WBASNY

The Women's Bar Association of the State of New York

presents

Convention 2021
Continuing Legal Education Series

After the Conviction – Helping People Restore Their Rights

May 21, 2021
3:00 pm - 4:30 pm

Presenter: Elizabeth A. Justensen, Esq., MSW

How to Gather Evidence of Rehabilitation

recommended not required

How can you convince an employer, landlord, government agency, or other authority to give you a second chance despite your criminal record? One way is to show ***detailed proof*** that you have turned your life around since your most recent conviction.

School: Can you show you were in school for at least six months, are now in school, and have a positive school record? If so, try to get

- A **transcript** AND
- A letter from a teacher or school administrator, fi that persona can truthfully say that you:
  - Were in school for at least six months or are now in school
  - Had great attendance and punctuality
  - Had excellent grades, and
  - Are motivate to learn and get ahead in life

Job Training: Can you show that you stayed in a job training program for at least six months, or are now in such a program, and have a positive record? If so, try to get a **letter** from a program supervisor or administrator, if that person can truthfully say that you

- Participated for at least six months or are now participating
- Had or have great attendance and punctuality
- Are motivated to learn and get ahead in life
- Have learned useful skills to apply to a job; and
- Get along well with others

Employment: Can you show that you kept a job for at least six months and had a positive work record? If so, try to get **letters** from as many such jobs as you can- from a supervisor or another person on the job who worked with your- if this person or these people can truthfully say…

- What the job was and how long you worked ether
- What your job responsibilities were
- How well you performed your job
- Whether you were promoted while on eat job
- That you had an excellent attendance record and came to work on time, and
- That you are motivated, responsible, and get along well with others

Counseling or social service program: Can you show that you spend at least six months, or are now involved in a counseling or other social service program (including a drug treatment program) to deal with the problem that led to your involvement with the criminal justice system?
If so, try to get a **letter** from your counselor, therapist, or doctor if s/he can truthfully say that you

- Had or have great attendance
- Had clean/negative drug tests for at least 12 months (get the **drug test results**, too)

- Fully participated in programs
- Got along well with others
- Understood the causes of your past behavior and were committed to positive growth
- Were not a risk to the safety of others, and
- No longer associated with the peers/friends who got you in trouble in the first placed
    - If you have a disability that prevented you from working while you were in the program (for example, your drug or alcohol problem), make sure your counselor or whomever writes the letter explains this. Perhaps your counselor can also explain that your treatment calls for you to obtain employment. You will need to sign a consent form before your counselor, therapist, or doctor can disclose information about your treatment

Certificate of Relief from disabilities or Certificate of Good Conduct: These certificates help show your rehabilitation. IF you have no more than one felony conviction and any number of misdemeanors; you might be eligible for a Certificate of Relief from Disabilities. If you have more than one felony, you may be eligible for Good Conduct. For more information about whether you qualify for either of these certificates, see the Legal Action Center's booklet, *Certificate of Relief from Disabilities* and *Certificate of Good Conduct,* which you can download off the Center's website, http://lac.org (go to the "Free publications section and click on "criminal justice.")

Letter from your Parole or Probation Officer: If your parole or probation officer can say the following things truthfully, ask him/her to write a letter commenting on your:

- Clean/negative drug tests for at least 12 months
- Positive outlook
- Compliance with all requirements of parole or probation, and
- Exceptional motivation

Letters from clergy: If you play a leadership role in your community and volunteer, ask your priest, minister, imam, rabbi, or spiritual leader to write a **letter** on your behalf saying so.

Letters from your volunteer work: If you have volunteered for a school, nonprofit organization, or other group, try to get a letter from a responsible person saying that you

- Are responsible
- Have med a good contribution to the work of the program, and/or
- Are dedicated to your volunteer work.

https://lac.org/wp-content/uploads/2016/04/How-to-Gather-Evidence-of-Rehabilitation-3.30.16.pdf

STATE OF NEW YORK
APPLICATION BY AN ELIGIBLE OFFENDER FOR A CERTIFICATE OF RELIEF FROM DISABILITIES

FOR COURT OR BOARD OF PAROLE

Docket, File or other Identifying No.

1. Applicant's Last Name	First Name	Middle Initial	3. NYSID Number (If known)

2. Address (Street and No., City, State, Zip Code)

4. Sex ☐ Male ☐ Female	5. Race	6. Height feet inches	7. Date of Birth

8. Crime or Offense for which Convicted	9. Date of Arrest	10. Date of Sentence

11. Court of Sentence (Court, Part, Term, Venue)

12. Certificate Requested from:

a. ☐ Court Indicated in No. 11

b. ☐ State Board of Parole

13. If certificate being applied for is intended to replace an existing certificate, enter issue date of original certificate.

Date:

☐ Not Applicable

14. Application is hereby made for a grant of a "CERTIFICATE OF RELIEF FROM DISABILITIES" which will:

a. ☐ Relieve the holder of all forfeitures, and of all disabilities and bars to employment, excluding the right to retain or be eligible for public office, by virtue of the fact that the certificate is issued at the time of sentence.

b. ☐ Relieve the holder of all disabilities and bars to employment, excluding the right to be eligible for public office.

c. ☐ Relieve the holder of the forfeitures, disabilities or bars to employment hereinafter enumerated

_____

15. The applicant agrees to allow an investigation to be made to determine his/her fitness for a certificate of relief from disabilities, pursuant to Art. 23, Correction Law.

Applicant's Signature _____ Date _____

16. *State of New York*

County of _____

_____ *being duly sworn, deposes and says that he/she is the applicant named in the within application; that he/she has read the foregoing application and knows the contents thereof; that the same is true to his/her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he/she believes it to be true.*

Sworn to before me this _____ *day of* _____, _____

Signed _____

NEW YORK STATE | Corrections and Community Supervision

ANDREW M. CUOMO
Governor

ANTHONY J. ANNUCCI
Acting Commissioner

Department of Corrections and Community Supervision
Certificate of Relief from Disabilities - Certificate of Good Conduct
Application and Instructions

This is your application for a Certificate of Relief from Disabilities or for a Certificate of Good Conduct. Please review this information carefully. Then, complete the application as best you can. If you leave out information, it could take longer for the Department of Corrections and Community Supervision (DOCCS) to make a decision about your application.

1) How do I know if I am eligible - Who can apply?

The information below can help you understand if you are eligible. For more information, you can read Article 23 (Sections 700-706) of the New York State Correction Law.

I. Eligibility

A. CERTIFICATE OF RELIEF FROM DISABILITIES: You are eligible for this certificate if you have been convicted of any number of misdemeanors and no more than one felony (two or more felony convictions in the same court on the same day are counted as one felony for deciding which certificate you are eligible for). The term "disability" refers to laws that disqualify people from holding certain jobs or other rights because of their conviction.

B. CERTIFICATE OF GOOD CONDUCT: You are eligible for this certificate if you have been convicted of two or more separate felonies or if you are seeking a job that is specifically considered a "public office". You must show that you have completed/achieved a certain period of good conduct in the community. You must wait 5 years if the most serious felony on your criminal record is an A or B felony, 3 years if the most serious felony on your criminal record is a C, D or E felony, or 1 year if you only have misdemeanors on your criminal record. The waiting period starts when you were last released from incarceration (prison or jail) to community supervision, or were released from incarceration (prison or jail) by maximum expiration of your sentence, or at the time of your last criminal conviction (which ever of these events comes last). If you were convicted in another state or in federal court, the waiting period will be determined by what the level of the conviction would be considered in New York State.

DOCCS will only consider applications for Certificates of Good Conduct for public office if the application lists a specific public office and includes information about laws that prevent the individual from holding the office they want the Certificate for.

2) Where do I apply?

For Certificates of Relief From Disabilities, you should apply to the court that sentenced you unless:

1. you were sentenced to a New York State (DOCCS) correctional facility, or

2. you were convicted in a federal court or a court in another state and you are now a resident of New York State. Certificates in these cases are issued by the New York State Department of Corrections and Community Supervision (DOCCS).

For Certificates Of Good Conduct, you must apply to the Department of Corrections and Community Supervision.

Once you have decided which certificate you are eligible for, you should apply to the appropriate agency/location.

- If you are applying to the DOCCS, fill out and mail the attached application to DOCCS at the address on page 5.
- If you are applying to the sentencing court, you can get contact information from a telephone directory or at www.nycourts.gov. Do not submit this application form to the sentencing court. Courts use a different application form.

If you want information about restoring your firearms rights/privileges and were convicted of a felony in a Federal Court, you must seek/request relief from the United States Department of Justice, Office of the Pardon Attorney (www.justice.gov/pardon).

3) What do I need to provide to DOCCS to get my application considered?

- The Original Application Form – signed and notarized
- Copies of your Federal Income Tax Filings for the last two (2) years if you were required to file a tax return.
- Copies of your Statement and Wages (Tax Form W-2) for the last two (2) years if you earned wages.
- Copies of any miscellaneous income statements (Tax Form 1099) for the last two (2) years if you received one.

If you do not have copies of any of the documents listed above, you may contact the IRS at 1-800-829-1040. They will provide you with a copy of your records.

If you received public assistance, unemployment insurance, or Social Security benefits for any or all of this two year period, you must include a printout from the agency that provided you with these benefits/support, showing all the benefits that you received. If you had no reportable income for any or all of this two year period (including any other benefits not listed above), you must provide /submit a notarized document explaining how you supported yourself.

4) What can I expect after my application has been submitted to DOCCS for review?

Once we receive your application, DOCCS will assign a field Parole Officer for an investigation. The Officer will review:

1. Employment history and how you have supported yourself.
2. Proof that you have paid income taxes for the last two years.
3. Proof that you have paid any fines or restitution set by the courts.

After DOCCS has received all necessary documents and records from you, the field Parole Officer assigned to you will contact you to arrange an interview at your home/residence to answer any remaining questions and confirm your current circumstances and living situation. The New York State Department of Corrections and Community Supervision will then examine your application to decide whether to grant you a certificate. Under the law, DOCCS may choose to remove one, more than one, or all allowable disabilities (restrictions created by law because of your conviction history). Note that, under the law, individuals with certain conviction histories may be ineligible to have their firearm rights restored.

5) How long will the process take?

This will vary depending on the complexity of your case. The process will involve a complete review of the information you provide. Processing times depend on how complete the information you provide to DOCCS is. The assigned Parole Officer will review and check all of the information you provide. The process will be completed more quickly if you provide complete and accurate information to the best of your ability and are available to the Parole Officer when he or she contacts you.

The Parole Officer will want to see what you have been doing since your last conviction or release, including information about:

- Going to school – such as a transcript or a letter from a teacher or school administrator;
- Job Training – such as a letter from a program supervisor or administrator;
- Employment – such as letters from supervisors or other people who worked with you;
- Counseling or social service program – such as a letter from a counselor, therapist or doctor;
- Letters from Parole or Probation Officers;
- Letters from clergy;
- Letters from volunteer work

You do **NOT** need all of these items, only those that apply to you. For more examples, visit: http://lac.org/wp-content/uploads/2014/12/How_to_Gather_Evidence_of_Rehabilitation_2013.pdf

Please note that the process will be delayed if you move any time after you submit your application. It is therefore very important for you to let the Certificate Review Unit know if you move/relocate or change your phone number after you submit your application.

6) Who should I contact if I have questions or need help?

You can call DOCCS's Certificate Review Unit at (518) 485-8953.

You can also contact the following organizations who are familiar with the process and have experience assisting applicants

Anywhere in New York State (including New York City):

- Legal Action Center - (212) 243-1313

New York City:

- Community Service Society – (212) 614-5441)
- Neighborhood Defenders of Harlem (northern Manhattan residents; 96th street and above) – 212-876-5500
- Youth Represent – (212) 553-6421 or by email at info@youthrepresent.org (if you are under the age of 24);
- Bronx Defenders – (718) 838-7878 or walk-in Monday to Friday from 9 AM to 5 PM at their Client Reception space at 360 East 161st Street; (if you live in the Bronx)

Upstate New York

- Legal Assistance of Western New York (LAWNY) – LAWNY has 6 offices serving 14 counties in western New York: Allegany, Cattaraugus, Chautauqua, Chemung, Livingston, Monroe, Ontario, Schuyler, Seneca, Steuben, Tioga, Tompkins, Wayne and Yates Counties.
    - Bath – (607) 776-4126,
    - Elmira – (607) 734-1647,
    - Geneva (315) 781-1465,
    - Ithaca – (607) 273-3667,
    - Jamestown - (716) 664-4535,
    - Rochester - (585) 325-2520.
- Legal Aid Bureau of Buffalo - (716) 855-1553 (if you live in Erie County)

7) Where should I send my completed application?

To apply to DOCCS, please complete the attached application form and return the original copy with all signatures notarized, to this address:

STATE OF NEW YORK

DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION

ATTN: CERTIFICATE REVIEW UNIT

The Harriman State Campus – Building 2

1220 Washington Avenue

Albany, NY 12226-2050

(518) 485-8953

To find out how to apply to the court that sentenced you, you can find the contact information for the court in a phone directory or by visiting the web at www.nycourts.gov.

If you want to restore your firearms rights/privileges and were convicted of a felony in a Federal Court, you must seek/request relief from the United States Department of Justice, Office of the Pardon Attorney (www.justice.gov/pardon).

IMPORTANT INFORMATION (Detach and retain for your records)

If you are granted a Certificate, the Certificate will remove disabilities (such as license disqualifications) caused by your conviction but **it will not remove, seal, erase or expunge the underlying conviction**. You will still have a conviction and will have to tell employers and licensing agencies about the conviction if they ask.

A Certificate also does not limit the right of a prospective employer or licensing agency from using their lawful discretion to refuse you employment, or to refuse to grant or renew any license, permit, or privilege.

A Certificate is not needed to restore your right to register for or vote in an election. Those rights are completely restored when you reach the maximum expiration date of your sentence or the termination of your sentence (Executive Law §259-j or Correction Law §205).

CERTIFICATE APPLICATION

PURPOSE FOR REQUESTING CERTIFICATE:

Please provide your reason(s) or purpose for requesting a certificate:
Only check the reason(s) of primary interest to you:

- ☐ Secure employment and/or improve employment opportunities
- ☐ School bus driver
- ☐ Notary Public
- ☐ Long guns
- ☐ Handguns
- ☐ Other (Please specify) _____

For Long guns and/or Handguns please specify reason(s) for request (i.e., Hunting, Target, Armed Security Work, etc): _____

APPLICANT IDENTIFYING INFORMATION:

Name: _____
(Last) (First) (Middle) (Suffix)

Date of Birth: _____ Gender: ☐ Male ☐ Female

Race:
- ☐ White
- ☐ Black/African American
- ☐ American Indian
- ☐ Asian
- ☐ Other

Ethnicity:
- ☐ Hispanic
- ☐ Non-Hispanic

Social Security Number: _____ - _____ - _____

Height: _____ Weight: _____ Eye Color: _____ Hair Color: _____

Have you ever been known by any other legal name or alias other than the name on this application? If yes, indicate below and state reason(s) for change of name:

Name	Reason for Legal Name Change
_____	_____

RESIDENCE HISTORY:

Present Address: _____
(Street) (City) (State) (Zip Code)

_____
(Apt. No.) (Home Phone/Cell Phone) (County)

For your current address, list everyone who lives with you below:

Name	Age	Relationship
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

To the best of your knowledge, list ALL previous residences (including your present residence, as well as any time that you were homeless or lived in medical or other housing for the past two (2) years:

Address (Include City and State)	From/To
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

EMPLOYMENT HISTORY:

To the best of your knowledge, list your occupations/jobs and employers for the past two (2) years. Start with your present employer and work back. For each period of unemployment, provide dates:

Dates (mo. & yr.) From	To	Occupation Job/Position	Name & Address of employer	Full or P/T	Immediate Supervisor	Weekly Salary
_____	Present	_____	_____	__	_____	_____
_____	_____	_____	_____	__	_____	_____
_____	_____	_____	_____	__	_____	_____
_____	_____	_____	_____	__	_____	_____
_____	_____	_____	_____	__	_____	_____
_____	_____	_____	_____	__	_____	_____
_____	_____	_____	_____	__	_____	_____

DOCCS will only contact an employer as part of the investigation process if after your interview there is information that requires additional verification and DOCCS will not discuss your conviction with any employer.

