencing (July 15, 2009), <http://www.nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=217>). Although the Act follows the ABA in separating automatic from discretionary consequences, see *id.* § 2, it does not distinguish between these two categories in its advisement section, with the result being that the scope of advisement is much broader than under the ABA. *Id.* §§ 5–6. The Act does limit the types of consequences which require advisement. Perhaps most significantly, it fails to even mention advisement of any type of sexual-offender consequence, such as registration or the possibility of involuntary civil commitment as a “sexually violent predator.” See *id.* (including, in a non-exclusive list, advisement mandates for the possible inability to obtain certain licenses, permits, jobs, public housing or educational resources; the possibility of a higher sentence if convicted of another crime, or governmental taking of property; prohibitions on voting rights and possession of a firearm; and a variety of immigration consequences). Indeed, the Act specifically exempts sexual-offender registration from the list of consequences that would qualify for an Order of Limited Relief or a Certificate of Restoration of Rights under other sections of the Act. See *id.* § 11.

170. *Id.* § 3.

states that it “does not affect . . . the duty an individual’s attorney owes to the individual.”¹⁷¹

Although professional standards on their own may not adequately affect defense-counsel behavior, such standards are also woven into the constitutional landscape. “[The Sixth Amendment] relies . . . on the legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.”¹⁷² In explaining the first prong of the test for ineffective assistance of counsel (attorney-competence inquiry under a reasonableness standard), the Supreme Court stated in *Strickland v. Washington* that “[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.”¹⁷³ Some twenty years later, in another ineffective-assistance case, the Court excerpted *Strickland’s* language to place greater emphasis on those same professional standards: “Counsel’s conduct . . . fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as ‘guides to determining what is reasonable.’”¹⁷⁴

As yet, the Supreme Court has not incorporated professional standards into its norms governing any duty for defense counsel to warn about collateral consequences; indeed, the Court has yet to directly take up the question of such a duty (but may do so in *Padilla*). If the Court were to find such a duty and were it to rely on existing professional standards in articulating that duty, there would be a constitutional enforcement mechanism for such standards through Sixth Amendment jurisprudence. Unless and until the Court acts, however, the current force of the standards is almost non-existent.

171. *Id.*

172. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (noting that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,” and referencing the ABA Standards for Criminal Justice); see also *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (holding that “[c]ounsel’s decision not to expand their investigation . . . fell short of the professional standards that prevailed in Maryland in 1989,” and noting that “standard practice in Maryland in capital cases at the time of Wiggins’ trial included the preparation of a social history report”); *INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001) (noting that “competent defense counsel, following the advice of numerous practice guides, would have advised” the defendant about the immigration consequences of his guilty plea).

173. *Strickland*, 466 U.S. at 688.

174. *Wiggins*, 539 U.S. at 524 (quoting *Strickland*, 466 U.S. at 688). As one commentator noted, discussing how the ABA Standards have been more robustly incorporated into ineffective assistance jurisprudence, “[I]t is . . . a positive development systematically because the acceptance of the Guidelines as professional norms draws lawyers attention to specific duties and tasks which are integral to effective representation.” John H. Blume & Stacey D. Neumann, “*It’s Like Déjà Vu All Over Again*”: *Williams v. Taylor*, *Wiggins v. Smith* and *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127, 159 (2007).

This is not to say that attorneys and defender offices will completely ignore professional standards. Indeed, state bar associations sometimes incorporate them when interpreting binding state ethics rules.¹⁷⁵ However, the current iteration of the rules governing the duty to advise have limited impact because they are narrow, are non-binding, exclude many potentially serious collateral consequences, and lack enforcement potential. Combined with the lower courts' misguided constitutional stamp of approval on silence, these rules and standards do not properly encourage the significant, and much-needed, changes to the current culture of non-advisement about collateral consequences.

The way to give these prevailing standards real meaning is for the Supreme Court to incorporate them into a Sixth Amendment duty to warn.

5. Local Practice and Office Guidelines

In addition to court rules and national professional standards, practitioner behavior is shaped by local practice and office guidelines. For example, certain public-defender systems have written standards that address the duty to advise defendants about collateral consequences as part of the plea-counseling process.¹⁷⁶ These local standards, if there is a cultural acceptance of the practices they endorse, may have a greater influence than national professional standards, with which many attorneys may not be familiar.

Perhaps most important, in terms of the likelihood of influencing behavior, is local practice—specifically, a given jurisdiction's unwritten norms of defense-counsel, prosecutorial, or judicial conduct particular to a certain jurisdiction. For example, court rules in a particular jurisdiction may not require judges to warn defendants about the registration consequences of sex-offense convictions. However, judges in that court may, as a matter of best practice, choose to offer such warnings. Informal local practice regarding collateral consequences is probably most common at certain large defender offices with the ability to devote specific resources to such issues¹⁷⁷

175. See *supra* note 134. But see *supra* notes 148–50 and accompanying text (noting how state disciplinary boards rarely pursue charges against criminal defense attorneys).

176. See, e.g., GA. PUB. DEFENDER STANDARDS, *supra* note 114; LA. PUB. DEFENDERS ASS'N, REFORM: THE LOUISIANA PUBLIC DEFENDER STANDARDS COUNCIL § 6.D(A), (A)(b) (2006), available at <http://www.lapda.org/PDF%20Files/LaPDSC%20Second%20Edition%20Jan%202006%20FINAL.pdf> (“Prior to the entry of the plea, counsel should . . . make certain that the client receives a full explanation of . . . sanctions and collateral consequences the client will be exposed to by entering a plea.”); see also ABA COMM'N ON EFFECTIVE CRIM. SANCTIONS, REPORT TO THE HOUSE OF DELEGATES 1 (2007), available at <http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Report.V.PDF.121306.pdf> (“[T]he American Bar Association urges federal, state, territorial, and local governments to encourage prosecutors to inform themselves of the collateral consequences that may apply in particular cases.”).

177. For example, the Santa Clara Public Defender notes:

or in other offices that pursue a holistic approach to criminal-defense practice.¹⁷⁸ Such high standards of practice are critical in breaking the path to endorsement of those practices in national or state professional standards.¹⁷⁹ These demanding standards also provide an important training component for the attorneys who practice under them, even long after those attorneys leave the particular office or jurisdiction.

However, local practice is uneven, non-binding, and always subject to change. If a public defender's office loses funding, it might, for example, cut back on collateral-consequences training that it had previously supported. In addition, many jurisdictions do not have an organized public defender's office. Instead, they rely on assigned counsel plans, where the jurisdiction pays individual lawyers to represent indigent defendants, or contract bids, where one attorney or group of attorneys handle a large percentage of the cases.¹⁸⁰ In these jurisdictions, there is no institutional defender and the assigned attorneys are dispersed throughout different offices. Without a central office, it is difficult to offer training making defenders aware of collateral consequences and helping them incorporate that knowledge into their practices.¹⁸¹

6. Reputational Effects

Informal regulatory mechanisms for defense-counsel behavior, namely concerns about reputation, are much more likely to influence behavior than the formal approaches described above. On the one hand, most defense lawyers want to offer high-quality representation, which would support

[I]t is important to obtain legal advice from criminal defense counsel and/or immigration counsel regarding the immigration consequences of any pending criminal matter. The Santa Clara County Office of the Public Defender has an immigration attorney that can assist public defender clients in understanding the immigration consequences which may result from a criminal conviction.

County of Santa Clara, Office of the Pub. Defender, Immigration Consequences of Criminal Convictions, <http://www.sccgov.org/portal/site/opd/> (last visited Nov. 11, 2009).

178. See, e.g., MARK STEPHENS, ORIGINS OF THE COMMUNITY LAW OFFICE 19–22 (2008), available at <http://www.pdknox.org/Downloadable/Michigan.zip> (describing holistic representation in Knoxville, Tennessee); The Bronx Defenders, Our Practice, http://www.bronxdefenders.org/?page=content¶m=our_practice (last visited Nov. 11, 2009) (“[H]olistic defense means that clients . . . have one place where they can go for any issue, whether it is a case in a courtroom, a problem with a landlord, or a long-standing mental illness.”).

179. See *supra* notes 172–74 and accompanying text (describing how professional standards and local practice are woven into the constitutional landscape of effective assistance).

180. See *GIDEON'S BROKEN PROMISE*, *supra* note 94, at 2 (describing the three principle ways in which legal services are provided to indigent criminal defendants in the United States).

181. To be sure, there are some important movements to spread the word on these consequences beyond committed defender offices. See, e.g., N.Y. State Defenders Ass'n, Defense Training Calendar, http://www.nysda.org/Training/Training_Calendars/training_calendars.html (last visited Nov. 11, 2009) (listing classes addressing collateral consequences).

counseling regarding non-penal consequences. Related is the desire to avoid a reputation as a corner-cutting lawyer who has not availed himself or herself of the growing opportunities for education about the collateral consequences of criminal convictions.¹⁸² Still, some defense lawyers reject such a holistic approach and accept the more traditional (and still quite prevalent) view that defense counsel need only be an expert in the narrow, immediate criminal case.¹⁸³ In addition to concerns about giving erroneous advice, this limited-expert attitude may lead to silence about collateral consequences. For example, traditional defenders may consider the cost of time that it takes to gain the needed expertise in the particular area, as well as the time needed to discuss the issues with their clients and deem them outside their required service.¹⁸⁴

On the other hand, a concern about reputation in one's relevant community could lead defense lawyers to play it safe and stick closely to the jurisdiction's formal, mandatory rules. The current constitutional standard, the only formal rule binding defense counsel, advocates silence in cases involving collateral consequences.

7. Malpractice

In addition to avenues that could lead to plea withdrawal, a defendant might sue his criminal defense counsel in tort for providing erroneous information about one or more collateral consequences of his criminal conviction. However, such civil malpractice lawsuits pose significant legal and practical hurdles for defendants. One commentator has noted that "criminal malpractice actions are so difficult to win that, for the most part, criminal defense attorneys enjoy special protection from civil liability for substandard conduct."¹⁸⁵

Further, a civil tort remedy—like discipline of a defense lawyer under ethical rules—cannot get a defendant what he really wants: namely, withdrawal of his guilty plea. Available civil remedies do not matter much to a defendant who will be deported or civilly committed as a result of a plea that he entered without awareness of the consequences. Still, similar to the potential label of "ineffective assistance," defense counsel operates to some

182. See *supra* notes 114, 181 (describing examples of such opportunities).

183. See Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 123–24 (2004) (describing the "traditional defender office" as, among other things, "lawyer-driven and case-oriented," where "defenders address themselves primarily to the client's immediate legal needs believing that removing or reducing the imminent threat of incarceration is their function. . . . Once the case is over, so is the relationship with the client—at least until the next arrest.").

184. *But see* Pinard, *supra* note 112, at 1088–90 (recognizing this concern, but noting how counseling about collateral consequences could quickly and fairly easily become an integrated component of client counseling).

185. Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1255 (2003).

extent in the shadow of the malpractice lawsuit. Therefore, tort law may influence counsel's behavior.