CITIZENSHIP:

Are you a citizen of the Unites States? (check one)

☐ Yes, by birth ☐ Yes, by Naturalization, Certificate Number _____

If not a citizen, provide _____ _____
Alien registration Number Country

MILITARY SERVICE HISTORY:

If you ever served in the Unites States military, please provide:

Branch of Service: _____ Date of entry into Active Duty: _____

Date of Discharge: _____ Honorable Discharge: ☐ Yes ☐ No

LEGAL HISTORY:

If known: NYSID # _____ FBI # _____ Prison #_____

Record of out-of-state or federal convictions (DOCCS has access to your New York conviction information):
To the best of your knowledge, please list all out-of-state or federal convictions and adjudications.

Conviction Date	Court of Conviction (Include State, County and/or City)	Conviction Charge (Do not use codes)	Sentence
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

If you have been on out-of-state or federal probation/parole, please check below:

☐ Probation ☐ Parole

From	To	To the best of your knowledge Parole/Probation Officer's name and address where you reported
_____	_____	_____
_____	_____	_____

If you were committed to local jail or other adult facility in the past two (2) years, please provide the information below to the best of your knowledge:

Date of Conviction	Conviction Charge	Name of Facility/Institution and Location	Date of Release
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

If you previously applied for a Certificate of Relief from Disabilities, please provide:

Place: _____ Date: _____ Was it granted: _____

If you previously applied for a Certificate of Good Conduct, please provide:

Place: _____ Date: _____ Was it granted: _____

Have you ever had an Order Of Protection (OOP) issued against you?
If yes, please provide the information below to the best of your knowledge.

Date of OOP Issuance	Court of OOP Issuance	Person(s) Protected by OOP	Date of OOP Expiration
_____	_____	_____	_____
_____	_____	_____	_____

SOCIAL STATUS:

Marital Status: ☐ Single ☐ Married ☐ Separated ☐ Divorced ☐ Widow(er) ☐ Annulled

How many times have you been married? _____

For each marriage, please give the following information:

Name Used (If different from name used on this application)	Wife's Maiden Name or Husband's Full Name	Date Married/ Divorced
_____	_____	_____
_____	_____	_____
_____	_____	_____

If during the past two (2) years you lived with a roommate(s) or live-in partner(s) to whom you were not legally married, please provide name(s) and current address below.
Use reverse side of paper if additional space is required.

Name	Address
_____	_____
_____	_____
_____	_____

LICENSE INFORMATION:

Licenses you hold (Motor Vehicle, Trade, Professional or Pistol Permit):
Please use reverse side of paper if additional space is required.

Type of License	Licensing Agency	License Number	Date Issued	Expires

REFERENCES:

Please provide the complete names and mailing addresses of two (2) people who we can contact to provide character references on your behalf:

Name	Address	Phone

I agree to allow an investigation to be made to determine my fitness for a certificate pursuant to Article 23 of the NYS Correction Law. I hereby certify that I have fully and truthfully answered all of the above questions.

Applicant's Signature: _____ Date: _____

MUST BE SIGNED BY A NOTARY PUBLIC

State of New York
County of _____

_____ being duly sworn, deposed and says that he/she is the applicant named within the application: the he/she has read the foregoing application and knows the contents thereof; that the same is true to his/her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he/she believes it to be true.

_____
Notary Public

Authorization for release of information

I, _____, have applied to the New York State Department of Corrections and Community Supervision for a Certificate of Relief from Disabilities/Good Conduct. To facilitate the investigation of my application, I hereby authorize any individual, private business concern, state or federal agency to release to any authorized representative of the Department of Corrections and Community Supervision any information such person, private business concern. State or federal agency may have in its possession concerning me or my activities.

Applicant's Signature: _____ Date: _____

_____
Notary Public

BREAKING BARRIERS PROCEDURE FOR SEALING MOTION (CPL160.59)

1. Client is eligible for sealing if:
    a. Total of 2 convictions – only one of which can be a felony (non-violent, non sex offense – check list)
    b. 10 years has passed since conviction AND sentence (time in jail/prison does NOT count toward the 10 year period)
    c. You can have more than one conviction if in the "same incident", and that will only count as one conviction for these purposes

2. Step 1 – Certificate of Disposition
    a. Client must obtain a certificate of disposition from the court of conviction (will have court seal), there will be a $5 fee for each (Liz will see if there is a fee waiver)
    b. They fill out the form, and can mail or appear
        i. If mailing it must include a money order or check, and it must be notarized and include a stamped, self-addressed envelope
        ii. In person, the client will need a picture license, but form is not required to be notarized
    c. We can fill out the information from the RAP sheet to assist the client with this form
    d. Liz will find out whether she can obtain certificates of dispositions for the clients?

3. Step 2 – Evidence of Rehabilitation
    a. In the interim, before filing the actual motion, the client should be given the information to gather (See LAC list)
    b. These documents will be included and listed in the document as attachments, the form allows 7 additional attachments, but we can use additional paper if necessary

4. Step 3 – Notice of Motion and Affidavit in Support
    a. We will fill out as much of the form in advance for the client
    b. Include the additional "attachment" documents
    c. With client, develop a well thought out reason/explanation in the "interest of justice" for granting the motion under number 20
    d. Form must be notarized
    e. Attached documents will be labelled as "Attachment 4, 5, etc." separately
    f. Packet assembled, BUT not stapled, as Affidavit of Service must be filled out, and once completed, added to the Court's original copy

g. Original, plus 3 copies of all documents (1 to be served on DA, one for client, one for our file)
h. Liz or other attorney must approve before service

5. Service – where does client file
    a. If client is requesting 2 cases be sealed, still one motion
        i. File where the most serious charge occurred
        ii. If both the same class, file where the most recent conviction occurred
    b. For Suffolk – will we file for the client for cases in Central Islip and/or Riverhead?
    c. If so, the DA office must be served first, then we must complete the affidavit of service, make a copy, and attach the original to the copy for the Court before we file
    d. Must get client and our copy stamped by DA and the court for proof that it was filed

6. Step 4 – Waiting……
    a. DA has 45 days to consent or oppose the motion
    b. The court will require the client to get fingerprinted, as they will be requesting an unsuppressed copy of the client's RAP sheet, the court will send client instructions – Liz will find out whether there will be a cost for the client and whether they can accept ours, or if they will waive the fees
    c. If the DA opposes, the Court will schedule a hearing, students will assist client in preparing for hearing and try to attend as an advocate,(Liz or other attorney may attend as pro bono attorney?)
    d. Even if the DA does not oppose, Court has the right to request a hearing to make it's determination

7. Outcome
    a. If client has a hearing – will court reserve decision or give it on the spot?
    b. How will client be notified if the motion is granted?
    c. How long before the RAP sheet reflects the case is sealed (60 days?)
    d. Can the client get a new RAP sheet at no cost automatically (as when we do a corrective request to Albany), or do we have to order a new one?
    e. If denied, will client be given an explanation?
    f. If denied, what should the client do to possibly change the outcome and when should they re-apply?

New York State Prosecutors' Offices

County	Address 1	Address 2	Room/Suite Floor	City/Town	State	Zip Code
Albany County District Attorney's Office	Albany County Judicial Center	6 Lodge Street		Albany	NY	12207-2111
Allegany County District Attorney's Office	7 Court Street		Room 333	Belmont	NY	14813-1044
Bronx County District Attorney's Office	198 E. 161st Street		4th Floor	Bronx	NY	10451-3536
Broome County District Attorney's Office	George Harvey Justice Building	45 Hawley Street	4th Floor	Binghamton	NY	13902-3722
Cattaraugus County District Attorney's Office	Cattaraugus County Center	303 Court Street		Little Valley	NY	14755-1028
Cayuga County District Attorney's Office	95 Genesee Street			Auburn	NY	13021-3698
Chautauqua County District Attorney's Office	1 N. Erie Street			Mayville	NY	14757-1000
Chemung County District Attorney's Office	226 Lake Street	P.O. Box 588		Elmira	NY	14902-0588
Chenango County District Attorney's Office	26 Conkey Avenue	P.O. Box 126	2nd Floor	Norwich	NY	13815-0126
Clinton County District Attorney's Office	Clinton County Government Center	137 Margaret Street	Suite 201	Plattsburgh	NY	12901-0059
Columbia County District Attorney's Office	325 Columbia Street			Hudson	NY	12534-1902
Cortland County District Attorney's Office	Cortland County Courthouse	46 Greenbush Street	Suite 102	Cortland	NY	13045-2765
Delaware County District Attorney's Office	1 Courthouse Square		Suite 5	Delhi	NY	13753-1600
Dutchess County District Attorney's Office	236 Main Street			Poughkeepsie	NY	12601-3102
Erie County District Attorney's Office	25 Delaware Avenue			Buffalo	NY	14202-3926
Essex County District Attorney's Office	7559 Court Street	P.O. Box 217		Elizabethtown	NY	12932-0217
Franklin County District Attorney's Office	355 West Main Street		Suite 466	Malone	NY	12953-1855
Fulton County District Attorney's Office	County Office Building	223 West Main Street		Johnstown	NY	12095-2309
Genesee County District Attorney's Office	1 West Main Street			Batavia	NY	14020-2019
Greene County District Attorney's Office	411 Main Street			Catskill	NY	12414-1363
Hamilton County District Attorney's Office	P.O. Box 277	White Birch Lane		Indian Lake	NY	12842-0277
Herkimer County District Attorney's Office	301 N. Washington Street		Suite 2401	Herkimer	NY	13350-1299
Jefferson County District Attorney's Office	175 Arsenal Street			Watertown	NY	13601-2563
Kings County (Brooklyn) District Attorney's Office	350 Jay Street			Brooklyn	NY	11201-2900
Lewis County District Attorney's Office	7660 North State Street			Lowville	NY	13367-1562
Livingston County District Attorney's Office	Livingston County Courthouse	2 Court Street		Geneseo	NY	14454-1048
Madison County District Attorney's Office	Veteran's Memorial Building	P.O. Box 578		Wampsville	NY	13163-0578
Monroe County District Attorney's Office	47 S. Fitzhugh Street			Rochester	NY	14614-1414
Montgomery County District Attorney's Office	58 Broadway	P.O. Box 1500		Fonda	NY	12068-1500
Nassau County District Attorney's Office	262 Old Country Road		2nd Floor	Mineola	NY	11501-4251
New York County (Manhattan) District Attorney's Office	1 Hogan Place			New York	NY	10013-4311
Niagara County District Attorney's Office	Niagara County Courthouse	175 Hawley Street	3rd Floor	Lockport	NY	14094-2740
Oneida County District Attorney's Office	235 Elizabeth Street			Utica	NY	13501-2201
Onondaga County District Attorney's Office	505 S. State Street		4th Floor	Syracuse	NY	13202-2183
Ontario County District Attorney's Office	Ontario County Courthouse	27 N. Main Street	3rd Floor	Canandaigua	NY	14424-1447
Orange County District Attorney's Office	40 Matthews Street			Goshen	NY	10924-1964
Orleans County District Attorney's Office	13925 State Route 31		Suite 300	Albion	NY	14411-9385
Oswego County District Attorney's Office	Public Safety Center	39 Churchill Road		Oswego	NY	13126-6671
Otsego County District Attorney's Office	197 Main Street			Cooperstown	NY	13326-1128
Putnam County District Attorney's Office	40 Gleneida Avenue			Carmel	NY	10512-1705
Queens County District Attorney's Office	125-01 Queens Boulevard		Suite 7	Kew Gardens	NY	11415-1514

Rensselaer County District Attorney's Office	Rensselaer County Courthouse	80 2nd Street		Troy	NY	12180-4098
Richmond County (Staten Island) District Attorney's Office	130 Stuyvesant Place		Suite 602	Staten Island	NY	10301-1900
Rockland County District Attorney's Office	1 South Main Street		Suite 500	New City	NY	10956-3539
Saratoga County District Attorney's Office	25 West High Street			Ballston Spa	NY	12020-1963
Schenectady County District Attorney's Office	Schenectady County Courthouse	612 State Street	3rd Floor	Schenectady	NY	12305-2112
Schoharie County District Attorney's Office	157 Depot Lane	P.O. Box 888	2nd Floor	Schoharie	NY	12157-0888
Schuyler County District Attorney's Office	105 9th Street			Watkins Glen	NY	14891-1435
Seneca County District Attorney's Office	44 West Williams Street			Waterloo	NY	13165-1338
St. Lawrence County District Attorney's Office	48 Court Street			Canton	NY	13617-1197
Steuben County District Attorney's Office	3 East Pulteney Square			Bath	NY	14810-1510
Suffolk County District Attorney's Office	William J. Lindsay County Complex	77 Veterans Memorial Highway		Hauppauge	NY	11788
Sullivan County District Attorney's Office	Sullivan County Courthouse	414 Broadway		Monticello	NY	12701-1380
Tioga County District Attorney's Office	20 Court Street			Owego	NY	13827-1792
Tompkins County District Attorney's Office	320 North Tioga Street			Ithaca	NY	14850-4206
Ulster County District Attorney's Office	Ulster County Courthouse	275 Wall Street		Kingston	NY	12401-3817
Warren County District Attorney's Office	1340 State Route 9			Lake George	NY	12845-3434
Washington County District Attorney's Office	Municipal Center - Building B	383 Broadway		Fort Edward	NY	12828-1001
Wayne County District Attorney's Office	Hall of Justice	54 Broad Street		Lyons	NY	14489-1199
Westchester County District Attorney's Office	111 Dr. Martin Luther King, Jr. Boulevard		3rd Floor	White Plains	NY	10601-2500
Wyoming County District Attorney's Office	Wyoming County Courthouse	147 North Main Street		Warsaw	NY	14569-1123
Yates County District Attorney's Office	415 Liberty Street			Penn Yan	NY	14527-1122
Office of the New York State Attorney General	Chief of Criminal Appeals & Habeas	28 Liberty Street		New York	NY	10005-1400

mar

CHECKLIST

- ☐ Make sure you are eligible (see next page).
- ☐ Gather any supporting documents you think will help your application. These can be documents such as a certificate of relief from disabilities or a certificate of good conduct; verification of employment; community service, volunteer or charity work; educational transcripts; letters of recommendation or commendation from employers, teachers/professors, community leaders, faith leaders, or charitable organizations; certificates of successful completion of training programs, drug or alcohol treatment programs; etc. Attach copies (not originals!) to your application.
- ☐ Get a "certificate of disposition" for each conviction you want to seal. Attach copies to your application.
- ☐ Fill out the application.
- ☐ Get your sworn statement notarized (page 3 of the application). If you use additional pages for your sworn statement, then you must also sign, date and notarize the last page of your statement.
- ☐ Before you file your application with the Court, you or another person must either mail or personally deliver a copy of your full application to the prosecutor(s). This is called "serving" them. If the application is served in person, make sure your copy and the copy you will file with the court are stamped "received."
- ☐ Fill out the Affidavit of Service, get it notarized and attach it to the application. The Affidavit of Service must be filled out by the person who served the application on the prosecutor's office.
- ☐ Take your original application and Affidavit of Service and attach copies of any supporting documents and file it with the court.
- ☐ Keep copies of all the papers you filed for your records.

C.P.L. §160.59 PRO SE APPLICATION

PLEASE READ THESE INSTRUCTIONS COMPLETELY BEFORE STARTING THE APPLICATION

ARE YOU ELIGIBLE?

DO YOU HAVE MORE THAN TWO (2) CRIMINAL CONVICTIONS (MISDEMEANOR OR FELONY)?
(If you have more than one conviction that was "committed as part of the same criminal transaction," they count as a single conviction under this law. NOTE: A "criminal transaction" is conduct that is part of the same criminal incident or venture.)

○Yes ○No

DO YOU HAVE MORE THAN ONE FELONY CONVICTION?
(If you have more than one felony conviction that was "committed as part of the same criminal transaction," they count as a single conviction under this law. NOTE: A "criminal transaction" is conduct that is part of the same criminal incident or venture.)

○Yes ○No

HAVE LESS THAN TEN YEARS PASSED SINCE YOUR LAST CRIMINAL CONVICTION?
(Start counting the ten-year period from the date you were *sentenced* OR, if you were incarcerated after being sentenced, from the date you were *released* from incarceration. Time spent on probation or parole counts toward the ten-year period.)