The basic claim of professional negligence or malpractice applies in the criminal-defense context.¹⁸⁶ While such claims raise issues of state tort law, which vary from jurisdiction to jurisdiction, some general rules illustrate the potential for a claim of malpractice based on counsel's failure to advise, or counsel's misadvice, about collateral consequences. Counsel "is considered negligent if he fails to exercise the knowledge and the degree of care and skill ordinarily adequate and appropriate to the matter he undertakes to handle."¹⁸⁷ This standard for malpractice is similar, in many respects, to the standard for ineffective assistance of counsel, which requires demonstrating that the attorney performed below accepted norms.¹⁸⁸ As discussed in Part II.A, courts have almost uniformly held that failure to advise about collateral consequences does not constitute ineffective assistance. Since dismissal of a defendant's claim for ineffective assistance for failure to warn will often lead to collateral estoppel of any claim of civil malpractice,¹⁸⁹ courts give defense counsel the message that silence offers immunity from malpractice, whereas advice runs the risk of becoming affirmative misadvice, and therefore the loss of such immunity.

Even if a plaintiff wins a claim of ineffective assistance against his former defense counsel in a post-conviction proceeding, this does not ensure success in a civil claim for malpractice. In some jurisdictions, a guilty plea can foreclose any civil remedy.¹⁹⁰ In many others, a plaintiff must prove his actual innocence on the underlying criminal charges, in addition to attorney negligence, to succeed in the civil case.¹⁹¹ Finally, in some states public defenders and appointed defense counsel may be immune from state tort liability.¹⁹²

186. 7 AM. JUR. 2D *Attorneys at Law* § 213 (2007).

187. 14 AM. JUR. TRIALS 265 (1968).

188. See *supra* note 64 and accompanying text (describing the *Strickland* test).

189. See, e.g., *Zeidwick v. Ward*, 548 So. 2d 209, 214 (Fla. 1989). The *Zeidwick* court held:

[W]here a defendant in a criminal case has had a full and fair opportunity to present his claim in a prior criminal proceeding, and a judicial determination is made that he has received the effective assistance of counsel, then the defendant/attorney in a subsequent civil malpractice action brought by the criminal defendant may defensively assert collateral estoppel.

Id.

190. See Gregory G. Sarno, *Legal Malpractice in Defense of Criminal Prosecution*, 4 A.L.R.5th 273, § 4 (1992) (discussing the effects of a valid guilty plea).

191. See, e.g., *Coscia v. McKenna & Cuneo*, 25 P.3d 670, 672 (Cal. 2001) ("In a legal malpractice case arising out of a criminal proceeding, California, like most jurisdictions, also requires proof of actual innocence."); see also *id.* at 673 (listing various public-policy considerations for an "actual innocence" requirement in malpractice cases).

192. See, e.g., *Morgano v. Smith*, 879 P.2d 735, 736–37 (Nev. 1994) (citing a state statute that holds that a "public defender is immune from suit for malpractice arising out of discretionary

Successful malpractice actions against criminal defense attorneys are rare for the reasons mentioned as well as many others,¹⁹³ but they are not unheard of. To some extent the possibility of defending against such a lawsuit will influence counsel's actions. Against this backdrop, the message to counsel is that they may be liable for malpractice if they misadvise, but collateral estoppel will protect them if they simply fail to advise about any and all collateral consequences.

* * *

The intersection of the collateral-consequences rule and the affirmative-misinformation exception pits norms of good lawyering and transparency for defendants against the strong pull of finality and efficiency, the avoidance of ineffective assistance or some other label, and the unfortunate realities of high-volume criminal practice. It also pits evolving professional standards and court rules against the lagging constitutional rule. With the lower courts' current constitutional stamp of approval on total failures to warn, many defense lawyers, judges, and prosecutors may choose to steer entirely clear of warnings about collateral consequences. In other words, they may choose silence.¹⁹⁴

decisions made pursuant to his or her duties as a public defender" and explaining that the same rule applies to court-appointed counsel). *But see* *Reese v. Danforth*, 406 A.2d 735, 739 (Pa. 1979). The *Reese* court stated:

While the availability of court-appointed counsel to represent indigents is indubitably the public business, we hold that once the appointment of a public defender in a given case is made, his public or state function ceases and thereafter he functions purely as a private attorney concerned with servicing his client.

Id. Federal law does not provide federal public defenders with immunity from a state-law malpractice suit brought by a former client. *Ferri v. Ackerman*, 444 U.S. 193, 205 (1979). In addition, state public defenders do not act "under color of state law" when performing a lawyer's traditional functions, and therefore are not subject to suit under 42 U.S.C. § 1983. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981).

193. For example, civil practitioners may hesitate to accept a malpractice action brought by a former criminal defendant because such actions are both difficult to win and may result in little to no damages. Often, then, defendants must proceed *pro se*. This is particularly onerous for incarcerated defendants. In addition, with prospects for damages limited and with no potential for the remedy the defendant may really want—plea withdrawal—there is often little incentive for defendants to pursue such actions.

194. Imagine a training on the collateral consequences of criminal convictions, organized to educate criminal defense attorneys on the most common non-penal consequences that their clients may face if convicted. The speaker summarizes the effect of various convictions in the areas of immigration, housing, public benefits, family law, and employment. One participant, perhaps concerned because she is not an expert in these other areas, thanks the speaker for the helpful information but then asks: "Do I have to warn all of my non-citizen clients about the potential immigration consequences of any guilty plea? What about housing consequences? What happens if I don't warn them?" The speaker pauses, and then responds as follows: "Well, of course you *should* warn non-citizen clients about possible deportation and of course you *should* warn clients in (or with families in) public housing that certain convictions will jeopardize that. But you should also know that under the current constitutional law of

IV. THE VARIOUS RATIONALES FOR THE AFFIRMATIVE-MISADVICE
EXCEPTION ALSO APPLY TO THE FAILURE TO WARN

Substantial practical problems of interpretation and implementation, discussed in Part II.B, plague the current approach, which differentiates between silence and misinformation. There are also significant doctrinal flaws associated with courts accepting the collateral-consequences rule, both with and without recognition of an affirmative-misadvice exception. This Part first explores those flaws and then weighs the various potential rationales for differentiating between silence and misadvice against the costs of such an approach.

A. *THE BRIGHT LINES OF THE COLLATERAL-CONSEQUENCES RULE AND
AFFIRMATIVE-MISREPRESENTATION EXCEPTION ARE DOCTRINALLY UNSOUND*

The roots of the affirmative-misadvice exception seem to lie in misrepresentations about direct consequences.¹⁹⁵ For example, Carroll Rumery's lawyer told him that he faced a maximum penalty of thirty years if convicted of what the lawyer erroneously interpreted to be three counts in the indictment. In fact, the indictment charged only one crime carrying a maximum penalty of five years. After hearing this incorrect advice about maximum penalties, Mr. Rumery pleaded guilty to the only count charged and was sentenced to the five-year maximum (although he believed at the time that this was significantly below the maximum).¹⁹⁶ Under any definition of "direct consequence," this advice clearly qualified, since it concerned the ability of a trial court to impose a particular sentence. Because of this, the Fifth Circuit found ineffective assistance of counsel

advisement, you might be safer remaining silent, because if you attempt to warn your client and you turn out to be wrong about that particular consequence, you may later be on the receiving end of an ineffective-assistance-of-counsel ruling. There might be other repercussions, such as a malpractice claim if you give erroneous advice. But if you stay silent, you are pretty safe."

Under current Kentucky law, a speaker in that state might say: "You can go ahead and say whatever you want because even advice that's wrong won't be ineffective. Your state criminal-procedure rules probably require the judge to warn the client about immigration consequences, but they don't say anything about housing, and in any case, that's the judge and not you. You should know that there are some professional standards that recommend warnings on various consequences, but not all of them, and in any case, these are not binding on you."

195. See *People v. Ensor*, 149 N.E. 737, 738–39 (Ill. 1925) (recognizing rule that whether defendant can withdraw guilty plea is discretionary with the trial court with some exceptions, including "[w]here it appears that a plea of guilty was entered through a misapprehension of the facts or the law"); *People v. Bonheim*, 138 N.E. 627, 628 (Ill. 1923) (examining Bonheim's claim that he was misled into believing that a guilty plea would lead to a sentence of probation and noting that "where it appears that the plea of guilty was entered through a misapprehension of the facts or the law, or in consequence of misrepresentation by his counsel or the state's attorney . . . the court should permit the withdrawal of the plea of guilty").

196. *United States v. Rumery*, 698 F.2d 764, 766 (5th Cir. 1983).

leading to an involuntary and unknowing guilty plea, which Rumery was allowed to withdraw.¹⁹⁷

The more recent misadvice decisions, however, branch over into consequences already labeled “collateral” by the courts. These decisions evince a perfectly understandable concern about allegations of officers of the court misinforming defendants about something as severe—and as critical to the process of deciding whether to enter a guilty plea—as deportation. One judge expressed this concern by stating that “[c]ounsel who gives erroneous advice [about deportation] to a client which influences a felony conviction is worse than no lawyer at all.”¹⁹⁸

Yet these same jurisdictions rely on the collateral-consequences rule and have thus chosen to draw a bright line between direct and collateral consequences with respect to defense counsel’s duty to warn. Working from (but not agreeing with) this strict categorization, it is doctrinally inconsistent for these same courts to blur the bright line and find that erroneous information about collateral consequences violates the relevant constitutional norms. For example, the consequences of enduring potential lifetime civil commitment or deportation with separation from home, family, and livelihood are “collateral,” if one accepts the widespread, prevailing definition of that term.¹⁹⁹ Yet if a defendant received no information or erroneous information about these severe consequences prior to pleading guilty, he did not have the necessary and accurate information to make a truly informed and intelligent plea. In both situations, the person still faces the same consequence. The only factor that has changed is the actual “collateral” information that flowed from the defense lawyer, the court, or the prosecutor to that person. Instead of a total lack of information, the defendant now has erroneous information.

The *Russell* and *Roberti* decisions, discussed in the Introduction and Part II, respectively, illustrate this predominant and doctrinally inconsistent approach. They deemed misadvice about collateral consequences during the guilty-plea process a potential constitutional violation, but did not deem a total failure to warn as such.²⁰⁰ This approach is not flawed because of the misadvice exception, but rather fails at its inception, with acceptance of the flawed collateral consequences doctrine and its indefensible bright line in

197. *Id.* (finding ineffective assistance of counsel where “[c]ounsel erroneously advised defendant that he was charged with three separate counts and could receive a prison term of thirty years,” and stating that “[a]ppellant’s guilty plea, based as it was upon the erroneous expectation that it reduced his maximum potential sentence from thirty years to five years, was not knowingly and intelligently made”).

198. *Commonwealth v. Padilla*, 253 S.W.3d 482, 485 (Ky. 2008) (Cunningham, J., dissenting), *cert. granted*, 129 S. Ct. 1317 (2009).

199. *See supra* note 154 (discussing the Fourth Circuit’s often-cited definition)

200. It is a potential violation because of the prejudice requirement for ineffectiveness claims. *See supra* note 21 (describing prejudice-prong test).

an area of law—effective assistance of counsel—that is instead fact sensitive.²⁰¹

At first blush, the Kentucky Supreme Court’s recent decision in *Commonwealth v. Padilla* appears to offer a rare example of a doctrinally consistent approach to the rule and its exception in the context of defense-counsel warnings.²⁰² However, closer examination of the case reveals both doctrinal failure and a disturbing lack of concern with the message the court’s approach sends to defense lawyers. Jose Padilla lived in the United States for decades and served in the military during the Vietnam War before he pleaded guilty to marijuana trafficking and received a sentence of five years in prison followed by probation.²⁰³ In a short opinion, the court rejected Padilla’s claim that due to his attorney’s misadvice—namely, that he would not be deported based upon his guilty plea because he had been in the United States for so many years—he received constitutionally ineffective counsel and should be able to withdraw his plea. The court cited its previous decision in *Commonwealth v. Fuartado*, “which determined that collateral consequences are outside the scope of representation required by the Sixth Amendment and that failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.”²⁰⁴ *Padilla* then extended this analysis one step further, finding that:

[I]t follows that counsel’s failure to advise Appellee of such collateral issue or his act of advising Appellee incorrectly provides no basis for relief. In neither instance is the matter required to be addressed by counsel, and so an attorney’s failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*.²⁰⁵

In short, the court decided it was “too bad” for Mr. Padilla—whose lawyer, after all, didn’t have a duty to discuss deportation with him in the first place.

Padilla is one of only a few decisions taking the approach that consequences deemed collateral remain so even when the defendant’s own attorney gives erroneous advice about them.²⁰⁶ The court’s adherence to the

201. See *infra* notes 211–14, 246 and accompanying text (discussing *Strickland*’s insistence on review of the particular facts of each claim of ineffectiveness).

202. *Padilla*, 253 S.W.3d 482.

203. *Id.* at 483.

204. *Id.* (citing *Commonwealth v. Fuartado*, 170 S.W.3d 384, 386 (Ky. 2005)).

205. *Id.* at 485.

206. See *supra* note 11 and accompanying text (discussing how the U.S. Supreme Court has granted certiorari in *Padilla*). Another such case was *United States v. Parrino*, where the defense lawyer, a former Commissioner of Immigration, signed an affidavit admitting that he gave Parrino erroneous advice about deportation. *United States v. Parrino*, 212 F.2d 919, 921 (2d Cir. 1954). Despite this, and despite noting “the terrific impact on the defendant’s life and family of the collateral consequence of deportation,” *id.* at 922, and conceding that deportation

bright line dividing direct from collateral makes the decision appear consistent. Closer examination of *Padilla's* and *Fuortado's* reasoning, however, reveals the Kentucky approach's doctrinal flaws. In *Fuortado*, the court noted that other jurisdictions categorized deportation as a collateral consequence and thus found no duty for defense counsel to warn about it.²⁰⁷ It then explored two interrelated reasons "behind these opinions": (1) "that a defendant's Sixth Amendment right to counsel encompasses *criminal* prosecutions only, and does not extend to requiring counsel on collateral consequences that may result from such proceedings"; and (2) "The constitutional requirement of effective assistance of counsel, therefore, extends to and encompasses only those activities which tend to protect a criminal defendant's right to a fair and intelligent determination of guilt or innocence."²⁰⁸ Neither line of reasoning withstands scrutiny.

While it is true that the Sixth Amendment does not extend to civil proceedings,²⁰⁹ the court's first reason is flawed. When a criminal defense lawyer warns a client about collateral consequences of a criminal conviction, it does not mean that lawyer is representing the client in the non-criminal matter. The warning comes in the context of a lawyer counseling her client about the pros and cons of pleading guilty versus going to trial in the criminal case. This counseling seeks to give an individual the information that *the individual* decides (along with counsel) that he needs to make an informed decision, and it is squarely within the ambit of the Sixth Amendment.²¹⁰ Courts cannot simply pluck moments of that critical conversation out of the sphere of the Sixth Amendment.

rested on the fact of the conviction, the Second Circuit deemed Parrino's deportation collateral. *Id.* Technically, the court held that under Federal Rule of Criminal Procedure 32(d), governing plea withdrawals in federal court, Parrino failed to show "manifest injustice." *Id.* However, the Second Circuit recently found that misadvice about deportation could constitute ineffective assistance of counsel, effectively overruling *Parrino*. See *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002) ("[A]n affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable."). Kentucky courts have begun to cite the *Padilla* decision in denying claims involving misadvice. See, e.g., *Cowherd v. Commonwealth*, No. 2008-CA-000835-MR, 2009 WL 1636360, at *2-3 (Ky. Ct. App. June 12, 2009) (discussing *Padilla* in denying Cowherd's claim that his counsel misadvised him about state law that required Cowherd to serve eighty-five percent of his sentence before becoming eligible for parole, despite the fact that counsel testified at an evidentiary hearing that had he known the law, "he strongly believed he would not have advised Cowherd to enter his plea").

207. *Commonwealth v. Fuortado*, 170 S.W.3d 384, 386 (Ky. 2005).

208. *Id.*

209. See *Lassiter v. Dep't of Soc. Services*, 452 U.S. 18, 25-27 (1981) (noting "the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom").

210. See *Patterson v. LeMaster*, 21 P.3d 1032, 1036 (N.M. 2001) ("Effective assistance of counsel is necessary during plea negotiations because the most important decision for a defendant in a criminal case is generally whether to contest a charge or enter into a plea agreement.").

The second reason is also flawed on several grounds. The touchstone for the right to effective assistance is the right to a fair adjudication,²¹¹ but the Supreme Court has never held that only conversations about guilt or innocence are constitutionally required when an attorney counsels a client about the case against him. Rather, the Court has been careful to note that “specific guidelines” are not appropriate in determining whether “counsel’s representation fell below an objective standard of reasonableness.”²¹² In evaluating reasonableness, the Court relies instead on prevailing professional norms.²¹³ Indeed, *Fuortado* recognized that in the guilty-plea context, the right to a just determination “is extended to include investigating and advising the criminal defendant on all aspects of the plea and the direct consequences thereof.”²¹⁴ *Fuortado* went on to state that this encompassed “the sufficiency of the evidence supporting the plea, the availability of substantial defenses, the loss of several fundamental constitutional rights, and the punishment that may be imposed by the trial court.”²¹⁵ Yet not all items on this list go directly to guilt or innocence. For example, knowledge that a guilty plea could result in a certain number of years in prison does not speak to guilt or innocence, but rather to the recognition that an individual facing criminal charges needs the assistance of counsel to understand this important information.²¹⁶ Along with just adjudications, a core purpose of the right to effective assistance is ensuring that an individual makes a voluntary, informed decision about whether to plead guilty. Sixth Amendment jurisprudence has never attempted to delineate items that would or would not fit that purpose, choosing instead to examine the particular facts and circumstances of the case.

Additionally, the second *Fuortado* rationale incorrectly relied on case law applying the Fifth Amendment and overlooked relevant Sixth Amendment Supreme Court precedent. *Fuortado* cited the Supreme Court case of *Brady v. United States* in support of its bright-line finding that

211. *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“[T]he purpose of the effective assistance guarantee of the Sixth Amendment is . . . to ensure that criminal defendants receive a fair trial.”); see also *Hill v. Lockhart*, 474 U.S. 52, 56–57 (1985) (stating that the right to counsel applies in the context of guilty pleas).

212. *Strickland*, 466 U.S. at 688.

213. *Id.*; see also *supra* notes 172–74 and accompanying text (explaining how courts rely on professional standards).

214. *Commonwealth v. Fuortado*, 170 S.W.3d 384, 386 (Ky. 2005).

215. *Id.*

216. See *Brady v. United States*, 397 U.S. 742, 748 n.6 (1970) (noting “[t]he importance of assuring that a defendant does not plead guilty except with a full understanding of the charges against him and the possible consequences of his plea”); see also Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CAL. L. REV. 471, 504–05 (1978) (explaining the requirement that the defendant be informed of possible sentence before pleading guilty “does not help him in assessing his own guilt or innocence,” but rather can be explained by “the defendant’s interest in being given the information he needs in order to choose what is ‘best for himself’”).

counsel's constitutional role in advising defendants about guilty pleas extends only to "the direct consequences thereof."²¹⁷ However, *Brady* examined a claim of a Fifth Amendment due-process violation and resulted in the Court "holding that Brady's plea was not compelled even though the law promised him a lesser maximum penalty if he did not go to trial."²¹⁸ Brady brought no Sixth Amendment claim before the Court; indeed, the decision found that Brady "had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty."²¹⁹ Furthermore, no issue involving collateral consequences was before the Court in *Brady*. When the Court confronted a claim of an invalid guilty plea based on pre-plea misadvice from defense counsel about a collateral consequence in *Hill v. Lockhart*, it ignored *Brady*'s Fifth Amendment voluntariness test and instead applied *Strickland*'s two-pronged Sixth Amendment test.²²⁰ This cuts squarely against *Fuortado*'s and *Padilla*'s claim that examination of counsel's failure to warn or misadvise about a collateral consequence does not fall within the Sixth Amendment. In short, the Kentucky decisions got the law wrong.

A third flaw in the Kentucky courts' reasoning is that both decisions completely ignore the reality of criminal practice, which often does take collateral consequences into account in both plea bargaining and sentencing. The former President of the National District Attorneys Association wrote that prosecutors "must consider [collateral consequences] if we are to see that justice is done" and asked: "How can we ignore a consequence of our prosecution that we know will surely be imposed by the operation of law?"²²¹ As criminal-defense practitioners who incorporate their knowledge about collateral consequences into their plea negotiations know, prosecutors are increasingly aware of the plethora of collateral consequences of criminal convictions. They also know that prosecutors may be amenable to taking applicable consequences into account when negotiating the punishment aspect of a plea bargain or offering a bargain that, in the appropriate case, allows a person to avoid an unjustly harsh collateral consequence.²²² The San Francisco Public Defender has noted:

217. *Fuortado*, 170 S.W.3d at 386.

218. *Brady*, 397 U.S. 742, at 754. For a critique of the doctrinal origins of "direct consequences" language in *Brady*, see Roberts, *supra* note 15, at 684–89.

219. *Brady*, 397 U.S. at 754.

220. *Hill v. Lockhart*, 474 U.S. 52, 57–60 (1985).

221. Robert M.A. Johnson, *Message from the President*, PROSECUTOR, May–June 2001, at 5, 5.

222. See, e.g., Smyth, *supra* note 156, at 494–95. Smyth states:

[P]rosecutors and judges respond best to consequences that offend their basic sense of fairness—consequences that are absurd or disproportionate or that affect innocent family members. Four major categories of hidden punishments provide the most leverage: (1) housing (loss of public housing or Section 8 housing); (2) employment (loss of a job or employment license, particularly for the primary breadwinner); (3) student loans; and (4) immigration.