○Yes ○No

ARE YOU REQUIRED TO REGISTER AS A SEX OFFENDER? ○Yes ○No

ARE YOU APPLYING TO SEAL AN INELIGIBLE OFFENSE?
(INELIGIBLE offenses include sex offenses, sexual performance by a child, homicide, violent felonies, Class A felonies, felony level conspiracy cases to commit an ineligible offense, and attempts to commit ineligible offenses if the offense still constitutes a felony. There is a complete list of ineligible offenses at the end of these instructions.) ○Yes ○No

DO YOU CURRENTLY HAVE AN OPEN CRIMINAL CASE? ○Yes ○No

If you answered **YES** to any of the above questions, you are not eligible to have your record sealed. Your application will be DENIED.

If you answered **NO** to all the questions, COMPLETE THE ATTACHED APPLICATION, have it notarized, serve it on the prosecutor's office, and file it with the court. A list with the location of each prosecutor's office can be found online at:
http://www.nycourts.gov/FORMS/cpl_160.59_sealing_application/pdfs/List_of_District_Attorneys_Offices.pdf

Note: Before deciding this motion, the law requires the court to have a fingerprint-based criminal history report (rap sheet), which will include any sealed or suppressed cases, and any criminal history information that occurred in jurisdictions outside of New York. By filing this Notice of Motion, you are agreeing to be fingerprinted if required. When the motion is filed, the court clerk will give you instructions if you must be fingerprinted.

Note: IF YOU ARE NOT A CITIZEN OF THE UNITED STATES, sealing a conviction under C.P.L. §160.59 DOES NOT seal the conviction for immigration purposes. Sealed cases may still be reported to the federal government for immigration purposes.

WHAT DO I NEED TO DO?

1. **GET A CERTIFICATE OF DISPOSITION FOR EACH CASE YOU ARE APPLYING TO SEAL**. You may already have a Certificate of Disposition. If not, contact the clerk's office of the court where you will apply to seal your case, which is the court where you were convicted and sentenced. If you are applying to seal more than one case, you must get a Certificate of Disposition for each case. If you cannot get a Certificate of Disposition, you must attach a written explanation of why you cannot get one. A form to request a Certificate of Disposition from the court is available online at:
http://nycourts.gov/FORMS/cpl_160.59_sealing_application/pdfs/CPL_160.59_CoD_Request_Form.pdf
2. **COMPLETE and NOTARIZE your application**. If you used additional page(s) for your statement, you must sign, date and notarize the last page of your statement as well. You do NOT need to notarize documents you attach in support of your application, such as letters of reference or training certificates.

3. **MAKE 3 FULL COPIES of your application, including all attached documents.** If you have cases from 2 different counties, make 4 full copies.

4. **SERVE THE PROSECUTOR.** Before you file your application with the Court, you or another person must mail or deliver a copy of your full application to the prosecutor(s). This is called "serving" them. A list of prosecutors' offices can be found online at:
http://www.nycourts.gov/FORMS/pdf/160.59_sealing_application/pdfs/List_of_District_Attorneys_Offices.pdf

   NOTE: If you are applying to seal convictions *from two different counties*, you must serve your motion on the prosecutor of *each* county. The prosecutor is usually the District Attorney, but if your case was prosecuted by the Attorney General or Special Narcotics Prosecutor, serve them instead.

   - **If you or another person are serving the motions on the prosecutor in person:**
     1. Bring all copies to the appropriate prosecutor's office(s).
     2. Ask the prosecutor's office to stamp all copies as "received" and leave one copy with the clerk of that office. If you are serving more than one prosecutor, the copy you keep for yourself and the copy you file with the court should be stamped as "received" by *both* prosecutors' offices.
   - **If you or another person are serving by mail**:

     Mail one copy of your full application to the appropriate prosecutor's office. You will need to mail a copy to each prosecutor's office if you are applying to seal cases from different counties. Certified mail is recommended, so you have proof of mailing.

5. **GET PROOF OF SERVICE.** Fill out the Affidavit of Service (at the back of this application), sign and notarize it. If a person other than you served the application, that person must fill out the Affidavit. If more than one prosecutor's office was served, you or the person who served the application must complete a separate Affidavit of Service for each prosecutor that was served.

6. **FILE YOUR APPLICATION.**
   - Attach the original Affidavit(s) of Service to your original completed application and file it with the court.
   - You may file your application by mail or in person at the clerk's office of the appropriate courthouse.

7. **WHERE TO FILE**: **DO NOT FILE IN MORE THAN ONE COURT**. If you are applying to seal two cases, your motion must be filed in the court where the most serious conviction was entered. If both cases were the same level of crime (e.g., two class "A" misdemeanors (AM) or two class "B" misdemeanors (BM)), the motion must be filed in the court where the most recent conviction was entered. You can find courts' addresses online at: http://www.nycourts.gov/courts/index.shtml

8. **KEEP PROOF OF FILING.**
   1. Save one copy of the application for your records.
   2. If you file your motion in person, ask the court clerk to time stamp your copy "received."
   3. If you file your motion by mail, it is best to send it via certified mail, so you get a receipt showing that mailing occurred. Save this receipt.

9. **HEARING OR DECISION.** If your case is eligible for sealing but the prosecutor opposes your application, the court will contact you to schedule a hearing. At the hearing, the court will consider any evidence offered by you or the prosecutor that would aid the court in deciding whether to seal your conviction(s). If the prosecutor does not oppose your application or you are not eligible for sealing, you will receive a decision from the court by mail.

10. **CONFIRM SEALING.** After your record has been sealed by the court, if you want to check on whether your case record is properly sealed in the NYS Division of Criminal Justice Service's database (from which official rap sheets are generated), you should:
    1. Get a copy of your sealing order from the court.
    2. Send a duplicate copy of the order with the "Request for CPL §160.59 Verification Form" to the address on the form. This form is available online at:
https://www.nycourts.gov/FORMS/pdf/160.59_sealing_application/pdfs/160.59_Seal_Verification_Form_DCJS.pdf
    3. You will receive a letter from the NYS Division of Criminal Justice Service confirming that your sealing was correctly processed and that the case will not appear on rap sheets provided to outside agencies. The sealed case will still appear on a rap sheet you order for yourself and will still be visible to law enforcement.

ITEMIZED FORM INSTRUCTIONS

The instruction for each number below refers to the field number in the "Notice of Motion in Support of Sealing Pursuant to CPL §160.59" and the "Affidavit in Support of Sealing Pursuant to CPL §160.59" forms. For additional help, and to find fillable versions of these forms, go to the Unified Court System's website at: http://www.nycourts.gov/forms/index.shtml

Notice of Motion in Support of Sealing Pursuant to CPL §160.59

1. Enter your full legal name.
2. If you used a different name than your legal name on a case you are applying to seal, list that name here.
3. Enter your New York State Identification Number (NYSID) if known. This number may be found on the Certificate of Disposition you obtained from the court where your conviction occurred.
4. Enter your date of birth.
5. Enter the court's docket number if you were convicted and sentenced in a city, town or village court, or enter the indictment/SCI number if you were convicted and sentenced in a supreme or county court. The case number will be on the Certificate of Disposition you get from the court.

   NOTE: If you were convicted of a charge in another case that was part of the same incident, enter the information for that case in the same row. For example, you were arrested for DWI and Unauthorized Use of a Vehicle. Both crimes occurred in the same incident, but you were convicted for a misdemeanor DWI in the City Court, and you were also convicted for a felony Unauthorized Use of a Vehicle in the County Court. Because these convictions were part of the same incident, they count as one conviction for sealing purposes, and they should be listed together.)

6. Enter the name of the court where you were convicted and sentenced. The name of the court will be on the Certificate of Disposition you get from the court.

Affidavit in Support of Sealing Pursuant to CPL §160.59

7. You are telling the court that you have not been convicted in more than two criminal cases, and that no more than one of those cases was a conviction for a felony charge.

   NOTE: A felony level offense will have a charge weight of AF, BF, CF, DF or EF. An attempt to commit a crime is displayed on your Certificate of Disposition as "Attempted" and will have the number 110 before the penal law section and subsection. For example, Attempted Robbery 2° will be displayed as PL §110-160.10.

8. You are telling the court that you are not trying to seal an ineligible charge. If you were convicted of any of the crimes listed below, you are NOT ELIGIBLE for CPL §160.59 sealing. Check your Certificate of Disposition to verify that it does not include a conviction for any of the following charges:

Sex Offenses:

- PL §130.20 Sexual Misconduct
- PL §130.25 Rape 3°
- PL §130.30 Rape 2°
- PL §130.35 Rape 1°
- PL §130.40 Criminal Sexual Act 3°
- PL §130.45 Criminal Sexual Act 2°
- PL §130.50 Criminal Sexual Act 1°
- PL §130.52 Forcible Touching
- PL §130.53 Persistent Sexual Abuse
- PL §130.55 Sexual Abuse 3°
- PL §130.60 Sexual Abuse 2°
- PL §130.65 Sexual Abuse 1°
- PL §130.65-a Aggravated Sexual Abuse 4°
- PL §130.66 Aggravated Sexual Abuse 3°
- PL §130.67 Aggravated Sexual Abuse 2°
- PL §130.70 Aggravated Sexual Abuse 1°

- PL §130.75 Course of Sexual Conduct Against a Child 1°
- PL §130.80 Course of Sexual Conduct Against a Child 2°
- PL §130.85 Female Genital Mutilation
- PL §130.90 Facilitating a Sex Offense with a Controlled Substance
- PL §130.91 Sexually Motivated Felony
- PL §130.95 Predatory Sexual Assault
- PL §130.96 Predatory Sexual Assault Against a Child
- PL §263.05 Use of a Child in a Sexual Performance
- PL §263.10 Promoting an Obscene Sexual Performance by a Child
- PL §263.11 Possessing an Obscene Sexual Performance by a Child
- PL §263.15 Promoting a Sexual Performance by a Child
- PL §263.16 Possessing a Sexual Performance by a Child
- PL §263.30 Facilitating a Sexual Performance by a Child with a Controlled Substance or Alcohol
- Any conviction that requires you to register as a sex offender

Homicide Offenses:

- PL §125.10 Criminally Negligent Homicide
- PL §125.11 Aggravated Criminally Negligent Homicide
- PL §125.12 Vehicular Manslaughter 2°
- PL §125.13 Vehicular Manslaughter 1°
- PL §125.14 Aggravated Vehicular Homicide
- PL §125.15 Manslaughter 2°
- PL §125.20 Manslaughter 1°
- PL §125.21 Aggravated Manslaughter 2°
- PL §125.22 Aggravated Manslaughter 1°
- PL §125.25 Murder 2°
- PL §125.26 Aggravated Murder
- PL §125.27 Murder 1°
- PL §125.40 Abortion 2°
- PL §125.45 Abortion 1°
- PL §125.50 Self-Abortion 2°
- PL §125.55 Self Abortion 1°
- PL §125.60 Issuing Abortion Articles

Class A Felony Offenses (AF):

- Any Class A felony offense

Class B Violent Felony Offenses (BF):

- PL §110/125.25 Attempted Murder 2°
- PL §110/135.25 Attempted Kidnapping 1°
- PL §110/150.20 Attempted Arson 1°
- PL §125.20 Manslaughter 1°
- PL §125.22 Aggravated Manslaughter 1°
- PL §130.35 Rape 1°
- PL §130.50 Criminal Sexual Act 1°
- PL §130.70 Aggravated Sexual Abuse 1°
- PL §130.75 Course of Sexual Conduct Against a Child 1°
- PL §120.10 Assault 1°
- PL §135.20 Kidnapping 2°
- PL §140.30 Burglary 1°
- PL §150.15 Arson 2°
- PL §160.15 Robbery 1°
- PL §230.34(5)(a)&(b) Sex Trafficking
- PL §255.27 Incest 1°
- PL §265.04 Criminal Possession of a Weapon 1°
- PL §265.09 Criminal Use of a Firearm 1°
- PL §265.13 Criminal Sale of a Firearm 1°
- PL §120.11 Aggravated Assault upon a Police Officer or a Peace Officer
- PL §120.07 Gang Assault 1°
- PL §215.17 Intimidating a Victim or Witness 1°
- PL §490.35 Hindering Prosecution of Terrorism 1°
- PL §490.40 Criminal Possession of a Chemical Weapon or Biological Weapon 2°
- PL §490.47 Criminal Use of a Chemical Weapon or Biological Weapon 3°

Class C Violent Felony Offenses (CF):

- An attempt to commit any of the Class B felony offenses listed above
- PL §125.11 Aggravated Criminally Negligent Homicide
- PL §125.21 Aggravated Manslaughter 2°
- PL §130.67 Aggravated Sexual Abuse 2°
- PL §120.08 Assault on a Peace Officer, Police Officer, Fireman or Emergency Medical Services Professional
- PL §120.09 Assault on a Judge
- PL §120.06 Gang Assault 2°
- PL §121.13 Strangulation 1°
- PL §140.25 Burglary 2°
- PL §160.10 Robbery 2°
- PL §265.03 Criminal Possession of a Weapon 2°
- PL §265.08 Criminal Use of a Firearm 2°
- PL §265.12 Criminal Sale of a Firearm 2°
- PL §265.14 Criminal Sale of a Firearm with the Aid of a Minor
- PL §265.19 Aggravated Criminal Possession of a Weapon
- PL §490.15 Soliciting or Providing Support for an Act of Terrorism 1°
- PL §490.30 Hindering Prosecution of Terrorism 2°
- PL §490.37 Criminal Possession of a Chemical Weapon or Biological Weapon 3°

Class D Violent Felony Offenses (DF):

- An attempt to commit any of the Class C violent felony offenses listed above
- PL §120.02 Reckless Assault of a Child
- PL §120.05 Assault 2°
- PL §120.18 Menacing a Police Officer or Peace Officer
- PL §120.60 Stalking 1°
- PL §121.12 Strangulation 2°
- PL §130.30 Rape 2°
- PL §130.45 Criminal Sexual Act 2°
- PL §130.65 Sexual abuse 1°
- PL §130.80 Course of Sexual Conduct Against a Child 2°
- PL §130.66 Aggravated Sexual Abuse 3°
- PL §130.90 Facilitating a Sex Offense with a Controlled Substance
- PL §135.35 (3)(a)&(b) Labor Trafficking
- PL §265.02 (5), (6), (7), (8), (9) or (10)
- PL §265.11 Criminal Sale of a Firearm 3°
- PL §215.16 Intimidating a Victim or Witness 2°
- PL §490.10 Soliciting or Providing Support for an Act of Terrorism 2°
- PL §490.20 Making a Terroristic Threat
- PL §240.60 Falsely Reporting an Incident 1°
- PL §240.62 Placing a False Bomb or Hazardous Substance 1°
- PL §240.63 Placing a False Bomb or Hazardous Substance in a Sports Stadium or Arena, Mass Transportation Facility or Enclosed Shopping Mall
- PL §405.18 Aggravated Unpermitted Use of Indoor Pyrotechnics 1°

Class E Violent Felony Offenses (EF):

- PL §110/265.02 (5), (6), (7), or (8) Attempted Criminal Possession of a Weapon 3° as a lesser included offense of that section as defined in CPL §220.20
- PL §130.53 Persistent Sexual Abuse
- PL §130.65-a Aggravated Sexual Abuse 4°
- PL §240.55 Falsely Reporting an Incident 2°
- PL §240.61 Placing a False Bomb or Hazardous Substance 2°

Conspiracy Offenses:

- PL §105.10 Conspiracy 4° when the crime you conspired to commit is one of the charges listed above
- PL §105.13 Conspiracy 3° when the crime you conspired to commit is one of the charges listed above
- PL §105.15 Conspiracy 2° when the crime you conspired to commit is one of the charges listed above
- PL §105.17 Conspiracy 1° when the crime you conspired to commit is one of the charges listed above

9 Your last criminal conviction and sentence must be more than ten years ago. Any time you spent on probation or parole counts toward the ten years. However, if you served time in jail or prison after you were sentenced, that time does not count. For example, your last conviction was 11 years ago, and you served 2 years in state prison (11 – 2 = 9), that is only 9 years, and you are not eligible for sealing until next year.