“[My] office regards a defendant’s immigration status as an important factor to be considered in determining the appropriate plea bargain for one’s client.” Accordingly, the . . . office imposes on its staff attorneys, under its “Minimum Standards of Representation,” the duty to ascertain “what the impact of the case may have on [the client’s] immigration status in this country.”²²³

Similarly, judges may agree to accept a negotiated bargain if made aware of the collateral consequences that entered into the cost–benefit analysis for both the defense and prosecution. Judges will also directly consider non-penal consequences in determining appropriate punishment.²²⁴

Finally, as noted in the Introduction, a rule that allows for both silence and misadvice about collateral consequences sends the worst sort of message. It tells defense lawyers they can fail to inform their client about consequences that might significantly affect their client in major aspects of his life. At the same time, it tells lawyers that if they do attempt to warn their clients about collateral consequences, then there is no need to take much care in investigating the particular consequence at issue because any erroneous information they offer—no matter how egregious the error or consequential the results—is not of constitutional significance. Worse, this allows a defense lawyer to induce a plea that the lawyer wanted the client to take (for reasons of efficiency, time management, etc.) by giving the client false information that convinces him that a particular collateral consequence will not come to pass as a result of the plea.²²⁵

The New Mexico Supreme Court, applying federal constitutional law in *State v. Paredes*, also treated defense counsel’s silence the same as misadvice.²²⁶ However, it arrived at the opposite conclusion from *Padilla*. As described in Part III.A, *Paredes* held defense counsel has a Sixth Amendment duty to affirmatively, and correctly, advise clients about the immigration consequences of any guilty plea.²²⁷ The court thus applied *Strickland*’s two-part ineffective-assistance test to *Paredes*’s claim of misadvice by his defense attorney.²²⁸ The way in which *Paredes* applied the test, however, is somewhat unique. *Paredes* first made an interesting move when it joined the Second

Id.

223. *People v. Soriano*, 240 Cal. Rptr. 328, 335 (Cal. Ct. App. 1987) (alteration in original) (citing an amicus brief from the San Francisco Public Defender).

224. *See Chin & Holmes, supra* note 49, at 722–23 (describing various ways in which judges can and do take collateral consequences into account in sentencing determinations).

225. *See* note 12 and accompanying text (quoting *Padilla* Petition for Certiorari). While one would certainly hope that such a situation would not arise, the *Padilla* approach does allow for it. The idea that the Constitution would allow a guilty plea under such circumstances (even if such behavior would potentially allow for a malpractice claim or bar association disciplinary action against counsel) is unacceptable.

226. *State v. Paredes*, 101 P.3d 799, 805 (N.M. 2004).

227. *Id.* at 805.

228. *Id.* at 804.

Circuit in holding “that ‘an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable.’”²²⁹ It then extended this holding to non-advice.²³⁰ The court was quite specific in setting out counsel’s responsibilities:

We hold that criminal defense attorneys are obligated to determine the immigration status of their clients. If a client is a non-citizen, the attorney must advise that client of the specific immigration consequences of pleading guilty, including whether deportation would be virtually certain. Proper advice will allow the defendant to make a knowing and voluntary decision to plead guilty. . . . An attorney’s failure to provide the required advice regarding immigration consequences *will be* ineffective assistance of counsel *if* the defendant suffers prejudice by the attorney’s omission.²³¹

There are two important elements to consider from this holding: first, the recognition that the *Strickland* test, rather than a due-process framework, is the correct test for failures to warn; and second, the finding of per se unreasonableness under prong one of *Strickland* for both defense-counsel misadvice and for failure to warn about deportation.²³² This first element should be fairly uncontroversial. As noted above, other courts’ reliance on *Brady*’s Fifth Amendment voluntariness test when examining claims of counsels’ failures is misplaced and directly contradicts the Supreme Court’s ruling in *Hill*.

The application of a per se unreasonableness rule is more complicated, and *Paredes* does not adequately explain its reasoning. While meeting the first prong of the ineffective-assistance test requires demonstrating

229. *Id.* (quoting *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002)).

230. *Id.*

231. *Paredes*, 101 P.3d at 805 (emphases added). Since the case was on direct appeal and there was not yet a fully-developed record of defense counsel’s alleged ineffectiveness, the Court remanded the case for an evidentiary hearing at which *Paredes* could prove what the high court characterized as “a distinct possibility that [his] attorney failed to adequately inform him of the immigration consequences of his plea, and [that] if [he] had been properly advised, he would not have pleaded guilty.” *Id.* at 806.

232. The Supreme Court has recognized a limited class of ineffective-assistance cases where it is appropriate to presume prejudice under *Strickland*’s second prong. *Florida v. Nixon*, 543 U.S. 175, 177 (2004) (noting *Cronic*’s per se prejudice standard is “reserved for situations in which counsel has entirely failed to function as the client’s advocate,” and finding that defense counsel’s strategy of conceding defendant’s guilt, without the defendant’s consent, did not constitute per se prejudice); *see, e.g.*, *United States v. Cronic*, 466 U.S. 648, 657–62 (1984) (noting the prejudice prong is presumed where counsel’s actions—or lack thereof—constitutes an actual breakdown of the adversarial process at trial); *Smith v. Wainwright*, 777 F.2d 609, 616–17 (11th Cir. 1985) (finding a presumption of prejudice where defendant’s counsel failed to move to suppress defendant’s confession). However, the Supreme Court has never applied such a per se rule to the attorney-competence prong. Rather, it has insisted on a case-by-case analysis under the particular circumstances of the case. *See Strickland v. Washington*, 466 U.S. 668, 696 (1984).

objectively unreasonable representation by defense counsel, the Supreme Court has cautioned that there is no checklist for what counsel must or cannot do and instead courts should consider “all of the circumstances” of the particular case.²³³ In doing this, *Strickland* requires that courts reviewing ineffectiveness claims be “highly deferential” to defense counsel to avoid second-guessing what might be legitimate case strategy.²³⁴ It thus requires that defendants “overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.”²³⁵ *Paredes* noted this aspect of the *Strickland* framework,²³⁶ but did not explain why it chose to rely instead on a per se rule. Implicit in the New Mexico Supreme Court’s holding, however, is that neither misadvice nor the failure to warn about deportation can ever be strategic, and thus neither are ever reasonable. Indeed, *Paredes* noted the particular harshness of deportation, how it often overshadows concerns about any penal sentence in lower-level cases,²³⁷ and how, in many cases, it is “virtually automatic.”²³⁸

As applied to misadvice, the per se approach should not draw much disagreement. It is hard to imagine a strategic reason for misadvising about deportation. The only explanations would be good-faith error, negligence in failing to research the matter properly, or intentional manipulation in order to force the defendant to plead guilty. None of these reasons, however, can qualify as legitimate case strategy requiring judicial deference. Indeed, most courts seem to adopt such an approach for misadvice situations even where they do not explicitly apply a per se rule.²³⁹

As for the failure to advise, *Paredes* stands alone in using a per se rule. The court’s position is not, however, indefensible, particularly with respect to such a severe consequence as deportation. In practice, it means that even if a defense attorney were to offer a strategic reason for failing to warn—such as the need to focus on other, more pressing aspects of the case—it would be irrelevant, and it would still be deemed unreasonable behavior. What makes this controversial is that some attorneys might decide that they

233. *Strickland*, 466 U.S. at 688.

234. *Id.* at 689–90.

235. *Id.* (quotation marks omitted).

236. *Paredes*, 101 P.3d at 804.

237. *Id.* at 805.

238. *Id.* at 801.

239. In *Roberti v. State*, the court held that “[a]ffirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea.” *Roberti v. State*, 782 So. 2d 919, 920 (Fla. Dist. Ct. App. 2001). It then remanded for an evidentiary hearing at which *Roberti* could demonstrate that there was misadvice and that he would not have pleaded no contest (tantamount to a guilty plea) with proper advice. It thus appears that all *Roberti* had to show was the fact of misadvice, and not the further showing that misadvice in his particular case demonstrated unreasonable attorney behavior. On remand, however, the court denied *Roberti*’s motion to withdraw his guilty plea. See *supra* note 66 (stating the same).

do not know enough about, say, immigration law to undertake advisement and thus they remain silent. Under *Paredes* this is no excuse, implying that counsel can either educate himself or herself about the applicable immigration consequences or consult counsel with expertise. In addition, a defendant seeking to withdraw a guilty plea based on either a failure to warn or misadvice will still have to demonstrate prejudice. Although the harsh nature of deportation may make this a somewhat less difficult task than proving prejudice in other contexts,²⁴⁰ courts will still take such factors as family ties in the United States, length of residence, employment status, and strength of the evidence in the criminal case into account in making such prejudice determinations.²⁴¹

In short, like *Padilla*, *Paredes* uses some bright lines. However, they are more doctrinally defensible and comprehensible. *Paredes* did not rule that counsel must inform clients about every applicable collateral consequence in every case. However, less than three years later, an intermediate New Mexico appeals court extended both the duty to warn and to avoid misadvice, as well as the per se unreasonableness rule, to the consequence of sex-offender registration.²⁴² *State v. Edwards* set out two reasons for this extension. First, registration is severe and can lead to “employability problems, harassment, stigma[,] ostracism, humiliation, and physical harm.”²⁴³ Second, registration and community notification are “immediate and automatic” consequences of twelve enumerated sex-offense convictions in New Mexico, which means that “counsel need only consult this list to determine whether the defendant’s plea will expose him or her to the virtually certain consequence of sex offender registration.”²⁴⁴ On this point, *Edwards* makes a better argument for the use of per se unreasonableness in relation to registration warnings than *Paredes* makes for immigration warnings. Immigration law is much more complex than registration law, particularly in the way in which it interacts with state criminal law. The major nuance with registration law is keeping up with any legislative amendments which add crimes to a state’s sex-offense list. Legislative amendments are likely in the political climate surrounding these types of crimes, however this nuance is not particularly complex. By contrast, there are many unsettled

240. See *supra* note 101 (discussing how proving prejudice is a formidable barrier for individuals claiming ineffective assistance of counsel).

241. See, e.g., *United States v. Couto*, 311 F.3d 179, 188 (2d Cir. 2002) (noting that defendant’s behavior and her nine-year residency in the United States evidenced her clear desire to avoid deportation, and that “the facts of the current case demonstrate [prejudice] beyond peradventure”).

242. See *State v. Edwards*, 157 P.3d 56 (N.M. Ct. App. 2007).

243. *Id.* at 63 (alteration in original) (quoting *State v. Druktenis*, 86 P.3d 1050, 1061 (N.M. Ct. App. 2004)).

244. *Id.* at 64 (quoting *Druktenis*, 86 P.3d at 1061).

issues surrounding which state crimes qualify as deportable offenses under federal immigration law.²⁴⁵

There are three approaches to counsel's informational duties with respect to the consequences of guilty pleas: (1) the majority approach, which accepts the collateral-consequences rule and affirmative-misadvice exception; (2) the Kentucky approach, which subsumes misadvice into the collateral-consequences rule and finds both outside the scope of the Sixth Amendment; and (3) the New Mexico approach, which imposes an affirmative duty of accurate advice. The majority and Kentucky methods are doctrinally flawed and raise serious issues about the troubling messages they send to counsel. They either sanction silence or allow for misadvice (intentionally, unintentionally, or negligently) about even the most severe consequences. By contrast, the New Mexico cases (although not uncontroversial in their per se approach) recognize that *Strickland* does affirmatively require advice about a consequence when it would be unreasonable to withhold it. The New Mexico approach thus requires lawyers to educate themselves about consequences that would reasonably matter to their clients and to share this knowledge as part of the counseling they provide under the Sixth Amendment. Although this approach is not currently representative of the manner in which other courts have approached the issue, the Supreme Court will soon have the opportunity to change this.