⑩ If you previously filed an application for sealing under CPL §160.58 or CPL §160.59 with this court or any other court, attach a copy of that application regardless of whether it was granted, denied or is still pending.

⑪ If you intend to file another application for sealing under CPL §160.58 or CPL §160.59 with this court or any other court, list the cases that you will ask to have sealed and check the applicable sealing section.

⑫ Documents 1 and 2 (Certificate of Disposition and Affidavit of Service) are required, and you must attach them to your application. You may also attach additional documents (items 3-10) that you think will help the court decide the motion in your favor.

1. Certificate of Disposition. You must attach a Certificate of Disposition for each case you are asking the court to seal. You may already have a Certificate of Disposition. If not, contact the court where you were convicted and sentenced. If you are applying to seal more than one case, you must get a Certificate of Disposition for each case. If you cannot get a Certificate of Disposition, you must attach a written explanation of why you cannot get one. The form to request a Certificate of Disposition from the court is available at: http://nycourts.gov/FORMS/cpl_160.59_sealing_application/pdfs/CPL_160.59_CoD_Request_Form.pdf

2. Affidavit of Service (page 4 of the application form). *BEFORE* you file your motion with the court, you or another person must either mail or hand-deliver a copy of your motion and supporting papers to the District Attorney in the county where you were convicted and sentenced (this is called "serving" them). If you are applying to seal two cases, and you were convicted in different counties, you or another person must serve the District Attorney of BOTH counties.
NOTE: If you served more than one District Attorney, you or the person who served the application must complete and attach a separate Affidavit of Service for each prosecutor that was served.

3-10. You are not required to submit additional supporting documents, but if you do have additional documents showing positive changes or accomplishments in your life since the conviction(s) took place, you should attach copies of them. These can include documents such as a Certificate of Relief from Disabilities or a Certificate of Good Conduct; verification of employment; community service, volunteer or charity work; educational transcripts; letters of recommendation or commendation from employers, teachers/professors, community leaders, faith leaders, or charitable organizations; certificates of successful completion of training programs, drug or alcohol treatment programs; etc.

⑬ **You must tell the court why you believe your prior conviction(s) should be sealed.**

YOU MUST WRITE SOMETHING. If you don't answer this question, your application may be automatically denied. Tell the court why sealing your conviction(s) is in the interest of justice. Tell the court about positive changes you have made in your life and things you have accomplished since the conviction took place, such as positive work history, participating in training programs, drug or alcohol treatment programs, work or schooling, performing community service, participating in faith-based programs, or volunteer work. If you need more space or wish to attach your statement separately, you can write your statement on a separate sheet of paper, but any additional page(s) you write must be signed, dated and notarized.

STATE OF NEW YORK

_____ **COURT, COUNTY OF** _____

(name of the court where you are filing) (county where the court is located)

In the Matter of the Application of:

1. **Name:** _____
2. **AKA(s):** _____
3. **NYSID:** _____
4. **Date of Birth:** _____

Notice of Motion in Support of Sealing Pursuant to CPL §160.59

This is a Notice of Motion for sealing New York State convictions pursuant to New York Criminal Procedure Law (CPL) section 160.59.

The sealing application is based upon the attached Affidavit in Support of Sealing and, if applicable, the attached supporting documents. The applicant asks the court to seal the following conviction(s):
NOTE: The case number (docket, indictment or SCI number) and court name required for the two paragraphs below (numbered 5 and 6) will be found on your Certificate(s) of Disposition. If you have more than one case number for the same incident (for example, you were charged in city/village/municipal court and supreme/county court for the same incident) enter the case number and court name for both cases in the same row.

5. Case Number (Docket, Indictment, or SCI Number)	6. Court Name

By: _____
Name of Applicant

_____
Street Address

_____
City, State, Zip

_____
Phone

_____
Email

Affidavit in Support of Sealing Pursuant to CPL §160.59

The applicant states that, upon information and belief, the following facts are true:

7. I was convicted of a crime or crimes in no more than two criminal transactions in New York State, and no more than one of those criminal convictions includes a conviction for a felony offense. I do not have any open or pending criminal charges against me.

8. I have not been convicted of any of the following offenses:
   a. a sex offense defined in article one hundred thirty of the Penal Law; or
   b. an offense defined in article two hundred sixty-three of the Penal Law; or
   c. a felony offense defined in article one hundred twenty-five of the Penal Law; or
   d. a violent felony offense defined in section 70.02 of the Penal Law (*see instructions for list*); or
   e. a class A felony offense defined in the Penal Law; or
   f. a felony offense defined in article one hundred five of the Penal Law where the underlying offense is not an eligible offense; or
   g. an attempt to commit an offense that is not an eligible offense if the attempt is a felony; or
   h. an offense for which registration as a sex offender is required pursuant to article six-C of the correction law.

9. It has been over 10 years since I was sentenced for my most recent case. I did not count any jail or prison time I served after being sentenced in calculating the 10-year period.

10. I ○ ***have*** or ○ ***have not*** filed another application for sealing under CPL §160.58 or CPL §160.59. If I did file another application, I have attached a copy to this motion.

11. I ○ ***do*** or ○ ***do not*** intend to file another application for sealing under CPL §160.58 or CPL §160.59. If I do file another application, I will ask to have the following conviction(s) sealed:

Case Number (Docket, Indictment, or SCI Number)	**Court Name**

12. **REQUIRED AND ADDITIONAL DOCUMENTS:**

I attach the following documents to support my request for sealing
(*NOTE: In addition to the required documents (items 1and 2), you may attach other documents showing positive change or accomplishments, including a Certificate of Relief from Disabilities or a Certificate of Good Conduct; verification of employment; community service, volunteer or charity work; educational transcripts; letters of recommendation from employers, teachers/professors, community leaders, faith leaders, or charitable organizations; certificates of successful completion of training or drug or alcohol treatment programs; etc.*):

1. Affidavit of Service upon the District Attorney. **This is required**.
2. Certificate of Disposition (or a copy) for each conviction I am asking the court to seal. **This is required**. (*NOTE: To get a Certificate of Disposition, see item #12 in the instructions.*)
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

⓭ I am asking the court to grant my application for sealing under CPL §160.59 for the following reasons. **This is required.**
(NOTE: Explain the reasons why you believe the case(s) should be sealed. You can include information about positive steps you have taken in your life or things you have accomplished since your conviction. You can attach documents that show these positive steps, but attaching additional documents is not required. Your statement must be signed, dated and notarized below. If you need more space or wish to attach your statement separately, you can write your statement on a separate sheet of paper, but any additional page(s) you write must also be signed, dated and notarized.)

_____

By: _____
Name of Applicant

_____
Street Address

_____
City, State, Zip

_____
Phone

_____
Email
(If you provide your email address, the court will email a copy of your order to you.)

_____
Signature of Applicant

Sworn to before me this ____
day of _____, 20____.

_____
Notary Public

Affidavit of Service for CPL §160.59 Sealing Application

STATE OF NEW YORK

_____ **COURT, COUNTY OF** _____
(name of the court where you are filing) (county where the court is located)

Name of Applicant: _____

The applicant is asking the court to seal the following convictions:

Case Number (Docket, Indictment, or SCI Number)	**Court Name**

The undersigned (deponent), being sworn, says:

I, _____ am over 18 years of age and reside at:
(Name of Person Serving/Mailing)

_____
(Address of Person Serving/Mailing)

That on _____, I served the attached Notice of Motion and Affidavit in Support of Sealing Pursuant to CPL §160.59, including any supporting documents, upon the District Attorney as listed below:
(Date of Service/Mailing)

The District Attorney of _____ County, at the following address:
(Name of County)

_____
(Address)

Select one:

- O by mailing a complete copy in a properly stamped and addressed envelope at the post office or official depository of the United States Postal Service (i.e. a mailbox).
- O by personally delivering a complete copy to the above District Attorney's Office.

_____
Signature of Person Serving/Mailing

Sworn to before me this ____
day of _____, 20____.

_____
Notary Public

NOTE: If more than one prosecutor's office was served, the person who served the application must complete a separate Affidavit of Service for each prosecutor that was served.

THIS SWORN AFFIDAVIT IS PROOF THAT THE PROSECUTOR WAS SERVED.

YOU MUST ATTACH THIS AFFIDAVIT WHEN YOU FILE YOUR APPLICATION WITH THE COURT.

Criminal Certificate of Disposition Request Form for CPL 160.59 Sealing Application

To: _____ **Court**
Number & Street: _____
City, State & Zip: _____
Phone: _____

NOTE: The name, address and phone number of the court can be found by selecting the County and Court Type in the Court Locator at: http://www.nycourts.gov/courts/index.shtml

Please complete the information below to request a criminal Certificate of Disposition for your CPL 160.59 sealing application. You may either bring your completed form to the court in person, or you may mail the completed form to the court. A fee of five ($5) dollars is required in courts located outside the City of New York, and a fee of ten ($10) dollars is required in courts located within the 5 boroughs of the City of New York. When delivering your request in person, you may pay in cash or by certified check or money order, and you must provide a valid photo ID. When mailing your request, you must pay by certified check or money order (do not send cash in the mail), and the form must be notarized below.
NOTE: To avoid delays, contact the court and ask who your certified check or money order must be "payable to" before mailing this request form.

Requestor Information (only the defendant or the defendant's agent may use this form to request a Certificate of Disposition)	
	Date of Request:
Requestor	Name:
	Address:
	Phone:
	Email:
Role	O I am the Defendant
	O I am the Defendant's Agent (must provide notarized authorization from the defendant)
Receipt	O Please mail to the above address (must provide self-addressed stamped envelope)
	O I will pick up at court when notified
For Court Use Only	☐ Certificate of Disposition fee paid O Cash O Certified Check # O Money Order #
	☐ Proper ID provided (specify):
	☐ Written authorization provided (for Defendant's Agent only)
	☐ Self-addressed stamped envelope provided (for request to receive Certificate of Disposition by mail only)

Defendant Information			
Name	First:	Middle:	Last:
AKA(s)			
Date of Birth			
Sex	O Male O Female O Unknown		

Case Identifiers (provide as much information as you can)				
Docket, Indictment, SCI or IDV Number				
Arrest Number				
Order of Protection Number				
Certificate of Disposition Number				
Criminal Justice Tracking Number (CJTN)				
Complaint Number				
Ticket Number				
Other Identifiers (provide other identifiers if known)				
NYSID Number				
Partial Docket Number				
Motorist ID Number				
Arrest Date		or Date Range	from	to
Incident Date		or Date Range	from	to
Address				
License Plate Number				
Charges				
Other				

NOTE: Form MUST be notarized when submitting a request by mail.

_____
Signature of Requestor

Sworn to before me this ____
day of , 20

_____
Notary Public

STATE OF NEW YORK

_____ COURT, COUNTY OF _____

(name of the court where you are filing) (county where the court is located)

In the Matter of the Application of:

1 Name: _____

2 AKA(s): _____

3 NYSID: _____

4 Date of Birth: _____

Notice of Motion in Support of Sealing Pursuant to CPL §160.59

This is a Notice of Motion for sealing New York State convictions pursuant to New York Criminal Procedure Law (CPL) section 160.59.

The sealing application is based upon the attached Affidavit in Support of Sealing and, if applicable, the attached supporting documents. The applicant asks the court to seal the following conviction(s):
NOTE: The case number (docket, indictment or SCI number) and court name required for numbers 5 and 6 will be found on your Certificate(s) of Disposition. If you have more than one case number for the same incident (for example, you were charged in city/village/municipal court and supreme/county court for the same incident) enter the case number and court name for both cases.

5 Case Number (Docket, Indictment, or SCI Number)	6 Court Name

By: _____
Name of Applicant

_____
Street Address

_____
City, State, Zip

_____
Phone

_____
Email

Affidavit in Support of Sealing Pursuant to CPL §160.59

The applicant states that, upon information and belief, the following facts are true:

7. I was convicted of a crime or crimes in no more than two criminal transactions in New York State, and no more than one of those criminal convictions includes a conviction for a felony offense. I do not have any open or pending criminal charges against me.

8. I am not applying to seal any of the following offenses:
   a. a sex offense defined in article one hundred thirty of the Penal Law; or
   b. an offense defined in article two hundred sixty-three of the Penal Law; or
   c. a felony offense defined in article one hundred twenty-five of the Penal Law; or
   d. a violent felony offense defined in section 70.02 of the Penal Law (*see instructions for list*); or
   e. a class A felony offense defined in the Penal Law; or
   f. a felony offense defined in article one hundred five of the Penal Law where the underlying offense is not an eligible offense; or
   g. an attempt to commit an offense that is not an eligible offense if the attempt is a felony; or
   h. an offense for which registration as a sex offender is required pursuant to article six-C of the correction law.

9. It has been over 10 years since I was sentenced for my most recent case. I did not count any jail or prison time I served after being sentenced in calculating the 10-year period.

10. I ○ ***have*** or ○ ***have not*** filed another application for sealing under CPL §160.58 or CPL §160.59. If I did file another application, I have attached a copy to this motion.

11. I ○ ***do*** or ○ ***do not*** intend to file another application for sealing under CPL §160.58 or CPL §160.59. If I do file another application, I will ask to have the following conviction(s) sealed:

Case Number (Docket, Indictment, or SCI Number)	Court Name

12. **REQUIRED AND ADDITIONAL DOCUMENTS:**

I attach the following documents to support my request for sealing
(*NOTE: In addition to the required documents (items 1and 2), you may attach other documents showing positive change or accomplishments, including a Certificate of Relief from Disabilities or a Certificate of Good Conduct; verification of employment; community service, volunteer or charity work; educational transcripts; letters of recommendation from employers, teachers/professors, community leaders, faith leaders, or charitable organizations; certificates of successful completion of training or drug or alcohol treatment programs; etc.*):

1. Certificate of Disposition (or a copy) for each conviction I am asking the court to seal. **This is required.** (*NOTE: To get a Certificate of Disposition, see item #12 in the instructions.*)
2. Affidavit of Service upon the Prosecutor. **This is only required** if the motion was not stamped "received" by the prosecutor's office or was served by mail.
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

13 I am asking the court to grant my application for sealing under CPL §160.59 for the following reasons:
This statement is required.
(*NOTE: Explain the reasons why you believe the case(s) should be sealed. You can include information about positive steps you have taken in your life or things you have accomplished since your conviction. You can attach documents that show these positive steps, but attaching additional documents is not required. Your statement must be signed, dated and notarized below. If you need more space or wish to attach your statement separately, you can write your statement on a separate sheet of paper, but any additional page(s) you write must also be signed, dated and notarized.*)

By: _____
Name of Applicant

_____
Street Address

_____
City, State, Zip

_____
Phone

_____
Email

(If you provide your email address, a copy of the court's decision will be emailed to you.)

_____
Signature of Applicant

Sworn to before me this ____
day of _____, 20____.

_____
Notary Public

Affidavit of Service for CPL §160.59 Sealing Application

STATE OF NEW YORK

_____ COURT, COUNTY OF _____
(name of the court where you are filing) (county where the court is located)

Name of Applicant: _____

The applicant is asking the court to seal the following convictions:

❺ Case Number (Docket, Indictment, or SCI Number)	❻ Court Name

The undersigned (deponent), being sworn, says:

I, _____ am over 18 years of age and reside at:
(Name of Person Serving/Mailing)

_____.
(Address of Person Serving/Mailing)

That on _____, I served the attached Notice of Motion and Affidavit in Support of Sealing Pursuant to CPL §160.59, including any supporting documents, upon the District Attorney as listed below:
(Date of Service/Mailing)

The District Attorney of _____ County, at the following address:
(Name of County)

_____.
(Address)

Select one:

- O by mailing a complete copy in a properly stamped and addressed envelope at the post office or official depository of the United States Postal Service (i.e. a mailbox).
- O by personally delivering a complete copy to the above District Attorney's Office.

_____
Signature of Person Serving/Mailing

Sworn to before me this ____
day of _____, 20____.

_____
Notary Public

NOTE: If more than one prosecutor's office was served, the person who served the application must complete a separate Affidavit of Service for each prosecutor that was served.