This Article claims that only a rule requiring full information about serious, relevant consequences (collateral or otherwise) would advance the values behind the constitutional requirement of knowing guilty pleas and would avoid the disturbing incentives that the collateral-consequences rule encourages—with and without an affirmative-misadvice exception. Only a rule analyzing *both* counsel's failure to advise about collateral consequences *and* counsel's affirmative misadvice about the same under the Supreme Court's ineffective-assistance-of-counsel framework would be true to *Strickland's* insistence on a review of the reasonableness of counsel's actions (or lack thereof) under the particular circumstances of each case.²⁴⁶ Under

245. See, e.g., *Lopez v. Gonzales*, 549 U.S. 47, 52–53 (2006). The *Lopez* court stated:

The [relevant immigration law] makes Lopez guilty of an aggravated felony if he has been convicted of “illicit trafficking in a controlled substance . . . including,” but not limited to, “a drug trafficking crime (as defined in [federal law]).” Lopez’s state conviction was for helping someone else possess cocaine in South Dakota, which state law treated as the equivalent of possessing the drug, a state felony. Mere possession is not, however, a felony under the federal [Controlled Substances Act], although possessing more than what one person would have for himself will support conviction for the federal felony of possession with intent to distribute.

Id. (citations omitted).

246. *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.”).

this fact-sensitive framework, affirmative misadvice about material consequences may *always* be unreasonable attorney behavior, but it cannot be the case that the failure to advise about the same consequence will *never* constitute such a violation.

B. *THE COSTS OF THE COLLATERAL-CONSEQUENCES RULE AND THE AFFIRMATIVE-MISADVICE EXCEPTION OUTWEIGH ANY PERCEIVED BENEFITS*

The difficulties that riddle the current constitutional structure carry significant costs, including the effect that the advocate's failure to inform individuals about the true consequences that their guilty pleas have on that individual, his family, and the legitimacy of the criminal justice system. This raises the question of whether the reasons for having a collateral-consequences rule—with or without an affirmative-misrepresentation exception—outweigh the costs.

This section considers three potential rationales that could explain why courts treat affirmative misrepresentations differently from a total failure to warn about a collateral consequence. The first rationale looks at things from the defendant's perspective and claims that misinformation runs more directly to the "knowing and voluntary" nature of a guilty plea than a simple lack of information. Second, although innocent people sometimes plead guilty, they are even more likely to do so when their lawyer erroneously informs them that a particular collateral consequence will not occur as a result of their guilty plea. Third, the lack of a remedy for defendants when an officer of the court makes an incorrect statement—particularly on a matter that may be of critical importance to the defendant, even if it is technically collateral—threatens the legitimacy of the criminal justice system.

This section finds that the underlying principles of each rationale also apply to many failures to disclose important collateral consequences. Careful analysis thus demonstrates that each rationale for distinguishing between silence and misadvice is problematic, causing the costs of a regime that encourages silence about collateral consequences to outweigh any perceived benefits.

1. Effect on Defendants

One rationale for the misrepresentation exception is that erroneous information has a different effect on defendants than lack of information. Under this theory, a defendant does not plead "intelligently" when his counsel misinforms him, and defense counsel does not act "effectively" when she offers incorrect information about even a collateral consequence.²⁴⁷ The person will believe he is making an informed decision and avoiding the

247. See *supra* notes 20–21 and accompanying text (describing the misrepresentation exception).

relevant collateral consequence, when in fact, the opposite may be true. This rests on the premise that it is worse, from a defendant's perspective, to get incorrect information than to get no information at all. While that may be true in some cases, a total lack of knowledge about consequences that can eclipse the penal sanction can often lead to the same (or a quite similar) effect on a defendant.

A common example illustrates how a person without information can sometimes be in the same position as the recipient of incorrect information. In many instances, non-citizen defendants plead guilty to offenses which make them mandatorily deportable and they do so without their attorney counseling them regarding the potential immigration consequences. In this absence of advice, the non-citizen might have: (1) known exactly what the immigration consequences were, perhaps because he consulted an immigration attorney, unbeknownst to his criminal defense lawyer; (2) had some idea that immigration consequences were possible but no clear understanding of whether they would actually come to pass under the particular circumstances of the plea bargain; (3) been completely unaware of any immigration consequences and possibly under the natural assumption that his defense attorney had told him about all of the serious consequences of the plea when they discussed its pros and cons; or (4) had the mistaken belief, from a source other than defense counsel, that there would be no immigration consequences under the plea bargain. Under the first scenario, and arguably under the second, the guilty plea in the absence of warnings from the criminal defense attorney is knowing and voluntary. However, if under these same two scenarios the non-citizen's attorney incorrectly told him that no immigration consequences would flow from his plea, this ineffective assistance of counsel would render the plea unknowing. Under the third and fourth scenarios, the non-citizen feels the same effect—an uninformed guilty plea leading to deportation—whether counsel remained silent or misadvised that deportation would not follow.²⁴⁸

Another example illustrates how counsel's silence about a collateral consequence can actually be affirmatively misleading. Imagine that an individual has decided to plead guilty to a sex crime in Minnesota and will serve a state-prison term. Under that state's criminal procedure rules, the judge must warn the person that for "most sex offenses, a mandatory period of conditional release will be imposed to follow any executed prison sentence, and violating the terms of that conditional release may increase the time the defendant serves in prison."²⁴⁹ No one in this hypothetical,

248. Another possibility is that a person pleads guilty without either defense counsel or the court telling him anything about the consequence, yet does so because he wants the plea bargain despite any collateral consequences. Here, however, the defendant would not be able to make out the prejudice prong of the two-part ineffective-assistance test. Thus, this defendant would not be able to later withdraw the plea.

249. MINN. R. CRIM. P. 15.01(10)(d).

however, has warned that Minnesota also has a law allowing for the indefinite civil commitment of “sexually dangerous persons” or persons with a “sexual psychopathic personality” after completion of any sentence of imprisonment for a criminal conviction.²⁵⁰ In other words, if the individual met the standards under the civil-commitment act he would go directly from state prison to a “secure treatment facility.”²⁵¹ That individual would not, as the judge had told him, go from prison to mandatory conditional release in the community.

Both the immigration and civil-commitment examples show the problem with a categorical approach that draws a bright line between direct and collateral consequences. The reality is much more nuanced, and thus much more suited to *Strickland*'s two-part analysis for ineffective assistance.

In some cases involving failures to warn or misadvice about immigration consequences, courts seem to assume that non-citizens are aware of the possibility of deportation based on a criminal conviction.²⁵² The argument could be made that the uninformed defendant acts in a system where ignorance or mistake of law is no excuse,²⁵³ and thus the misinformed defendant is in a different position, having been given affirmative misadvice. However, the well-established mistake-of-law rule relates to substantive criminal liability and does not apply in the pre-plea-information context. This context, rather, is governed by norms which require that guilty pleas be knowing, voluntary, and taken with the effective assistance of counsel. It is for this reason that due process, the right to effective assistance, and state and federal laws governing guilty-plea procedures require that an attorney (and, in some instances, the court) make a defendant aware—and not simply leave him to figure out on his own by reading the statutes—of such things as the maximum penalty for the crime.²⁵⁴ Thus, while this assumption about the relatively well-publicized consequence of deportation may well be faulty,²⁵⁵ worse yet is the assumption that individuals charged with crimes

250. MINN. STAT. § 253B.185 (2008); *see also id.* § 253B.02(18b)–(18c) (defining, respectively, “sexually psychopathic personality” and “sexually dangerous person”).

251. *See id.* § 253B.02(18a) (defining “secure treatment facility”).

252. *See, e.g.,* *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (“[A]lien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.” (footnote omitted)).

253. *See Cheek v. United States*, 498 U.S. 192, 199 (1991) (“The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.”).

254. *See United States v. Rumery*, 698 F.2d 764, 766 (5th Cir. 1983) (vacating defendant's conviction after he pleaded guilty when his lawyer advised him that he faced a maximum of thirty years in prison when in fact the maximum penalty was five years).

255. *See* Anthony Lewis, *Abroad at Home; 'This Has Got Me in Some Kind of Whirlwind,'* N.Y. TIMES (N.Y. ed.), Jan. 8, 2000, at A13 (describing Mary Anne Gehris's surprise upon learning that she faced deportation for an old misdemeanor conviction); *see also supra* note 245 and accompanying text (describing the complex nature of determination when federal deportation law applies to state criminal conviction).

(and even most of the public, for that matter) are aware of the plethora of potential collateral consequences of criminal convictions.²⁵⁶

Perhaps nothing better illustrates the problem of failing to consider silence and misinformation from the defendant's perspective than the context of minor adjudications. As the prosecution of misdemeanors and other minor offenses has steadily risen,²⁵⁷ the list of collateral consequences has also grown to apply to many convictions on minor charges. For example, a lawful permanent resident of the United States may face mandatory deportation for an old misdemeanor conviction, despite having lived in the U.S. for many years with strong family ties.²⁵⁸ In such a case, and in many cases, the collateral consequence is what matters most from the defendant's perspective. Yet defendants often enter guilty pleas to minor offenses with

256. See, e.g., *Doe v. Weld*, 954 F. Supp. 425, 434 (D. Mass. 1996) (rejecting a plaintiff's argument that, among other things, sex-offender "registration is punitive when it is required of juveniles who were promised confidentiality and who were not told at the time of the plea of the possibility that their records could be used by enforcement officials in the future").

These assumptions are exacerbated in the context of "no contest" and *Alford* pleas. In the former, the individual is convicted of the charge and sentenced accordingly without having to admit guilt to the underlying offense. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 27.02(5) (Vernon 2006) (noting how the legal effect of a plea of *nolo contendere* "shall be the same as that of a plea of guilty, except that such plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based"). In the latter, the person may plead guilty while claiming innocence, so long as there is a strong factual basis for the allegations beneath the conviction. See *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970) (holding that because the evidence "substantially negated" the defendant's claim of innocence, it was not a constitutional error for the judge to accept the guilty plea). In both categories of pleas, the defendant is even more likely to assume that the resulting conviction would not lead to collateral consequences, since all parties involved in the plea have agreed that he does not have to say that he committed the crime but instead only state that he is pleading guilty. Yet these pleas can lead to any number of collateral consequences. See, e.g., FLA. STAT. § 394.912(2) (2008) (including *nolo contendere* pleas in Florida's Involuntary Civil Commitment of Sexually Violent Predators Act's definition of "convicted of a sexually violent offense"). For example, Ronald Roberti was allowed to seek withdrawal of his no-contest plea only because his lawyer misrepresented the Florida civil-commitment-act consequence to him. *Roberti v. State*, 782 So. 2d 919, 920 (Fla. Dist. Ct. App. 2001). If defense counsel had remained silent about commitment, then Roberti would have been stuck with his plea, despite the fact that he might quite reasonably have assumed that a no-contest plea would mean that the state could not use the plea against him in other circumstances. That assumption might have been even more likely in a case where the defendant entered an *Alford* plea, and affirmatively insisted upon his innocence while making the strategic decision to plead guilty.