THIS SWORN AFFIDAVIT IS PROOF THAT THE PROSECUTOR WAS SERVED.
YOU MUST ATTACH THIS AFFIDAVIT WHEN YOU FILE YOUR APPLICATION WITH THE COURT IF YOU DID NOT GET YOUR COPY STAMPED "RECEIVED" BY APPEARING IN PERSON AT THE PROSECUTOR'S OFFICE.

NEW YORK STATE | Division of Criminal Justice Services

Request for CPL 160.59 Seal Verification

This form should be used to request verification, from the Division of Criminal Justice Services, that a CPL 160.59 Seal has been applied to their New York State Criminal History Record.

To receive verification, please provide your name and current mailing address below and mail this form, along with a copy of the court's CPL 160.59 Seal order to:

NYS Division of Criminal Justice Services
Correspondence Unit – 5th Floor
80 South Swan Street
Albany, NY 12210

Note: DCJS will not provide verification of a CPL 160.59 Seal without a copy of the court signed Seal Order.

To be completed by requestor (Required):

Requester's name: _____

Current Mailing Address: _____

_____

_____

Signature of Requestor: _____ Date: _____

Questioned
As of: January 8, 2018 7:38 PM Z

Padilla v. Kentucky

Supreme Court of the United States

October 13, 2009, Argued; March 31, 2010, Decided

No. 08-651

Reporter
559 U.S. 356 *; 130 S. Ct. 1473 **; 176 L. Ed. 2d 284 ***; 2010 U.S. LEXIS 2928 ****; 78 U.S.L.W. 4235; 22 Fla. L. Weekly Fed. S 211

JOSE PADILLA, Petitioner v. KENTUCKY

Subsequent History: On remand at, Remanded by *Padilla v. Commonwealth, 381 S.W.3d 322, 2012 Ky. App. LEXIS 193 (Ky. Ct. App., 2012)*

Prior History: [****1] ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY.

Commonwealth v. Padilla, 253 S.W.3d 482, 2008 Ky. LEXIS 3 (Ky., 2008)

Disposition: Reversed and remanded.

Core Terms

deportation, removal, advice, guilty plea, consequences, immigration law, immigration, misadvice, alien, advise, criminal conviction, noncitizen, collateral consequence, sentencing, immigration consequences, defense counsel, convictions, courts, aggravated felony, matters, criminal defense attorney, attorney's, collateral, Guidebook, warn, involving moral turpitude, criminal defense, federal court, cases, narcotics offense

Case Summary

Procedural Posture
Defendant, who pleaded guilty to drug charges, sought postconviction relief based on ineffective assistance of counsel. The Supreme Court of Kentucky denied relief. The United States Supreme Court granted certiorari.

Overview

Defendant was a lawful permanent resident who pleaded guilty to transporting marijuana. His crime was a removable offense under *8 U.S.C.S. § 1227(a)(2)(B)(i)*. He claimed that his counsel incorrectly told him prior to entry of his plea that he did not have to worry about immigration status because he had been in the United States for so long. The state court held that the *Sixth Amendment* did not protect defendant from erroneous advice about deportation because it was merely a collateral consequence of his conviction. The Supreme Court held that the distinction between collateral and direct consequences was ill-suited to the deportation context, so advice regarding deportation was not categorically removed from the ambit of the *Sixth Amendment*. Counsel's alleged failure to correctly advise defendant of the deportation consequences of his guilty plea amounted to constitutionally deficient assistance under prevailing professional norms, as the consequences could easily have been determined from reading the removal statute. Whether defendant was entitled to relief depended on whether he could demonstrate prejudice, a matter for the state courts to consider in the first instance.

Outcome

The state court's judgment was reversed, and the matter was remanded for further proceedings. 7-2 decision; one concurrence in the judgment, one dissent.

LexisNexis® Headnotes

Immigration Law > Deportation & Removal > Relief From Deportation & Removal > Cancellation of Removal

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Controlled Substance Offenses

HN1[] **Relief From Deportation & Removal, Cancellation of Removal**

If a noncitizen has committed a removable offense after the 1996 effective date of amendments to the Immigration and Nationality Act, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. *8 U.S.C.S. § 1229b*. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. *8 U.S.C.S. §§ 1101(a)(43)(B), 1228*.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN2[] **Grounds for Deportation & Removal, Criminal Activity**

As a matter of federal law, deportation is an integral part--indeed, sometimes the most important part--of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

HN3[] **Effective Assistance of Counsel, Pleas**

Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel.

Immigration Law > Deportation & Removal > General Overview

HN4[] **Immigration Law, Deportation & Removal**

Deportation is a particularly severe "penalty," but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN5[] **Criminal Process, Assistance of Counsel**

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a Strickland claim concerning the specific risk of deportation. Advice regarding deportation is not categorically removed from the ambit of the *Sixth Amendment* right to counsel.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN6[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

Under Strickland, a court first determines whether counsel's representation fell below an objective standard of reasonableness. Then the court asks whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The first prong--constitutional deficiency--is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable. Although they are only guides and not "inexorable commands," these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN7[] **Counsel, Effective Assistance of Counsel**

Counsel must advise a criminal client regarding the risk of deportation.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Controlled Substance Offenses

HN8[] **Criminal Activity, Controlled Substance Offenses**

See *8 U.S.C.S. § 1227(a)(2)(B)(i)*.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN9[] **Counsel, Effective Assistance of Counsel**

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

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN10[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the Strickland analysis.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN11[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

Judicial scrutiny of counsel's performance must be highly deferential.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

HN12[] **Effective Assistance of Counsel, Pleas**

To obtain relief on an ineffective assistance claim involving a guilty plea, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN13[] **Criminal Process, Assistance of Counsel**

The negotiation of a plea bargain is a critical phase of litigation for purposes of the *Sixth Amendment* right to effective assistance of counsel. The severity of deportation--the equivalent of banishment or exile--only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN14[] **Criminal Process, Assistance of Counsel**

It is the United States Supreme Court's responsibility under the U.S. Constitution to ensure that no criminal defendant--whether a citizen or not--is left to the mercies of incompetent counsel. Counsel must inform her client whether his plea carries a risk of deportation.

Lawyers' Edition Display

Decision

[*284]** Counsel's alleged failure to correctly advise alien legal permanent resident of United States, before he pleaded guilty to trafficking in marijuana, that this was deportable offense under Immigration and Naturalization Act provision (*8 U.S.C.S. § 1227(a)(2)(B)(i)*) held to be deficient assistance under *Sixth Amendment*.

Summary

Procedural posture: Defendant, who pleaded guilty to drug charges, sought postconviction relief based on ineffective assistance of counsel. The Supreme Court of Kentucky denied relief. The United States Supreme Court granted certiorari.

Overview: Defendant was a lawful permanent resident who pleaded guilty to transporting marijuana. His crime was a removable offense under *8 U.S.C.S. § 1227(a)(2)(B)(i)*. He claimed that his counsel incorrectly told him prior to entry of his plea that he did not have to worry about immigration status because he had been in the United States for so long. The state court held that the *Sixth Amendment* did not protect defendant from erroneous advice about deportation because it was merely a collateral consequence of his conviction. The Supreme Court held that the distinction between collateral and direct consequences was ill-suited to the deportation context, so advice regarding deportation was not categorically removed from the ambit of the *Sixth Amendment*. Counsel's alleged failure to correctly advise defendant of the deportation consequences of his guilty plea amounted to constitutionally deficient assistance under prevailing professional norms, as the consequences could easily have been determined from reading the removal statute. Whether defendant was entitled to relief depended on whether he could demonstrate prejudice, a matter for the state courts to consider in the first instance.

[*285] Outcome:** The state court's judgment was reversed, and the matter was remanded for further proceedings. 7-2 decision; one concurrence in the judgment, one dissent.

Headnotes

ALIENS §25.5 > REMOVABLE OFFENSE -- RELIEF -- CONTROLLED SUBSTANCE > Headnote:
LEdHN[1][] [1]

If a noncitizen has committed a removable offense after the 1996 effective date of amendments to the Immigration and Nationality Act, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. *8 U.S.C.S. § 1229b*. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. *8 U.S.C.S. §§1101(a)(43)(B), 1228*. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

ALIENS §25.5 > DEPORTATION -- SPECIFIED CRIMES > Headnote:
LEdHN[2][] [2]

As a matter of federal law, deportation is an integral part--indeed, sometimes the most important part--of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §46.4 > GUILTY PLEA -- COUNSEL > Headnote:
LEdHN[3][] [3]

Before deciding whether to plead guilty, a defendant is entitled to the effective assistance of competent counsel. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

ALIENS §33 > DEPORTATION -- CRIMINAL SANCTION -- CIVIL PROCEEDING > Headnote:
LEdHN[4][] [4]

Deportation is a particularly severe "penalty," but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §46.4 CRIMINAL LAW §46.7 > DEPORTATION -- ASSISTANCE OF COUNSEL -- EFFECTIVENESS > Headnote:
LEdHN[5][] [5]

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a Strickland claim concerning the specific risk of deportation. Advice regarding deportation is not categorically removed from the ambit of the *Sixth Amendment* right to counsel. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[*286]**

CRIMINAL LAW §46.7 > COUNSEL -- INEFFECTIVE ASSISTANCE -- STANDARDS > Headnote:
LEdHN[6][] [6]

Under Strickland, a court first determines whether counsel's representation fell below an objective standard of reasonableness. Then the court asks whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The first prong--constitutional deficiency--is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable. Although they are only guides and not "inexorable commands," these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §46.7 > DEPORTATION -- ADVICE FROM COUNSEL > Headnote:
LEdHN[7][] [7]

Counsel must advise a criminal client regarding the risk of deportation. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

ALIENS §25.5 > DEPORTABILITY -- CONTROLLED SUBSTANCE > Headnote:
LEdHN[8][] [8]

See *8 U.S.C.S. § 1227(a)(2)(B)(i)*, which provides in part: "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §46.7 > ADVICE FROM COUNSEL -- DEPORTATION > Headnote:
LEdHN[9][] [9]

When the law is not succinct and straightforward, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, the duty to give correct advice is equally clear. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §46.7 > INEFFECTIVE ASSISTANCE OF COUNSEL -- DEPORTATION > Headnote:
LEdHN[10][] [10]

It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so clearly satisfies the first prong of the Strickland analysis. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §46.7 > COUNSEL'S PERFORMANCE -- SCRUTINY > Headnote:
LEdHN[11][] [11]

Judicial scrutiny of counsel's performance must be highly deferential. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §46.7 > INEFFECTIVE ASSISTANCE OF COUNSEL -- GUILTY PLEA > Headnote:
LEdHN[12][] [12]

To obtain relief on an ineffective assistance claim involving a guilty plea, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §46.7 > COUNSEL -- EFFECTIVE ASSISTANCE -- PLEA BARGAIN -- DEPORTATION > Headnote:
LEdHN[13][] [13]

The negotiation of a plea bargain is a critical phase of litigation for purposes of the *Sixth Amendment* right to effective assistance of counsel. The severity of deportation--the equivalent of banishment or exile--only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

CRIMINAL LAW §46.7 > INCOMPETENT COUNSEL -- CLIENT'S RISK OF DEPORTATION > Headnote:
LEdHN[14][] [14]

It is the United States Supreme Court's responsibility under the U.S. Constitution to ensure that no criminal defendant--whether a citizen or not--is left to the mercies of incompetent counsel. Counsel must inform her client whether his plea carries a risk of deportation. (Stevens, J., joined by Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

Syllabus

[*356] [1475] [***288]** Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug-distribution charges in Kentucky. In postconviction proceedings, he claims that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived **[**1476]** in this country so long. He alleges that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on the ground that the *Sixth Amendment's* effective-assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction.

Held: Because counsel must inform a client whether his plea carries a risk of deportation, Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether he is entitled to relief depends on whether he has been prejudiced, a matter not addressed here. *Pp. 360-375, 176 L. Ed. 2d, at 290-299.*

(a) Changes to immigration law have dramatically raised **[****2]** the stakes of a noncitizen's criminal conviction. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited judges' authority to alleviate deportation's harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. *Pp. 360-364, 176 L. Ed. 2d, at 290-293.*

(b) *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674*, applies to Padilla's claim. Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763*. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about deportation concerned only collateral matters. However, this Court has never distinguished between direct and **[****3]** collateral consequences in defining the scope of constitutionally "reasonable professional assistance" **[*357]** required under *Strickland, 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. The question whether that distinction is appropriate need not be considered in this case because of the unique nature of deportation. Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence. Because that distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation, advice regarding deportation is not categorically removed from the ambit of the *Sixth Amendment* right to counsel. *Pp. 364-366, 176 L. Ed. 2d, at 293-294.*

(c) To satisfy *Strickland*'s two-prong inquiry, counsel's representation **[***289]** must fall "below an objective standard of reasonableness," *id., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674*, and there must be "a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different," *id., at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. The first, constitutional deficiency, is necessarily linked to the legal community's practice and expectations. *Id., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. The weight of prevailing professional norms supports **[****4]** the view that counsel must advise her client regarding the deportation risk. And this Court has recognized the importance to the client of " '[p]reserving the . . . right to remain in the United States' " and "preserving the possibility of" discretionary relief from deportation. *INS v. St. Cyr, 533 U.S. 289, 322, 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347*. Thus, this is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined **[**1477]** from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect. There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear. Accepting Padilla's allegations as true, he has sufficiently alleged constitutional deficiency to satisfy *Strickland*'s first prong. Whether he can satisfy the second prong, prejudice, is left for the Kentucky courts to consider in the first instance. **[****5]** *Pp. 366-369, 176 L. Ed. 2d, at 294-296*.

(d) The Solicitor General's proposed rule--that *Strickland* should be applied to Padilla's claim only to the extent that he has alleged affirmative misadvice--is unpersuasive. And though this Court must be careful about recognizing new grounds for attacking the validity of guilty pleas, the 25 years since *Strickland* was first applied to ineffective-assistance claims at the plea stage have shown that pleas are less frequently the subject of collateral challenges than convictions after a trial. Also, informed consideration of possible deportation can benefit both the State and noncitizen defendants, who may be able to reach agreements that better satisfy the interests of both parties. This decision will not **[*358]** open the floodgates to challenges of convictions obtained through plea bargains. Cf. *Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203*. *Pp. 369-374, 176 L. Ed. 2d, at 296-299*.

253 S. W. 3d 482, reversed and remanded.

Counsel: Stephen B. Kinnaird argued the cause for petitioner.

Michael R. Dreeben argued the cause for the United States, as amicus curiae, by special leave of court.

Wm. Robert Long, Jr., argued the cause for respondent.

Judges: Stevens, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Alito, J., filed an opinion concurring in the judgment, in which Roberts, C. J., joined, *post*, p. 375. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined, *post*, p. 388.

Opinion by: STEVENS

Opinion

[*359] Justice **Stevens** delivered **[****6]** the opinion of the Court.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served **[***290]** this Nation with honor as a member of the U. S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.[1]

[1] Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under *8 U.S.C. § 1227(a)(2)(B)(i)*.

[1478]** In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he " 'did not have to worry about immigration status since he had been in the country so long.' " *253 S. W. 3d 482, 483 (Ky. 2008)*. Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme Court of Kentucky **[****7]** denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the *Sixth Amendment's* guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence **[*360]** of his conviction. *Id., at 485*. In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief.

We granted certiorari, *555 U.S. 1169, 129 S. Ct. 1317, 173 L. Ed. 2d 582 (2009)*, to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority **[****8]** to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal, *Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S. Ct. 374, 92 L. Ed. 433 (1948)*, is now virtually inevitable for a vast number of noncitizens convicted of crimes.