257. See Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 272 (2006) (describing the rise in misdemeanor and low-level offense prosecutions in several major urban areas but questioning the efficacy of such policies).

258. See Lewis, *supra* note 255 (describing the case of a thirty-four-year-old Georgia woman living in the United States since she arrived from Germany as a child, whose husband and severely disabled son are both American citizens, facing deportation for a hair-pulling incident for which she received probation and a suspended jail sentence more than a decade earlier); see also *supra* note 2 (defining "lawful permanent resident").

little time to consult defense counsel, sometimes after only a few minutes of consultation at the first court appearance,²⁵⁹ or even without an attorney at all.²⁶⁰ All parties might assure the defendant that he will be released from jail with only a misdemeanor conviction, yet never mention (or even know) that the particular conviction will lead to automatic deportation. Regardless, courts deem such pleas “knowing” and such counseling “effective.”²⁶¹

The distinction between the effect on defendants from lack of information and erroneous information is problematic because it privileges defendants who know enough about the potential collateral consequences related to their case (or have friends or family members who know enough) to ask defense counsel about it. For the most part, only those who know to ask about collateral consequences will benefit from the affirmative-misadvice exception, by eliciting either correct information about the consequence (and making an informed decision about what to do) or misadvice with the subsequent right to withdraw the plea. Many defendants—indeed, many attorneys, even those in criminal practice or on the bench—remain unaware of the myriad and growing collateral consequences that could flow from a conviction. Defendants unfamiliar with the United States’s legal culture, with poor cognitive skills or education, or who cannot afford counsel on collateral issues, are all at a disadvantage.²⁶² This is especially true in low-level cases or with either recently enacted or obscure consequences, such as civil commitment based on a sex-offense conviction.²⁶³ Simply because they

259. See *GIDEON’S BROKEN PROMISE*, *supra* note 94, at 16 (noting the problem of “meet ‘em and plead ‘em” lawyers for indigent defendants).

260. See *COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 21* (2006), available at http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf (noting, in the section reviewing New York State’s town and village courts, that “the Commission was alarmed, not only by the vast disparity in these courts with respect to when the assignment of counsel is made, but also by the numerous outright denials of the right to assigned counsel itself”).

261. See, e.g., *People v. Clark*, No. 2000KN067225, 2007 WL 328841, at *2 (N.Y. Crim. Ct. Feb. 5, 2007) (rejecting Clark’s motion to vacate his two misdemeanor drug convictions following guilty pleas, one taken the day after arrest and the other taken a month after arrest).

262. See Francis, *supra* note 102, at 726 (noting that failure to require counsel specifically to advise the defendant of the immigration consequences of pleading guilty would “place[] an affirmative duty to discern complex legal issues on a class of clients least able to handle that duty”).

263. This should not excuse an attorney’s ignorance of collateral consequences. There are a number of defender offices that conduct continuing training on various collateral consequences. See, e.g., GA. PUB. DEFENDER STANDARDS, *supra* note 114. However, many indigent defendants are represented not by an established public defender’s office, but instead by private attorneys paid by the government at a fixed hourly rate to handle such cases (sometimes with a cap on total compensation). See Adam Liptak, *Public Defenders Get Better Marks on Salary*, N.Y. TIMES, July 14, 2007, at A1 (“[M]ost indigent defendants are not represented by staff public defenders at the [state] trial level.”). These attorneys do not work in one office with centralized training; indeed, they often have no mandated training at all beyond any continuing-legal-education requirements imposed by their respective licensing body. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, §§ 1500.1–.26 (2007) (codifying New York’s continuing-legal-education

did not know enough to ask (and were not “lucky” enough to receive erroneous advice), these defendants would be unable to withdraw the plea that led to the undesirable consequence.²⁶⁴

These same realities support the need for a duty to warn about serious consequences of guilty pleas. More than seventy-five percent of individuals charged with crimes qualify as indigent for the purpose of having counsel assigned to them at no cost;²⁶⁵ these individuals are not likely to have the funds available to hire a private attorney on “collateral” matters.²⁶⁶ There are few avenues for indigent clients to receive legal assistance in these matters, as the right to counsel does not extend to most civil cases.²⁶⁷ Underfunded offices, such as Legal Services, often have long waiting lists and provide representation only in certain circumstances.²⁶⁸

It is only in the extreme circumstance of affirmative misrepresentation on a serious collateral consequence that most courts have been willing to face what every defendant knows: that he needed information about that consequence before taking the plea and that, if he had full information, he either would not have taken the plea, would have worked with his attorney to secure a different plea offer that avoided the consequence, or would have taken the plea anyway but with knowledge that the consequence could or

requirements). This is only to say that defense counsel are often not required to learn about collateral consequences. It does not mean that they *cannot* learn about them through local trainings or the many electronically available manuals on the topic. *See generally* LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY (2004), available at http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf; Reentry Net, Find Out About Collateral Consequences of Criminal Charges, Proceedings, and Convictions in Your State, <http://www.reentry.net/library/attachment.156819> (last visited Nov. 11, 2009).

264. Under the current collateral-consequences rule and affirmative-misadvice exception approach in most jurisdictions, it is not clear whether a defendant must have affirmatively inquired about the collateral consequence prior to receiving erroneous information to come under the exception. The cases analyzing misadvice often do not specify whether or not the defendant made such inquiries. *See generally* Goodall v. United States, 759 A.2d 1077 (D.C. Cir. 2000).

265. *See supra* note 108 (citing studies finding high percentages of defendants in both the state and federal criminal justice systems who qualify as indigent).

266. Immigration poses a somewhat unique circumstance, where many people do hire someone to help them through the complex process. But often that person is not an attorney, and, although some may provide quality advice and assistance, scams and fraud abound in this industry. *See* Gary Rivlin, *Dollars and Dreams: Immigrants as Prey*, N.Y. TIMES, June 11, 2006, available at http://www.nytimes.com/2006/06/11/business/yourmoney/11migrate.html?page_wanted=1&r=1.

267. *See, e.g.*, Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 32–33 (1981) (balancing presumption against any right to counsel in cases where the individual does not face loss of personal freedom against the Court’s three-element due-process test, and finding no right to counsel in parental-termination case under particular facts presented).

268. *See generally* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA (2d ed. 2007), available at <http://www.lsc.gov/justicegap.pdf>.

would come to pass.²⁶⁹ The fact that courts do not recognize this need for knowledge has led the lower courts to establish a constitutional distinction between silence and misinformation which is based, at least in part, on a failure to step into a defendant's shoes.

One court did step into those shoes. In *Paredes*, the New Mexico Supreme Court "refuse[d] to draw a distinction between misadvice and non-advice."²⁷⁰ The court reasoned:

[I]n many cases, there will only be a tenuous distinction between the two. Whether an attorney provides no advice regarding immigration consequences or general advice that a guilty plea "could," "may," or "might" have an effect on immigration status, the consequence is the same: the defendant *did not receive information sufficient to make an informed decision to plead guilty*.²⁷¹

Unfortunately, *Paredes* is one of the few cases to acknowledge that failure to advise can have the same effect as misadvice.²⁷²

2. Collateral Consequences and Innocence²⁷³

A second rationale for treating misrepresentation about collateral consequences differently from silence is that misrepresentation may contribute more to the phenomenon of innocent people pleading guilty. The argument is that incorrect advice about a particular collateral

^{269.} It is important to note that rejecting a plea-bargain offer does not necessarily mean there will be a trial. Defense counsel may convey the rejection to the prosecution only to receive a better offer, or at least an offer that allows the defendant to avoid the undesirable consequence. See 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 (2006).

Incorporating the collateral consequences and reentry components into [plea] negotiations would allow defense attorneys to more accurately lay out both the immediate and long-term effects of the particular disposition. Conveying this information to prosecutors and courts would enable both entities to more fully understand and appreciate these effects and would encourage them to calibrate their positions accordingly.

Id. at 685.

^{270.} *State v. Paredes*, 101 P.3d 799, 804 (N.M. 2004).

^{271.} *Paredes*, 101 P.3d at 804–05 (emphasis added).

^{272.} See *supra* note 47 (listing the New Mexico, Colorado, Ohio, and California courts that have recognized the effect).

^{273.} For the purposes of this section, "innocent" means: (1) totally innocent of the charges (for example, there was a mistaken identification so that the wrong person was charged), or (2) innocent of the crime charged or top counts even if guilty of some other, lower-level, crime (for example, guilty of drug possession but not of sale). For a definition of "claims of innocence," see Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1633 (2008) (dividing "innocence claims into three basic categories: (1) substantial claims; (2) outcome-determinative claims; and (3) inconclusive claims" and noting that "[t]hese categories reflect a spectrum based on the varying degrees to which the new evidence of innocence . . . may undermine the evidence that was introduced at the criminal trial").

consequence weighs heavily on the scale of plea-bargain considerations. It might encourage an innocent defendant to plead guilty under the mistaken belief that the particular consequence will not apply. As one court noted, "It can readily be imagined that some resident aliens might prefer to avoid even the risk of deportation rather than stand trial for crimes of which they believed themselves innocent."²⁷⁴

Guilty pleas are constitutionally permissible and historically entrenched in our criminal justice system.²⁷⁵ Yet innocent people sometimes plead guilty,²⁷⁶ just as innocent people sometimes confess to crimes they did not commit,²⁷⁷ and are sometimes convicted after trial. The Supreme Court acknowledged this fact in holding that guilty pleas pass due-process muster so long as they are entered into knowingly and voluntarily:

This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury.²⁷⁸

274. *United States v. Russell*, 686 F.2d 35, 41 (D.C. Cir. 1982).

275. *See Blackledge v. Allison*, 431 U.S. 63, 71 (1978) ("Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system."). *See generally* MICHAEL McCONVILLE & CHESTER L. MIRSKY, *JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY* (2005) (chronicling the American criminal justice system's transition from one of primarily jury trials to one of primarily plea bargaining). Plea bargaining, however, is not without its critics. *See, e.g.*, Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 *YALE L.J.* 1979, 1979-80 (1992) ("[P]lea bargaining seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent.").

276. Samuel R. Gross, *Convicting the Innocent*, 4 *ANN. REV. L. & SOC. SCI.*, 173, 181 (Dec. 2008); Chris Conway, *The DNA 200*, *N.Y. TIMES*, May 20, 2007, available at <http://www.nytimes.com/2007/05/20/weekinreview/20conway.html?scp=1&sq=DNA+200++Chris+Conway&st=nyt> (citing the Innocence Project finding that four percent of the 200 DNA exonerations between 1989 and 2007 involved criminal defendants who pleaded guilty).

277. *See, e.g.*, Richard A. Leo, *The Problem of False Confession in America*, *CHAMPION*, Dec. 2007, at 30, 31 ("[F]alse confessions are . . . not an anomaly but a systemic feature of American criminal justice."); Jodi Wilgoren, *Confession Had His Signature; DNA Did Not*, *N.Y. TIMES*, Aug. 26, 2002, at A1 (describing a Michigan case where a man signed a confession yet DNA proved him innocent). False confessions continue to be a leading cause of miscarriages of justice in America. In six separate studies of documented false confessions, Professor Richard Leo found that "police-induced false confessions continue to occur regularly and 'are of sufficient magnitude to demand attention.'" RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 244 (2008). One of the studies found that, of the 200 DNA exonerations documented by the Innocence Project between 1989 and 2007, "[a]t least sixteen percent of these wrongful convictions were caused by false confession." *Id.* However, only four percent of those convictions involved actual guilty pleas, meaning the others involved only an earlier, pre-plea confession followed by conviction after trial. Conway, *supra* note 276.

278. *Brady v. United States*, 397 U.S. 742, 757-58 (10th Cir. 1970). For an extensive exploration of the various systemic incentives that lead innocent defendants to plead guilty and the roles that prosecutors, defense counsel, and judges play in securing such erroneous

Indeed, a defendant can plead guilty while insisting upon his innocence; the Supreme Court has upheld the validity of so-called *Alford* pleas.²⁷⁹

The numerous recent, highly publicized exonerations based on DNA evidence demonstrate beyond question that innocent people sometimes plead guilty. Since DNA was first used to expose a wrongful conviction in

convictions, see F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 191–93 (2002). See also Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 309 (1975) (“[P]ressures to plead guilty have been used to secure convictions that could not otherwise be obtained.”).

279. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (holding that it does not violate due process when trial judges accept a guilty plea from a defendant who continues to insist upon his innocence, so long as there is a factual basis for the plea). Anyone who has spent significant time practicing in the criminal justice system is aware that courts often allow defendants to plead guilty to a charge just seconds after protesting their innocence or “messaging up” their plea allocation, often with a short “consultation” with defense counsel to clear up the “confusion.” For example, consider the following excerpt from *Alford*:

After giving his version of the events of the night of the murder, Alford stated:

“I pleaded guilty on second degree murder because they said there is too much evidence, but I ain’t shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn’t they would gas me for it, and that is all.”

In response to questions from his attorney, Alford affirmed that he had consulted several times with his attorney and with members of his family and had been informed of his rights if he chose to plead not guilty. Alford then reaffirmed his decision to plead guilty to second-degree murder:

“Q [by Alford’s attorney]. And you authorized me to tender a plea of guilty to second degree murder before the court?”

“A. Yes, sir.

“Q. And in doing that, that you have again affirmed your decision on that point?”

“A. Well, I’m still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don’t—I’m not guilty but I plead guilty.”

Id. at 28 n.2; see also John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 126 U. PA. L. REV. 88, 95 (1977) (noting that one purpose of the requirement that the court establish a factual basis for a guilty plea before accepting it is to “protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge”). Despite this constitutional stamp of approval, many jurisdictions remain uncomfortable with the idea of such pleas, such that as of 2002 only thirteen states allowed *Alford* pleas. Hessick & Saujani, *supra* note 278, at 198. Hessick and Saujani stated:

Since the *Alford* decision, some courts have remained averse to the idea. The Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have upheld the *Alford* plea standard; only thirteen states have applied the standard. The U.S. Attorney’s Office permits *Alford* pleas only with permission from a higher authority, and the military tribunals ban it outright.

Id. (citations omitted).

1989, 232 people have been exonerated through DNA evidence.²⁸⁰ Of the first 200 exonerees, about four percent had pleaded guilty and one-quarter had falsely confessed or admitted to crimes that they did not commit.²⁸¹ Of course most cases do not involve DNA, and many who study wrongful convictions agree that wrongful convictions that actually result in DNA exonerations “reflect only the tip of a very large iceberg.”²⁸²

Since this nation’s criminal justice system is built around the values of convicting the guilty and not the innocent, rules that further avoidance of wrongful conviction are critical.²⁸³ Yet the criminal justice system has built-in incentives against going to trial that can lead even an innocent person to plead guilty.²⁸⁴ To offer an over-simplified view (but sufficient for the

280. Innocence Project, Facts on Post-Conviction DNA Exonerations, <http://www.innocenceproject.org/Content/351.php> (last visited Nov. 11, 2009).

281. See Conway, *supra* note 276. There are well-known examples of false confessions, with the recent spate of DNA exonerations starkly illustrating the phenomenon. See, e.g., Tina Kelley, *Charges Dropped for Man Imprisoned 19 Years*, N.Y. TIMES, July 10, 2007, at B3 (describing how DNA refuted the signed confession of Byron Halsey, a man with a sixth-grade education and severe learning disabilities, admitting to killing his two children); Bruce Tomaso & David McLemore, *Bush Spares Lucas from Death Penalty; Governor Commutes Sentence to Life, Cites Doubts Over Guilt*, DALLAS MORNING NEWS, June 27, 1998, at 1A (describing then-Governor of Texas George W. Bush’s commutation—despite Henry Lee Lucas’s detailed videotaped confession, which the prosecution played for the jury that sentenced him to death—after post-conviction evidence showed Lucas was 1000 miles away from murder scene).

282. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 291 (noting how “DNA evidence exists in only a small minority of all cases—and is preserved and available for post-conviction testing in an even smaller proportion of cases,” and how “innocence is so very difficult to prove postconviction without DNA”); see also Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1559 (“It is fair to say that the proven cases of actual innocence are just the tip of the innocence iceberg, so to speak.” (footnote omitted)).

283. The value of exonerating the innocent is high in our criminal justice system, since it both avoids miscarriages of justice and can lead to the conviction of the actual guilty person—something that will not happen if an innocent person ends the case by pleading guilty. Reinvestigation of a case will likely only happen if there is strong, affirmative evidence of the defendant’s innocence, and even then there may be great resistance. See, e.g., Daniel Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 138–41 (2004) (discussing the “conviction psychology” and identifying the institutional atmosphere and cognitive biases that prosecutors face in dealing with post-conviction innocence claims); Amaris Elliot-Engel, *DNA to Enter Murder Case*, CITIZEN (Auburn, N.Y.), Apr. 21, 2006, available at http://www.auburnpub.com/articles/2006/04/21/news/local_news/news03.txt (describing how lead prosecutor, when faced with possibility of new DNA evidence that could exonerate Roy Brown, stated that other evidence in the case against Brown still held up and noted how “[t]he absence of someone’s DNA does not automatically exonerate someone”); Ctr. on Wrongful Conviction, Northwestern Univ. Sch. of Law, Kirk Bloodsworth, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/mdBloodsworthSummary.html> (last visited Nov. 11, 2009) (describing how it took authorities a decade after Bloodsworth’s release from prison to run DNA evidence that had exonerated him through a national database, and how when this was finally done, it linked a man who had been in same prison as Bloodsworth to the crime).

284. See generally Hessick & Saujani, *supra* note 278, at 197–206.

purpose of this discussion), the tipping point towards pleading will be the moment when, in the defendant's calculation, the offer on the table outweighs the risk of proceeding to trial. As Professor Stephen Schulhofer stated in one of his many critiques of the plea-bargain system, "[T]he defendant, who seeks to minimize punishment, will be better off accepting a plea offer if the contemplated punishment is lower than the anticipated post trial sentence, discounted by the possibility of acquittal."²⁸⁵

To complete this equation, it is necessary to add any applicable collateral consequences into the definition of "contemplated punishment." This is particularly true for a collateral consequence that matters a lot to a particular defendant, or for a collateral consequence that overshadows the direct consequences of the particular plea. In a reasonable defendant's calculation, the potential jail or prison time, the fine, or any other penal sanction is not the only cost. Deportation, involuntary commitment, sex-offender registration and loss of housing—among other consequences—all impose significant burdens that must be added to the cost-benefit analysis.²⁸⁶

Since protection against wrongful conviction is a central value, the answer is not a misrepresentation exception but instead an affirmative duty to warn defendants about serious collateral consequences. The innocent defendant who wants to go to trial but has reasonable concerns about wrongful conviction may well choose trial—however risky—if he knows that he definitely, or likely, faces a serious collateral consequence if convicted.²⁸⁷

285. Schulhofer, *supra* note 275, at 1980. The equation is of course more complex than it first appears. For example, "[s]cholars have posited that the innocent defendant is inherently more risk averse than the criminal because a criminal was willing to risk breaking the law in the first place." Hessick & Saujani, *supra* note 278, at 201 (citing various examples). In addition, there are many other factors that might play a role in the decision-making process for a particular defendant, including pressure from family members or friends, unwillingness to serve any time in prison whatever the risk of loss at trial, or mental-health issues that may inhibit rational judgment. Still, a cost-benefit analysis of a plea offer is an integral part of the dialogue between defendant and counsel and is a useful starting point for any discussion about plea bargaining.

286. So, of course, do the less tangible collateral consequences, including days spent in court continuing to litigate the case (and thus days of work lost, or childcare to cover). See generally MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 239–40 (1979) (finding that a sample study of defendants indicated that the total income lost due to court appearances was five times the amount collected in fines for those cases); see also K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Misdemeanor Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 292 (2009) ("Many of these costs are externalized, born by individual arrestees, their families, their communities, and the larger community of taxpayers to the extent that arrests and criminal records lead to further arrests, incarceration, or un(der)employment. Other costs are borne directly by the system."); Pager, *supra* note 26 (discussing causal relationship between a criminal record and employment outcomes).

287. Of course going to trial is not a sure protection against conviction of the innocent. See Gross, *supra* note 276, at 181 ("[One 2005 study] found 20 individual exonerations in which the underlying convictions were based on guilty pleas, or about 6% of the 340 cases they analyzed.

To further explore the problems with this third rationale for valuing misinformation over silence, consider three scenarios in which the defendant: (1) is affirmatively given incorrect information that a serious collateral consequence will not come to pass; (2) knows that the consequence is out there but assumes, based on counsel's silence on such a serious issue, that it will not come to pass; or (3) is not aware of the consequence at all. Under scenarios 1 and 2, the defendant affirmatively believes that the consequence is not a possibility. Silence in scenario 2 has exactly the same effects on the innocent defendant as the misrepresentation in 1; both remove a major incentive against pleading guilty.

Scenario 3 is somewhat different, because a defendant cannot consciously weigh a collateral consequence that he does not even know exists. However, the reason to allow withdrawal of any plea based on misrepresentation (under an "innocence" rationale) is that full, correct information about all serious consequences would have a positive effect on the avoidance of guilty pleas by innocent defendants. This reasoning applies equally to scenario 3, since the innocent defendant, had he known about the potential for involuntary commitment, would weigh that fact and be much more likely to insist upon a trial.²⁸⁸

If knowledge about serious collateral consequences advances the goal of having only guilty people plead guilty, then it is particularly true in the context of minor charges. When the direct criminal penalty is low, even innocent defendants may find it easy to ignore that penalty in favor of a quick disposition of the case.²⁸⁹ Indeed, "[m]any courts refuse to give collateral estoppel effect to relatively minor convictions such as traffic offenses or misdemeanors because of the limited incentive even innocent defendants have to contest them."²⁹⁰ While it is certainly encouraging that some courts recognize the fact that guilty pleas to minor charges are not

This is a startlingly low proportion in a system in which 95% of felony convictions are obtained by guilty plea.").