The Nation's first 100 years was "a period of unimpeded immigration." C. Gordon & H. Rosenfield, Immigration Law and Procedure § 1.2a, p. 5 (1959). An early effort to empower the President to order the deportation of those immigrants he "judge[d] dangerous to the peace and safety of the United States," Act of June 25, 1798, ch. 58, 1 Stat. 571, was short lived and unpopular. Gordon § 1.2, at 5. It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country, Act of Mar. 3, 1875, ch. 141, *18 Stat. 477*. Gordon § 1.2b, at 6. In 1891, Congress added to the list of excludable persons those "who have been **[***291]** convicted of a felony or other infamous **[*361]** crime or misdemeanor involving moral turpitude." Act of Mar. 3, 1891, ch. 551, *26 Stat. 1084*.[2]

The Immigration Act of 1917 (1917 Act) brought "radical changes" **[**1479]** to our law. S. Rep. No. 1515, 81st Cong., 2d Sess., 54-55 (1950). For the first time in our history, Congress made classes of noncitizens deportable based on conduct committed on American soil. *Id.*, at 55. Section 19 of the 1917 Act authorized the deportation of "any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . . ." 39 Stat. 889. And § 19 also rendered deportable noncitizen recidivists who commit two or more crimes of moral turpitude at any time after entry. *Ibid.* Congress did not, however, define the term "moral turpitude."

While the 1917 Act was "radical" because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing **[****10]** or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation "that such alien shall not be deported." *Id.*, at 890.[3] This procedure, known as a judicial recommendation

---

[2] In 1907, Congress expanded the class **[****9]** of excluded persons to include individuals who "admit" to having committed a crime of moral turpitude. Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 899.

[3] As enacted, the statute provided:

"That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime

[*362] against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation," *Janvier v. United States, 793 F.2d 449, 452 (CA2 1986)*. Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

Although narcotics offenses--such as the offense at issue in this case--provided a distinct basis for deportation as early as 1922,[4] the JRAD procedure was generally available **[***292]** to avoid deportation in narcotics convictions. See *United States v. O'Rourke, 213 F.2d 759, 762 (CA8 1954)*. Except for "technical, inadvertent and insignificant violations of the laws relating to narcotics," *ibid.*, it appears that courts treated narcotics offenses as crimes involving **[**1480]** moral turpitude for purposes of the 1917 Act's broad JRAD provision. See *ibid.* (recognizing that until 1952 a JRAD in a narcotics **[*363]** case "was effective to prevent deportation" (citing *Dang Nam v. Bryan, 74 F.2d 379, 380-381 (CA9 1934)*)).

In light of both the steady expansion of deportable offenses and the significant ameliorative effect of a JRAD, it is unsurprising that, in the wake of *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, the Second Circuit held that the *Sixth Amendment* right to effective **[****13]** assistance of counsel applies to a JRAD request or lack thereof, see *Janvier, 793 F.2d 449*. See also *United States v. Castro, 26 F.3d 557 (CA5 1994)*. In its view, seeking a JRAD was "part of the sentencing" process, *Janvier, 793 F.2d, at 452*, even if deportation itself is a civil action. Under the Second Circuit's reasoning, the impact of a conviction on a noncitizen's ability to remain in the country was a central issue to be resolved during the sentencing process--not merely a collateral matter outside the scope of counsel's duty to provide effective representation.

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA),[5] and in 1990 Congress entirely eliminated it, 104 Stat. 5050. In 1996, Congress also eliminated the Attorney General's authority to grant discretionary relief from deportation, *110 Stat. 3009-596*, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996, *INS v. St. Cyr, 533 U.S. 289, 296, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)*. Under contemporary law, ***HN1***[↑] ***LEdHN[1]***[↑] [1] if a noncitizen has committed a removable offense after the 1996 effective **[****14]** date of these amendments, **[*364]** his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.[6] See *8 U.S.C. § 1229b*. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. See *§ 1101(a)(43)(B)*; *§ 1228*.

---

shall, at the time of imposing judgment or passing sentence or within thirty days **[****11]** thereafter, . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act." 1917 Act, 39 Stat. 889-890.

This provision was codified in *8 U.S.C. § 1251(b) (1994 ed.)* (transferred to *§ 1227* (2006 ed.)). The judge's nondeportation recommendation was binding on the Secretary of Labor and, later, the Attorney General after control of immigration removal matters was transferred from the former to the latter. See *Janvier v. United States, 793 F.2d 449, 452 (CA2 1986)*.

[4] Congress **[****12]** first identified narcotics offenses as a special category of crimes triggering deportation in the 1922 Narcotic Drug Act. Act of May 26, 1922, ch. 202, *42 Stat. 596*. After the 1922 Act took effect, there was some initial confusion over whether a narcotics offense also had to be a crime of moral turpitude for an individual to be deportable. See *Weedin v. Moy Fat, 8 F.2d 488, 489 (CA9 1925)* (holding that an individual who committed narcotics offense was not deportable because offense did not involve moral turpitude). However, lower courts eventually agreed that the narcotics offense provision was "special," *Chung Que Fong v. Nagle, 15 F.2d 789, 790 (CA9 1926)*; thus, a narcotics offense did not need also to be a crime of moral turpitude (or to satisfy other requirements of the 1917 Act) to trigger deportation. See *United States ex rel. Grimaldi v. Ebey, 12 F.2d 922, 923 (CA7 1926)*; *Todaro v. Munster, 62 F.2d 963, 964 (CA10 1933)*.

[5] The INA separately codified the moral turpitude offense provision and the narcotics offense provision within *8 U.S.C. § 1251(a) (1994 ed.)* under subsections (a)(4) and (a)(11), respectively. See 66 Stat. 201, 204, 206. The JRAD procedure, codified in *8 U.S.C. § 1251(b) (1994 ed.)*, applied only to the "provisions of subsection (a)(4)," the crimes-of-moral-turpitude provision. 66 Stat. 208; see *United States v. O'Rourke, 213 F.2d 759, 762 (CA8 1954)* (recognizing that, under the 1952 INA, narcotics offenses were no longer eligible for JRADs).

[6] The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term "removal" rather than "deportation." See *Calcano-Martinez v. INS, 533 U.S. 348, 350, n. 1, 121 S. Ct. 2268, 150 L. Ed. 2d 392 (2001)*.

These **[****15]** changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of **[***293]** crimes has never been more important. These changes confirm our view that, *HN2*[↑] *LEdHN[2]*[↑] [2] as a matter of federal law, deportation is an integral part--indeed, sometimes the most important part[7] --of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

II

HN3[↑] *LEdHN[3]*[↑] [3] Before deciding whether to plead guilty, a defendant is entitled to "the effective **[**1481]** assistance of competent counsel." *McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)*; *Strickland, 466 U.S., at 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.*, those matters not within the sentencing authority of the state trial court.[8] *253 S. W. 3d, [*365] at 483-484* (citing *Commonwealth v. Fuartado, 170 S. W. 3d 384 (2005)*). In its view, "collateral consequences are outside the scope of representation required by the *Sixth Amendment*," **[****16]** and, therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel." *253 S. W. 3d, at 483*. The Kentucky high court is far from alone in this view.[9]

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland, 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that *HN4*[↑] *LEdHN[4]*[↑] [4] deportation is a particularly severe "penalty," *Fong Yue Ting v. United States, 149 U.S. 698, 740, 13 S. Ct. 1016, 37 L. Ed. 905 (1893)*; but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS v. Lopez-Mendoza, 468 U.S. 1032, 1038, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984)*, deportation **[****18]** is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and **[*366]** the penalty of deportation **[***294]** for nearly a century, see Part I, *supra, at 360-364, 176 L. Ed. 2d, at 290-293*. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. *United States v. Russell, 686 F.2d 35, 38, 222 U.S. App. D.C. 313 (CADC 1982)*. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *St. Cyr, 533 U.S., at 322, 121 S. Ct. 2271, 150 L. Ed. 2d 347* ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the **[**1482]** immigration consequences of their convictions").

HN5[↑] *LEdHN[5]*[↑] [5] Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct

---

[7] See Brief for Asian American Justice Center et al. as *Amici Curiae* 12-27 (providing real-world examples).

[8] There is some disagreement among the courts over how to distinguish between direct and collateral consequences. See Roberts, Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, *95 Iowa L. Rev. 119, 124, n. 15 (2009)*. The disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case because, as even Justice Alito agrees, counsel must, at the very least, advise a noncitizen "defendant that a criminal conviction may have adverse immigration consequences," *post, at 375, 176 L. Ed. 2d, at 299* (opinion concurring in judgment). See also *post, at 387, 176 L. Ed. 2d, at 307* ("I do not mean to suggest that the ***Sixth Amendment*** does no more than require defense counsel to avoid misinformation"). In his concurring opinion, Justice Alito has thus departed from the strict rule applied by the Supreme Court of Kentucky and in the two federal cases that he cites, *post, at 375-376, 176 L. Ed. 2d, at 300*.

[9] See, *e.g.*, **[****17]** *United States v. Gonzalez, 202 F.3d 20 (CA1 2000)*; *United States v. Del Rosario, 902 F.2d 55, 284 U.S. App. D.C. 90 (CADC 1990)*; *United States v. Yearwood, 863 F.2d 6 (CA4 1988)*; *Santos-Sanchez v. United States, 548 F.3d 327 (CA5 2008)*; *Broomes v. Ashcroft, 358 F.3d 1251 (CA10 2004)*; *United States v. Campbell, 778 F.2d 764 (CA11 1985)*; *Ovekova v. State, 558 So. 2d 990 (Ala. Crim. App. 1989)*; *State v. Rosas, 183 Ariz. 421, 904 P.2d 1245 (App. 1995)*; *State v. Montalban, 2000-2739 (La. 2/26/02), 810 So. 2d 1106*; *Commonwealth v. Frometa, 520 Pa. 552, 555 A.2d 92 (1989)*.

distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that **[****19]** advice regarding deportation is not categorically removed from the ambit of the *Sixth Amendment* right to counsel. *Strickland* applies to Padilla's claim.

III

HN6[↑] *LEdHN[6]*[↑] [6] Under *Strickland*, we first determine whether counsel's representation "fell below an objective standard of reasonableness." *466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. Then we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id., at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. The first prong--constitutional deficiency--is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . ." *Ibid.;* **[*367]** *Bobby v. Van Hook, 558 U.S. 4, 7, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009) (per curiam)*; *Florida v. Nixon, 543 U.S. 175, 191, and n. 6, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004)*; *Wiggins v. Smith, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*; *Williams v. Taylor, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. Although they are "only guides," *Strickland, 466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674*, and **[****20]** not "inexorable commands," *Bobby, 558 U.S., at 8, 130 S. Ct. 13, 175 L. Ed. 2d 255*, these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that *HN7*[↑] *LEdHN[7]*[↑] [7] counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Defense Representation § 6.2 (1995); G. Herman, Plea Bargaining § 3.03, pp. 20-21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, *87 Cornell L. Rev. 697, 713-718 (2002)*; A. Campbell, Law of Sentencing **[***295]** § 13:23, pp. 555, 560 (3d ed. 2004); Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, pp. D10, H8-H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), p. 197 (3d ed. 1993); ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), p. 116 (3d **[****21]** ed. 1999). "[A]uthorities of every stripe--including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications--universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients . . . ." Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12-14 (footnotes omitted) (citing, *inter alia*, National Legal Aid and Defender Assn., Performance Guidelines for Criminal Prosecution §§ 6.2-6.4 (1997); S. Bratton & E. Kelley, Practice Points: Representing a Noncitizen **[*368]** in a Criminal Case, 31 The Champion 61 (Jan./Feb. 2007); N. Tooby, Criminal Defense of Immigrants **[**1483]** § 1.3 (3d ed. 2003); 2 Criminal Practice Manual §§ 45:3, 45:15 (West 2009)).

We too have previously recognized that " '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.' " *St. Cyr, 533 U.S., at 322, 121 S. Ct. 2271, 150 L. Ed. 2d 347* (quoting 3 Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)). Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed **[****22]** by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr, 533 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347*. We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief. *Ibid.,* n. 50.

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction. See *8 U.S.C. § 1227(a)(2)(B)(i)* (*HN8*[↑] *LEdHN[8]*[↑] [8] "Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable"). Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands **[****23]** removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would

not result in his removal from this country. This is not a hard case in which to find deficiency: **[*369]** The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Immigration law can be complex, **[***296]** and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. *HN9*[↑] *LEdHN[9]*[↑] [9] When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.[10] But when the deportation consequence **[****24]** is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, **[**1484]** a matter we leave to the Kentucky courts to consider in the first instance.

IV

The Solicitor General has urged us to conclude that *Strickland* applies to Padilla's claim only to the extent that he has alleged affirmative misadvice. In the United States' view, "counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case . . . ," though counsel is required to provide accurate advice if she **[*370]** chooses to discuss these matters. Brief for United States as *Amicus Curiae* 10.

Respondent and Padilla both find the Solicitor **[****25]** General's proposed rule unpersuasive, although it has support among the lower courts. See, *e.g.*, *United States v. Couto, 311 F.3d 179, 188 (CA2 2002)*; *United States v. Kwan, 407 F.3d 1005 (CA9 2005)*; *Sparks v. Sowders, 852 F.2d 882 (CA6 1988)*; *United States v. Russell, 686 F.2d 35, 222 U.S. App. D.C. 313 (CADC 1982)*; *State v. Rojas-Martinez, 2005 UT 86, 125 P. 3d 930, 935*; *In re Resendiz, 25 Cal. 4th 230, 105 Cal. Rptr. 2d 431, 19 P. 3d 1171 (2001)*. Kentucky describes these decisions isolating an affirmative misadvice claim as "result-driven, incestuous . . . [, and] completely lacking in legal or rational bases." Brief for Respondent 31. We do not share that view, but we agree that there is no relevant difference "between an act of commission and an act of omission" in this context. *Id.*, at 30; *Strickland, 466 U.S., at 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674* ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance"); see also *State v. Paredez, 2004-NMSC-036, 2004 NMSC 36, 136 N. M. 533, 538-539, 101 P.3d 799*.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even **[****26]** when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." *Libretti [***297] v. United States, 516 U.S. 29, 50-51, 116 S. Ct. 356, 133 L. Ed. 2d 271 (1995)*. When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.[11] Second, it would deny a **[*371]** class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. *HN10*[↑] *LEdHN[10]*[↑] [10] It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation, and the failure to do so "clearly satisfies the first prong of the *Strickland* analysis." *Hill v. Lockhart, 474 U.S. 52, 62, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)* (White, J., concurring in judgment).

---

[10] As Justice Alito explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice.

[11] As the Commonwealth conceded at oral argument, were a defendant's lawyer to know that a particular offense would result in the client's deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client's home country, any decent attorney would inform the client **[****27]** of the consequences of his plea. Tr. of Oral Arg. 37-38. We think the same result should follow when the stakes are not life and death but merely "banishment or exile," *Delgadillo v. Carmichael, 332 U.S. 388, 390-391, 68 S. Ct. 10, 92 L. Ed. 17 (1947)*.

We have given serious consideration to the concerns that the Solicitor General, respondent, and *amici* have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar "floodgates" concern in *Hill*, see *id., at 58, 106 S. Ct. 366, 88 L. Ed. 2d 203*, but nevertheless applied **[**1485]** *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.[12]

A flood did not follow in that decision's wake. Surmounting *Strickland*'s high bar is never an easy task. See, *e.g.*, *466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674* (*HN11*[↑] *LEdHN[11]*[↑] [11] "Judicial scrutiny of counsel's performance must be highly deferential"); *id., at 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674* (observing that "[a]ttorney errors . . . are as likely to be utterly harmless in a **[*372]** particular case as they are to be prejudicial"). Moreover, *HN12*[↑] *LEdHN[12]*[↑] [12] to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. See *Roe v. Flores-Ortega, 528 U.S. 470, 480, 486, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)*. There is no reason to doubt that lower courts--now quite experienced with applying *Strickland*--can effectively and efficiently use its framework to separate **[****29]** specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at **[***298]** least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. See *supra, at 368-371, 176 L. Ed. 2d, at 295-296*. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty. *Strickland, 466 U.S., at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674*.

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions.[13] But they account for only approximately 30% of the habeas petitions filed.[14] The nature of relief secured by a successful collateral **[*373]** challenge to a guilty plea--an opportunity to withdraw the plea and proceed to trial **[****30]** --imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs **[**1486]** whether it is wise to challenge a guilty plea in a habeas proceeding because, ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. **[****31]** By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of

---

[12] However, we concluded that, even though *Strickland* applied to petitioner's claim, he had not sufficiently alleged prejudice to satisfy *Strickland*'s second prong. *Hill, 474 U.S., at 59-60, 106 S. Ct. 366, 88 L. Ed. 2d 203*. This disposition further underscores the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong.

Justice Alito believes that the Court misreads Hill, *post, at 383-384, 176 L. Ed. 2d, at 305*. In Hill, the Court recognized--for the first time--that Strickland applies to advice respecting a guilty plea. **[****28]** *474 U.S., at 58, 106 S. Ct. 366, 88 L. Ed. 2d 203* ("We hold, therefore, that the two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel"). It is true that Hill does not control the question before us. But its import is nevertheless clear. Whether Strickland applies to Padilla's claim follows from Hill, regardless of the fact that the Hill Court did not resolve the particular question respecting misadvice that was before it.

[13] See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2003, p. 418 (31st ed. 2005) (Table 5.17) (only approximately 5%, or 8,612 out of 68,533, of federal criminal prosecutions go to trial); *id.*, at 450 (Table 5.46) (only approximately 5% of all state felony criminal prosecutions go to trial).

[14] See V. Flango, National Center for State Courts, Habeas Corpus in State and Federal Courts 36-38 (1994) (demonstrating that 5% of defendants whose conviction was the result of a trial account for approximately 70% of the habeas petitions filed).

deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that *HN13*[↑] *LEdHN/13/*[↑] [13] the negotiation of a plea bargain is a critical phase of litigation for purposes of the *Sixth Amendment* right to effective assistance of counsel. *Hill, 474 U.S., at 57, 106 S. Ct. 366, 88 L. Ed. 2d 203*; see also *Richardson, 397 U.S., at 770-771, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763*. The severity of deportation--"the equivalent of **[***299]** banishment **[****32]** or exile," *Delgadillo v. Carmichael, 332 U.S. 388, 390-391, 68 S. Ct. 10, 92 L. Ed. 17 (1947)* --only underscores how critical it is for counsel **[*374]** to inform her noncitizen client that he faces a risk of deportation.[15]

V

HN14[↑] *LEdHN/14/*[↑] [14] It is our responsibility under the Constitution to ensure that no criminal defendant--whether a citizen or not--is left to the "mercies of incompetent counsel." *Richardson, 397 U.S., at 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763*. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding *Sixth Amendment* precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Taking as true the basis for his motion for postconviction relief, we have little difficulty **[**1487]** concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as **[****34]** a result thereof, a question we do not reach because it was not passed on below. **[*375]** See *Verizon Communs., Inc. v. FCC, 535 U.S. 467, 530, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002)*.

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Concur by: ALITO

Concur

Justice **Alito,** with whom The **Chief Justice** joins, concurring in the judgment.

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt **[***300]** to explain what those consequences may be. As the Court concedes, "[i]mmigration

---

[15] To this end, we find it significant that the plea form currently used in Kentucky courts provides notice of possible immigration consequences. Ky. Admin. Office of Courts, Motion to Enter Guilty Plea, Form AOC-491 (rev. Feb. 2003), http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf (as visited Mar. 29, 2010, and available in Clerk of Court's case file). Further, many States require trial courts to advise defendants of possible immigration consequences. See, *e.g.*, Alaska Rule Crim. Proc. 11(c)(3)(C) (2009-2010); *Cal. Penal Code Ann. § 1016.5* (West 2008); *Conn. Gen. Stat. § 54-1j* (2009); ***D. C. Code § 16-713*** (2001); *Fla. Rule Crim. Proc. 3.172(c)(8)* (Supp. 2010); ***Ga. Code Ann. § 17-7-93(c)*** (1997); *Haw. Rev. Stat. Ann. § 802E-2* (2007); *Iowa Rule Crim. Proc. 2.8(2)(b)(3)* (Supp. 2009); ***Md. Rule 4-242*** (Lexis 2009); *Mass. Gen. Laws, ch. 278, § 29D* (West 2009); *Minn. Rule Crim. Proc. 15.01* (2009); *Mont. Code Ann. § 46-12-210* (West 2009); N. M. Rule Crim. Form 9-406 (2009); *N. Y. Crim. Proc. Law Ann. § 220.50(7)* **[****33]** (West Supp. 2009); *N. C. Gen. Stat. Ann. § 15A-1022* (Lexis 2007); *Ohio Rev. Code Ann. § 2943.031* (West 2006); *Ore. Rev. Stat. § 135.385* (2007); ***R. I. Gen. Laws § 12-12-22*** (Lexis Supp. 2008); *Tex. Code Crim. Proc. Ann., Art. 26.13(a)(4)* (Vernon Supp. 2009); ***Vt. Stat. Ann., Tit. 13, § 6565(c)(1)*** (Supp. 2009); *Wash. Rev. Code § 10.40.200* (2008); *Wis. Stat. § 971.08* (2005-2006).

law can be complex"; "it is a legal specialty of its own"; and "[s]ome members of the bar who represent clients facing [****35] criminal charges, in either state or federal court or both, may not be well versed in it." *Ante, at 369, 176 L. Ed. 2d, at 295*. The Court nevertheless holds that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is "succinct and straightforward"--but not, perhaps, in other situations. *Ibid.* This vague, halfway test will lead to much confusion and needless litigation.

I

Under *Strickland*, an attorney provides ineffective assistance if the attorney's representation does not meet reasonable professional standards. *466 U.S., at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. Until today, the longstanding and unanimous position of the federal [*376] courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction. See, *e.g.*, *United States v. Gonzalez, 202 F.3d 20, 28 (CA1 2000)* (ineffective-assistance-of-counsel claim fails if "based on an attorney's failure to advise a client of his plea's immigration consequences"); *United States v. Banda, 1 F.3d 354, 355 (CA5 1993)* (holding that "an [****36] attorney's failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel"); see generally Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, *87 Cornell L. Rev. 697, 699 (2002)* (hereinafter Chin & Holmes) (noting that "virtually all jurisdictions"--including "eleven federal circuits, more than thirty states, and the District of Columbia"--"hold that defense counsel need not discuss with their clients the collateral consequences of a conviction," including deportation). While the line between "direct" and "collateral" consequences is not always clear, see *ante, at 364, n. 8, 176 L. Ed. 2d, at 293*, the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess--and very often do not possess--expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on [**1488] matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction [****37] and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. *Chin & Holmes 705-706*. A criminal conviction may also severely damage a defendant's reputation and thus impair the defendant's ability to obtain future employment or business opportunities. All of those consequences are "seriou[s]," see *ante, at 374, 176 L. Ed. 2d, at 299*, but this Court has [*377] never held that a criminal defense attorney's *Sixth Amendment* duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations. See *ante, at 367, 176 L. Ed. 2d, at 289* ("The weight of prevailing professional [***301] norms supports the view that counsel must advise her client regarding the risk of deportation"). However, ascertaining the level of professional competence required by the *Sixth Amendment* is ultimately a task for the courts. *E.g.*, *Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)*. Although we may appropriately consult standards promulgated by private bar groups, we cannot [****38] delegate to these groups our task of determining what the Constitution commands. See *Strickland, supra, at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674* (explaining that "[p]revailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable, but they are only guides"). And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were "prevailing professional norms," it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law, see *ante, at 369, 176 L. Ed. 2d, at 295*, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court's opinion would not just require defense counsel to warn the client of a general *risk* of removal; it would also require counsel, IN at least some cases, to specify what the removal *consequences* of a conviction would be. See *ante, at 368-369, 176 L. Ed. 2d, at 296*.

The Court's new approach is particularly problematic because providing advice on whether [****39] a conviction for a particular offense will make an alien removable is often quite complex. "Most crimes affecting immigration status are not [*378] specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies*." M. Garcia & L. Eig, CRS Report for Congress, Immigration Consequences of Criminal Activity (Sept. 20, 2006) (summary) (emphasis in original). As has been widely

acknowledged, determining whether a particular crime is an "aggravated felony" or a "crime involving moral turpitude [(CIMT)]" is not an easy task. See R. McWhirter, ABA, The Criminal Lawyer's Guide to Immigration Law: Questions and Answers 128 (2d ed. 2006) (hereinafter ABA Guidebook) ("Because of the increased complexity of aggravated felony law, this edition devotes a new [30-page] chapter to the subject"); *id.*, § 5.2, at 146 (stating that the aggravated felony list at *8 U.S.C. § 1101(a)(43)* is not clear **[**1489]** with respect to several of the listed categories, that "the term 'aggravated felonies' can include misdemeanors," and that the determination of whether a crime is an "aggravated felony" is made "even **[****40]** more difficult" because "several agencies and courts interpret the statute," including Immigration and Customs Enforcement, the Board of Immigration Appeals (BIA), and Federal Circuit and District Courts considering immigration-law and criminal-law issues); ABA Guidebook § 4.65, at 130 ("Because nothing is ever simple with immigration law, the terms 'conviction,' 'moral turpitude,' and 'single scheme of criminal misconduct' are terms of art"); *id.*, § 4.67, at 130 ("[T]he term 'moral turpitude' evades precise definition").

[*302]** Defense counsel who consults a guidebook on whether a particular crime is an "aggravated felony" will often find that the answer is not "easily ascertained." For example, the ABA Guidebook answers the question "Does simple possession count as an aggravated felony?" as follows: "Yes, *at least in the Ninth Circuit.*" *Id.*, § 5.35, at 160 (emphasis added). After a dizzying paragraph that attempts to explain the evolution of the Ninth Circuit's view, the ABA Guidebook continues: "Adding to the confusion, however, is that the Ninth **[*379]** Circuit has conflicting opinions depending on the context on whether simple drug possession constitutes an aggravated felony under *8 U.S.C. § 1101(a)(43).*" **[****41]** *Id.*, § 5.35, at 161 (citing cases distinguishing between whether a simple possession offense is an aggravated felony "for immigration purposes" or for "sentencing purposes"). The ABA Guidebook then proceeds to explain that "*attempted* possession," *id.*, § 5.36, at 161 (emphasis added), of a controlled substance *is* an aggravated felony, while "[c]onviction under the federal *accessory* after the fact statute is *probably not* an aggravated felony, but a conviction for accessory after the fact to the manufacture of methamphetamine *is* an aggravated felony," *id.*, § 5.37, at 161 (emphasis added). Conspiracy or attempt to commit drug trafficking are aggravated felonies, but "[s]olicitation is not a drug-trafficking offense because a generic solicitation offense is not an offense related to a controlled substance and therefore not an aggravated felony." *Id.*, § 5.41, at 162.

Determining whether a particular crime is one involving moral turpitude is no easier. See *id.*, at 134 ("Writing bad checks *may or may not* be a CIMT" (emphasis added)); *ibid.* ("[R]eckless assault coupled with an element of injury, but not serious injury, is *probably* not a CIMT" (emphasis added)); *id.*, at 135 (misdemeanor driving **[****42]** under the influence is generally not a CIMT, but may be a CIMT if the DUI results in injury or if the driver knew that his license had been suspended or revoked); *id.*, at 136 ("If there is no element of actual injury, the endangerment offense *may* not be a CIMT" (emphasis added)); *ibid.* ("Whether [a child abuse] conviction involves moral turpitude *may* depend on the subsection under which the individual is convicted. Child abuse done with criminal negligence *probably* is not a CIMT" (emphasis added)).

Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. To take just a few examples, it may **[*380]** be hard, in some cases, for defense counsel even to determine whether a client is an alien,[1] or whether a **[**1490]** particular state disposition will result in a "conviction" for purposes of federal immigration law.[2] The task of offering advice about the immigration **[***303]** consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration **[****43]** consequences of juvenile, first-offender, and foreign convictions; and the relationship between the "length and type of sentence" and the

---

[1] Citizens are not deportable, but "[q]uestions of citizenship are not always simple." ABA Guidebook § 4.20, at 113 (explaining that U.S. citizenship conferred by blood is " 'derivative,' " and that "[d]erivative citizenship depends on a number of confusing factors, including whether the citizen parent was the mother or father, the immigration laws in effect at the time of the parents' and/or defendant's birth, and the parents' marital status").

[2] "A disposition that is not a 'conviction' under state law may still be a 'conviction' for immigration purposes." *Id.*, § 4.32, at 117 (citing *Matter of Salazar-Regino, 23 I. & N. Dec. 223, 231 (BIA 2002)* (en banc)). For example, state law may define the term "conviction" not to include a deferred adjudication, but such an adjudication would be deemed a conviction for purposes of federal immigration law. See ABA Guidebook § 4.37; accord, **[****44]** D. Kesselbrenner & L. Rosenberg, Immigration Law and Crimes § 2:1, p. 2-2 (2009) (hereinafter Immigration Law and Crimes) ("A practitioner or respondent will not even know whether the Department of Homeland Security (DHS) or the Executive Office for Immigration Review (EOIR) will treat a particular state disposition as a conviction for immigration purposes. In fact, the [BIA] treats certain state criminal dispositions as convictions even though the state treats the same disposition as a dismissal").

determination "whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen," Immigration Law and Crimes § 2:1, at 2-2 to 2-3.

In short, the professional organizations and guidebooks on which the Court so heavily relies are right to say that "nothing **[*381]** is ever simple with immigration law"--including the determination whether immigration law clearly makes a particular offense removable. ABA Guidebook § 4.65, at 130; Immigration Law and Crimes § 2:1. I therefore cannot agree with the Court's apparent view that the *Sixth Amendment* requires criminal defense attorneys to provide immigration advice.

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel's duty to offer advice concerning deportation consequences may turn on how hard it is to determine **[****45]** those consequences. Where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]" of a conviction, the Court says, counsel has an affirmative duty to advise the client that he will be subject to deportation as a result of the plea. *Ante, at 368, 176 L. Ed. 2d, at 295*. But "[w]hen the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Ante, at 369, 176 L. Ed. 2d, at 296*. This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is "succinct, clear, and explicit." How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer? See Immigration Law and Crimes § 2:1, at 2-2 ("Unfortunately, a practitioner or respondent cannot tell easily whether a conviction **[****46]** is for a removable offense. . . . [T]he cautious practitioner or apprehensive respondent will not know **[**1491]** conclusively the future immigration consequences of a guilty plea").

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal **[*382]** conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged **[***304]** with such an offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral. See ABA Guidebook § 4.14, at 111 ("Often the alien is both *excludable* and *removable*. At times, however, the lists are different. Thus, the oddity of an alien that is inadmissible but not deportable. This alien should not leave the United States because the government will not let him back in" (emphasis in original)). Incomplete legal advice **[****47]** may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court's rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem--such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences. As *amici* point out, "28 states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas." Brief for State of Louisiana et al. 25; accord, *Chin & Holmes 708* ("A growing number of states require advice about deportation by statute or court rule"). A nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting **[****48]** the **[*383]** advice of counsel. Likewise, flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information. Cf. *United States v. Russell, 686 F.2d 35, 39-40, 222 U.S. App. D.C. 313 (CADC 1982)* (explaining that a district court's discretion to set aside a guilty plea under the Federal Rules of Criminal Procedure should be guided by, among other considerations, "the possible existence of prejudice to the government's case as a result of the defendant's untimely request to stand trial" and "the strength of the defendant's reason for withdrawing the plea, including whether the defendant asserts his innocence of the charge").

Fourth, the Court's decision marks a major upheaval in *Sixth Amendment* law. This Court decided *Strickland* in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's *Sixth Amendment* right to counsel. As noted above, the **[****49]** Court's view has been rejected by every Federal Court of Appeals to have considered the issue thus far. See, *e.g.*, *Gonzalez, 202 F.3d, at 28*; *Banda, 1 F.3d, at 355*; *Chin & Holmes 697, 699*. The majority appropriately acknowledges that the lower courts **[**1492]** are "now quite experienced with applying *Strickland*,? *ante, at [***305] 372, 176 L. Ed. 2d, at 297*, but it casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel's duty to advise on collateral consequences.

The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel's duties under the *Sixth Amendment* by claiming that this Court in *Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)*, similarly "applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty." *Ante, at 371, 176 L. Ed. 2d, at 297*. That **[*384]** characterization of *Hill* obscures much more than it reveals. The issue in *Hill* was whether a criminal defendant's *Sixth Amendment* right to counsel was violated where counsel misinformed the client about his eligibility for parole. The Court found it "unnecessary to determine whether there may be circumstances under which erroneous **[****50]** 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.' *474 U.S., at 60, 106 S. Ct. 366, 88 L. Ed. 2d 203*. Given that *Hill* expressly and unambiguously refused to decide whether criminal defense counsel must *avoid misinforming* his or her client as to *one* consequence of a criminal conviction (parole eligibility), that case plainly provides no support whatsoever for the proposition that counsel must *affirmatively advise* his or her client as to *another* collateral consequence (removal). By the Court's strange logic, *Hill* would support its decision here even if the Court had held that misadvice concerning parole eligibility does *not* make counsel's performance objectively unreasonable. After all, the Court still would have "applied *Strickland*" to the facts of the case at hand.