288. There is a fourth scenario that, although perhaps less likely than the others, is nevertheless worthy of consideration. Here, counsel informs his or her client that a conviction after trial on the crimes charged will lead to a collateral consequence and that a guilty plea to reduced charges will avoid the consequence. Counsel was wrong, however, and in fact, neither conviction would lead to the consequence. Silence in this scenario, *if* accompanied by the defendant's assumption that there was no collateral consequence, would actually be more advantageous for the defendant trying to weigh the true costs and benefits of a plea versus a trial, whereas misadvice would put a heavy finger on the plea scale.

289. See generally FEELEY, *supra* note 286, at 186–87 (noting how many defendants charged with minor crimes choose to plead guilty once they realize "how much it will cost them to pursue their claim of innocence," especially in light of the fact that many who plead guilty will not receive a jail sentence). Of course, even in some serious cases, the collateral consequence outweighs the direct penalty. Thus, a defendant may well consider involuntary commitment or deportation harsher than a number of years in prison.

290. Chin & Holmes, *supra* note 49, at 740 (citing various articles arguing that innocent defendants frequently plead guilty).

always reliable, refusing to give the pleas collateral-estoppel effect is an *ex post facto* reaction that provides protection only in the later civil case. It does nothing to solve the core problem, which is that innocent defendants sometimes plead guilty in minor cases. Surely, if courts recognize the reliability problems in the civil context, where only money is at stake, they should also recognize the problem in the criminal context, where liberty, the ability to work and to vote, and other basic rights are at stake.

Another reason that it is important to warn people about collateral consequences *before* they plead guilty to a minor charge is that indigent defendants (even innocent ones) will be hard-pressed to find counsel to handle a collateral attack on a conviction based on a failure to warn or even a misrepresentation. There is no federal constitutional right to post-conviction representation beyond the first appeal,²⁹¹ and the legal community has understandably focused its pro bono efforts for potentially innocent defendants on those individuals on death row or serving extremely long sentences.²⁹²

Nor is full knowledge about serious consequences likely to cause a logjam in the system, with large percentages of defendants refusing to accept plea bargains because of those consequences.²⁹³ First, many defendants do not face collateral consequences that outweigh the criminal sanction. For example, while bars to employment are a serious and growing problem for individuals convicted of crimes,²⁹⁴ most defendants will not risk conviction at trial, with its likelihood of a much harsher sentence than for a guilty plea, based on the prospect of future employment difficulties.

Second, in more serious criminal cases where prosecutors have strong evidence of guilt, most defendants with no viable defense will accept a plea bargain with a reduced sentence rather than go to trial on a hopeless case and face the higher sentence at the end of it, regardless of the collateral consequence. Indeed, that defendant may seek a disposition which takes the

291. *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (stating that the Due Process Clause does not guarantee the right to counsel for discretionary appeals).

292. *See, e.g.*, ABA, Death Penalty Representation Project, <http://www.abanet.org/deathpenalty/> (last visited Nov. 11, 2009) (“Our goals are to raise awareness about the lack of representation available to death row inmates, to address this urgent need by recruiting competent volunteer attorneys and to offer these volunteers training and assistance.”); *see also* Celestine Richards McConville, *The Right to Effective Assistance of Capital Post Conviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 63–65 (noting how, despite the fact that federal constitutional law does not guarantee counsel beyond the first appeal even in capital cases, not all states with a death penalty provide a mandatory right to counsel for capital defendants for post-conviction proceedings).

293. Although, even if it did, that would be a weak argument against full information. If society supports numerous, harsh collateral consequences, then they should not be a secret. Indeed, the rule is not that judges and lawyers *cannot* inform defendants, but only that they *need not* inform them, at least not under constitutional norms.

294. *See supra* text accompanying note 25 (discussing the employment consequences of a criminal sanction).

fact of the collateral consequence into account in determining an appropriate criminal sanction. It is the individual facing weak charges against him who is most likely to insist upon a trial.²⁹⁵ This is precisely the person who should be going to trial (or have the charges against him dismissed).

The argument could be made that full disclosure about collateral consequences will deter even guilty people from pleading guilty, since they will now be aware of the added range of formerly hidden consequences. This argument against transparency seems to accept that the aggregated direct and collateral punishments may be disproportionately high for a particular conviction, but that knowledge of these heightened sanctions will hold up even the “right” guilty pleas. The answer is that there should not be such severe collateral consequences if they are so harsh that they will interfere with orderly plea bargains in the correct cases.

A duty to warn about collateral consequences would help protect against innocent people pleading guilty. While misinformation is certainly troubling in the innocence context, equally troubling is the permission the collateral-consequences rule gives to judges, defense attorneys, and prosecutors to remain silent. A constitutional duty to warn about such consequences will increase reliability in the plea process as pressure is brought to bear where it is needed the most, namely against taking the quick and convenient plea, where the person might be innocent.

3. Legitimacy of the Criminal Justice System

A third rationale for the affirmative-misrepresentation exception is the belief that it helps protect the legitimacy of the criminal justice system. It is troublesome when defense counsel, the judge, or the prosecutor incorrectly tells a defendant that he need not be concerned with a particular

295. As the National Conference of Commissioners on Uniform State Laws commented:

[B]ecause the [collateral] sanctions typically apply to a conviction by plea or jury verdict, pleading not guilty is not a means for a guilty person to avoid collateral sanctions. It is reasonable to assume that the largest group of people who will plead not guilty when they otherwise would have pleaded guilty will be those who have a defensible case, but planned to plead guilty under the misapprehension that a criminal conviction would have little effect.

See UNIF. ACT ON COLLATERAL CONSEQUENCES OF CONVICTIONS § 5 cmt. (Draft 2008), available at http://www.law.upenn.edu/blj/archives/ulc/ucsada/2008_amdraft.pdf (noting but disagreeing with the argument that “[o]ne possible objection to advisement about applicable collateral sanctions is that if defendants actually know about the dozens or hundreds of negative legal effects of a criminal conviction, many will refuse to plead guilty”). But see Julian A. Cook, III, *All Aboard: The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863, 899 (2004) (“[D]efendant ignorance about the realities of the plea process is necessary if the current plea structure is to maintain its vibrancy, for if defendants truly comprehended the process and its attendant consequences, the efficiency of the guilty plea system would likely be compromised.”).

consequence coming to pass should he plead guilty. This is not necessarily because the misinformation might undermine the validity of the admission of guilt that follows (although this may also be true), but rather because there is something unseemly about a court process that fails to correct erroneous information. Sanctioned misadvice undermines confidence in outcomes and raises concerns about procedural fairness and human-dignitarian interests, and it does so in a criminal justice system that is already fraught with legitimacy problems.

The concern that misrepresentations will undermine public confidence in the system is valid. The argument can be made that there is a greater blow to legitimacy with an affirmative act (of providing misinformation about a collateral consequence) than with an absence of action (the failure to warn about a collateral consequence). Certainly, misinformation is more starkly illustrative of the problem than failure to inform. However, a system that pretends knowledge of collateral consequences simply does not matter to defendants considering plea bargains is a system that undermines public confidence. Likewise, a system that assumes defendants “know” about such consequences (because they are published laws or regulations which are theoretically publicly accessible),²⁹⁶ or which places the burden on people charged with crimes to discover the existence and potential applicability of any such consequences, undermines public confidence.

Public confidence is particularly vulnerable at a time when the collateral consequences of criminal convictions are harsher, more numerous, and (due to technological advances allowing easy access to criminal records and increased focus among employers, immigration authorities, landlords, and others on even minor convictions) more likely to affect convicted individuals.²⁹⁷ For example, consider the perception of legitimacy for a system that allows a defendant to plead guilty to a relatively minor drug charge without knowing that this could result in the eviction of his entire family from public housing,²⁹⁸ or to plead to a misdemeanor without knowing that the conviction will make him mandatorily deportable.²⁹⁹ If these defendants would not have taken such guilty pleas had they known of the harsh consequences, or if they could have worked

296. See *supra* notes 252–56 and accompanying text (pointing out why ignorance-of-law concept does not apply to information about collateral consequences).

297. See generally PETERSILIA, *supra* note 24.

298. See *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 128 (2002) (upholding the Department of Housing and Urban Development's authority to evict tenants based on the drug activity of any visitor, “regardless of whether the tenant knew, or had reason to know, of that activity”).

299. See, e.g., Lewis, *supra* note 255 (illustrating the injustice of losing one's home or ability to live in what has become one's home country because of a minor conviction, and thus also illustrating the unfairness of immigration and housing laws).

with counsel to secure an alternative plea that allowed avoidance of the consequence, the criminal justice system is undermined.

The intersection of the collateral-consequences rule and affirmative-misrepresentation exception encourages silence about information that is critical to individuals facing criminal charges, and thus encourages poor lawyering. When the rules regulating attorneys have this effect, the systemic legitimacy problem rivals that of a system allowing for misinformation.

* * *

While there is some truth in the factual bases of these potential rationales for the affirmative-misadvice exception, they ultimately make a flawed distinction between lack of information and misinformation. The misrepresentation exception is more appropriately explained by an understandable discomfort when it comes to erroneous information about increasingly harsh and wide-ranging collateral consequences of guilty pleas. As the critique of the main rationales for the misrepresentation exception makes clear, this discomfort is really one with the collateral-consequences rule itself and not merely misinformation. This should lead to a reevaluation of the current constitutional norms for information about collateral consequences in the guilty-plea context.

V. CONCLUSION

As the number and harshness of collateral consequences continues to grow, the successful integration of individuals convicted of crimes while burdened with civil liabilities is of major social and economic concern. For these individuals, their families, and their communities, constitutional rules that discourage information about the collateral consequences of criminal convictions further exacerbate an already difficult situation. Under current constitutional rules in almost all jurisdictions, a defendant who pleaded guilty to criminal charges is actually better off—in terms of his ability to later withdraw that plea—if his lawyer gave him erroneous advice about certain consequences of that guilty plea than if the lawyer failed to advise him at all. This affirmative-misadvice rule chastises lawyers who try but fail to correctly advise and, combined with the collateral-consequences rule, effectively encourages silence. One commentator aptly characterized the misadvice line of cases as a “‘don’t ask—don’t tell’” policy.³⁰⁰

This Article does not argue that courts should simply reject the affirmative-misadvice exception for the sake of doctrinal consistency. Instead, it claims that the numerous ethical, practical and doctrinal difficulties at the intersection of the exception and the rule should lead the Supreme Court—when it decides *Padilla*—to reexamine the whole collateral-consequences doctrine. While defendants who plead guilty after

300. Francis, *supra* note 102, at 726.

getting erroneous information about collateral consequences should be able to withdraw their pleas, the rationales for such a remedy apply equally to the failure to warn.

Thus the Court should breach the direct–collateral divide and move to a requirement of full disclosure about serious or highly likely collateral consequences prior to any guilty plea. Defense lawyers should have a constitutional duty to accurately counsel their clients about any consequence that is significant enough to factor into that client’s decision-making process about whether to plead guilty. Recognizing such a duty in the Sixth Amendment’s right to the effective assistance of counsel will bring the constitutional jurisprudence in line with the professional norms in this area. It will also be true to the Supreme Court’s fact-specific approach to evaluating claims of ineffective assistance, by recognizing that the Sixth Amendment does require advice when it would be unreasonable to withhold it.