II

While mastery of immigration law is not required by *Strickland*, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting **[****51]** affirmative misadvice regarding a matter as crucial to the defendant's plea decision as deportation appears faithful to the scope and nature of the *Sixth Amendment* duty this Court has recognized in its past cases. In particular, we have explained that "a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys **[*385]** *in criminal cases*.' " *Strickland, 466 U.S., at 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674* (quoting *McMann v. Richardson, 397 U.S. 759, 770, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)*; emphasis added). As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not "within the range of competence demanded of attorneys *in criminal cases*." See *ante, at 369, 176 L. Ed. 2d, at 295* ("Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it"). By contrast, reasonably competent attorneys **[***306]** should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are **[****52]** not familiar. Candor concerning the limits of one's professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on **[**1493]** the Kentucky Supreme Court put it, "I do not believe it is too much of a burden to place on our defense bar the duty to say, 'I do not know.' " *253 S. W. 3d 482, 485 (2008)*.

Second, incompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question. See *Strickland, 466 U.S., at 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674* ("In giving meaning to the requirement [of effective assistance of counsel], we must take its purpose--to ensure a fair trial--as the guide"). When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk that the conviction may carry indirect consequences of which he or she is not aware. That is not the case when a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable. In the latter case, it seems hard to say that the plea was entered **[****53]** with the advice of constitutionally competent counsel--or that it embodies a voluntary and intelligent decision to forsake constitutional **[*386]** rights. See *ibid.* ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result").

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court's approach, not require any upheaval in the law. As the Solicitor General points out, "[t]he vast majority of the lower courts considering claims of ineffective assistance in the plea context have [distinguished] between defense counsel who remain silent and defense counsel who give affirmative misadvice." **[****54]** Brief for United States as *Amicus Curiae* 8 (citing cases). At least three Courts of Appeals have held that affirmative misadvice on immigration matters can give rise to ineffective assistance of counsel, at least in some circumstances.[3] And several other Circuits have held that affirmative **[***307]** misadvice concerning nonimmigration consequences of a conviction can violate the *Sixth Amendment* even if those consequences **[*387]** might be deemed "collateral."[4] By contrast, it appears that **[**1494]** no court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can *never* give rise to ineffective assistance. In short, the considered and thus far unanimous view of the lower federal courts charged with administering *Strickland* clearly supports the conclusion that the Kentucky Supreme Court's position goes too far.

In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the *Sixth Amendment* does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty **[*388]** that generally lies outside the scope of a criminal defense attorney's expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect **[****57]** information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel's duty to assist the client. Instead, an alien defendant's *Sixth Amendment* right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.

Dissent by: SCALIA

Dissent

---

[3] See *United States v. Kwan, 407 F.3d 1005, 1015-1017 (CA9 2005)*; *United States v. Couto, 311 F.3d 179, 188 (CA2 2002)*; *Downs-Morgan v. United States, 765 F.2d 1534, 1540-1541 (CA11 1985)* (limiting holding to the facts of the case); see also *Santos-Sanchez v. United States, 548 F.3d 327, 333-334 (CA5 2008)* (concluding that counsel's advice was **[****55]** not objectively unreasonable where counsel did not purport to answer questions about immigration law, did not claim any expertise in immigration law, and simply warned of "possible" deportation consequence; use of the word "possible" was not an affirmative misrepresentation, even though it could indicate that deportation was not a certain consequence).

[4] See *Hill v. Lockhart, 894 F.2d 1009, 1010 (CA8 1990)* (en banc) ("[T]he erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under *Strickland v. Washington*"); *Sparks v. Sowders, 852 F.2d 882, 885 (CA6 1988)* ("[G]ross misadvice concerning parole eligibility can amount to ineffective assistance of counsel"); *id., at 886* (Kennedy, J., concurring) ("When the maximum possible exposure is overstated, the defendant might well be influenced to accept a plea agreement he would otherwise reject"); *Strader v. Garrison, 611 F.2d 61, 65 (CA4 1979)* (?[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived **[****56]** of his constitutional right to counsel").

Justice **Scalia,** with whom Justice **Thomas** joins, dissenting.

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in **[***308]** order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The *Sixth Amendment* guarantees the accused a lawyer "for his defence" against a "criminal prosecutio[n]"--not for sound advice about the collateral consequences of conviction. **[****58]** For that reason, and for the practical reasons set forth in Part I of Justice Alito's concurrence, I dissent from the Court's conclusion that the *Sixth Amendment* requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders **[**1495]** an attorney's **[*389]** assistance in defending against the prosecution constitutionally inadequate; or that the *Sixth Amendment* requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable, overkill.

* * *

The *Sixth Amendment* as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel. See *United States v. Van Duzee, 140 U.S. 169, 173, 11 S. Ct. 758, 11 S. Ct. 941, 35 L. Ed. 399 (1891)*; W. Beaney, Right to Counsel in American Courts 21, 28-29 (1955). We have held, however, that the *Sixth Amendment* requires the provision of counsel to indigent defendants at government expense, *Gideon v. Wainwright, 372 U.S. 335, 344-345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)*, **[****59]** and that the right to "the assistance of counsel" includes the right to *effective* assistance, *Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the *Sixth Amendment's* textual limitation to criminal prosecutions. "[W]e have held that 'defence' means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery v. Gillespie County, 554 U.S. 191, 216, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008)* (Alito, J., concurring) (summarizing cases). We have limited the *Sixth Amendment* to legal advice directly related to defense against prosecution of the charged offense--advice at trial, of course, but also advice at postindictment interrogations and lineups, *Massiah v. United States, 377 U.S. 201, 205-206, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964)*; *United States v. Wade, 388 U.S. 218, 236-238, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)*, and in general advice at all phases of the prosecution where the defendant would be at a disadvantage when pitted alone against the legally trained agents of the state, see *Moran v. Burbine, 475 U.S. 412, 430, [*390] 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)*. **[****60]** Not only have we not required advice of counsel regarding consequences collateral to prosecution, we have not even required counsel appointed to defend against one prosecution to be present when the defendant is interrogated in connection with another possible prosecution arising from the same event. *Texas v. Cobb, 532 U.S. 162, 164, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001)*.

There is no basis in text or in principle **[***309]** to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand--to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within "the range of competence demanded of attorneys in criminal cases," *McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)*. See *id., at 769-770, 90 S. Ct. 1441, 25 L. Ed. 2d 763* (describing the matters counsel and client must consider in connection with a contemplated guilty plea). We have never held, as the logic of the Court's opinion assumes, that once counsel is appointed all professional responsibilities of counsel--even those extending beyond defense against the prosecution--become constitutional commands. Cf. *Cobb, supra, at 171, n. 2, 121 S. Ct. 1335, 149 L. Ed. 2d 321*; **[****61]** *Moran, supra, at 430, 106 S. Ct. 1135, 89 L. Ed. 2d 410*. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the *Sixth Amendment* has no application.

[1496]** Adding to counsel's duties an obligation to advise about a conviction's collateral consequences has no logical stopping point. As the concurrence observes,

> "[A] criminal convictio[n] can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. . . . All of those consequences are 'seriou[s]' . . . ." *Ante, at 376, 176 L. Ed. 2d, at 300* (Alito, J., concurring in judgment).

[*391] But it seems to me that the concurrence suffers from the same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence's suggestion that counsel must warn defendants of potential removal consequences, see *ante, at 387, 176 L. Ed. 2d, at 307*--what would come to be known as the "*Padilla* warning"--cannot be limited to those consequences **[****62]** except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act, *18 U.S.C. § 924(e)*. We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar's devising of ever-expanding categories of plea-invalidating misadvice and failures to warn--not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given.

The concurrence's treatment of misadvice seems driven by concern about the voluntariness of Padilla's guilty plea. See *ante, at 385-386, 176 L. Ed. 2d, at 306*. But that concern properly relates to the *Due Process Clauses of the Fifth* and *Fourteenth Amendments*, not to the *Sixth Amendment*. See *McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)*; *Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)*. Padilla has not argued before us that his guilty plea was not knowing and voluntary. If that is, however, the true substance of **[***310]** his claim (and if he has properly preserved it) the state court can address it on remand.[1] **[*392]** But we should not smuggle **[****63]** the claim into the *Sixth Amendment*.

The Court's holding prevents legislation that could solve the problems addressed by today's opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant's attention, and what warnings must be given. **[****64]** [2] Moreover, legislation could provide consequences for the misadvice, **[**1497]** nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel's misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today's sledge hammer.

In sum, the *Sixth Amendment* guarantees adequate assistance of counsel in defending against a pending criminal prosecution. We should limit both the constitutional obligation to provide advice and the consequences of bad advice to that well defined area.

References

U.S.C.S., *Constitution, Amendment 6*; *8 U.S.C.S. § 1227(a)(2)(B)(i)*

27 Moore's Federal Practice § 644.61 (Matthew Bender 3d ed.)

---

[1] I do not mean to suggest that the *Due Process Clause* would surely provide relief. We have indicated that awareness of "direct consequences" suffices for the validity of a guilty plea. See *Brady, 397 U.S., at 755, 90 S. Ct. 1463, 25 L. Ed. 2d 747* (internal quotation marks omitted). And the required colloquy between a federal district court and a defendant required by *Federal Rule of Criminal Procedure 11(b)* (formerly *Rule 11(c)*), which we have said approximates the due process requirements for a valid plea, see *Libretti v. United States, 516 U.S. 29, 49-50, 116 S. Ct. 356, 133 L. Ed. 2d 271 (1995)*, does not mention collateral consequences. Whatever the outcome, however, the effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the ***Due Process Clause***.

[2] As the Court's opinion notes, *ante, at 374, n. 15, 176 L. Ed. 2d, at 299*, many States--including Kentucky--already require that criminal defendants be warned of potential removal consequences.

L Ed Digest, Criminal Law §§46.4, 46.7

L Ed Index, Deportation or Exclusion of Aliens; Plea Bargaining

When is **[****65]** attorney's representation of criminal defendant so deficient as to constitute denial of federal constitutional right to effective assistance of counsel--Supreme Court cases. *83 L. Ed. 2d 1112*.

Supreme Court's views as to plea bargaining and its effects. *50 L. Ed. 2d 876*.

Validity of guilty pleas--Supreme Court cases. *25 L. Ed. 2d 1025*.

Accused's right to counsel under the Federal Constitution--Supreme Court cases. *93 L. Ed. 137*, *2 L. Ed. 2d 1644*, *9 L. Ed. 2d 1260*, *18 L. Ed. 2d 1420*.

End of Document

People v Olecski

2017 NY Slip Op 27281

Decided on September 5, 2017

Criminal Court Of The City Of New York, New York County

Statsinger, J.

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

Decided on September 5, 2017

Criminal Court of the City of New York, New York County

The People of the State of New York, Plaintiff,

against

Fallon Olecski, Defendant.

2016NY032655

For the Defendant: Cascione, Purcigliotti & Galluzzi, P.C., by Thomas. G. Cascinoe, Esq.

For the People: Cyrus R. Vance, Jr., New York County District Attorney, by A.D.A. Monica Narang

Steven M. Statsinger, J.

Defendant was charged with Operating a Motor Vehicle While Intoxicated, VTL §1192(2) and (3), and Operating a Motor Vehicle While Ability Impaired, VTL §1192(1). On October 26, 2016, she pled guilty to Operating a Motor Vehicle While Ability Impaired. The Court sentenced defendant to a one-year conditional discharge, the conditions being that she pay a fine and surcharge, attend the Impaired Driver's Program and abide by a 90-day license suspension.

The defendant now moves for an order pursuant to CPL § 440.10(1)(h) vacating the judgment on the ground of ineffective assistance of counsel. In a case of apparent first impression, the Court concludes that defense counsel's erroneous advice regarding defendant's ability to obtain a conditional license after her conviction constituted ineffective assistance of counsel. Accordingly, and for the reasons detailed below, defendant's motion is GRANTED. The accusatory instrument is restored to its pre-pleading status on the Part E Calendar.

I. Introduction

Both defendant and the attorney who represented her at the plea assert that defense counsel told the defendant that if she pled guilty she would be able to obtain a conditional license. This advice was incorrect. The DMW's 25-year "look-back" rule, promulgated in 2013, rendered defendant ineligible for a conditional license, 15 NYCRR §134.7(a)(11)(I), and also triggered an automatic license revocation lasting five additional years.[FN1] 15 NYCRR [*2]136.5(b)(3)(ii). Defense counsel asserts that he was unfamiliar with these rules at the time he advised defendant to plead guilty. Since counsel gave the defendant incorrect advice regarding the relicense consequences of her guilty plea, and defendant has convincingly established that she would not have pled guilty but for that advice, she is entitled to relief for ineffective assistance of counsel.

Defendant further argues that, because the five-year revocation of her license was a direct consequence of the plea, the Court was required to advise her of this prior to accepting the plea. As to this, the Court disagrees. The five-year revocation is a collateral consequence, not a direct consequence, of the guilty plea, and a court need not inform a defendant of the collateral consequences of a plea of guilty, other than immigration consequences. *People v. Peque*, 22 NY3d 168, 184 (2013). Accordingly, the Court was under no obligation to advise the defendant about the actions that The DMV would take, and the motion to vacate the judgment is denied on this particular theory.

II. Legal Discussion

Defendant moves to vacate judgment under CPL 440.10(1)(h), which provides for relief where the "judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States." Where a defendant has received in effective assistance of counsel, she is entitled to relief under this section. *Cf. People v. Maxwell*, 89 AD3d 1108 (2d Dept. 2011).

A. Introduction

The defense correctly argues that counsel's incorrect advice about the relicensing consequences of the guilty plea constitutes ineffective assistance of counsel under both the federal and state constitutions.

B. Federal Standard

A defendant relying on federal constitutional law "to challenge the voluntary and intelligent character of [her] guilty plea on the ground of ineffective assistance of counsel must establish that defense counsel's advice was not within the standard set forth in *Strickland v. Washington* ." *People v. McDonald*, 1 NY3d 109, 113 (2003),

citation omitted. Under *Strickland*, the defendant must show, first, that counsel's performance was deficient - or "unreasonable" - and, second, that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 , 690, 691-92 (1984). Where the defendant has pled guilty, in order to satisfy the prejudice requirement, she "must show that there is a reasonable probability that, but for counsel's errors, [she] would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

1. Counsel's Performance Was Deficient

Defendant has met the first prong of *Strickland*. Defense counsel admits that he incorrectly advised the defendant that accepting a plea of guilty to VTL 1192(1) would be the "only path" to obtaining conditional license and retaining her driving privileges. Cascione Aff. at ¶ 17. When he provided her with this incorrect advice, he was unaware of the DMV's 25-year "look-back" rule, under which it was in fact impossible for her to obtain a conditional license, 15 NYCRR §134.7(a)(11)(I), and which also caused the DMV to revoke her license for five [*3]additional years. 15 NYCRR 136.5(b)(3)(ii). Cascione Aff. at ¶¶ 15-16, 18-20.[FN2] *See McDonald*, 1 NY3d at 114-15 ("affirmative misstatements by defense counsel" about a collateral consequence "may, under certain circumstances, constitute ineffective assistance of counsel"). In truth, only an acquittal after trial could have prevented the consequences of the 25-year "look-back" rule.

While it appears that no court has considered an ineffectiveness claim based on counsel's ignorance of these relicensing regulations, *People v. Luther*, 48 Misc 3d 699 (County Ct, Monroe County 2014), examined this same problem through a different lens, and granted the defendant relief under CPL § 440.10. There, the issue was not that defense counsel gave incorrect advice about the relicensing consequences of a guilty plea. It was that, soon after the defendant's guilty plea, the regulations changed. *Id.* Specifically, defendant pled guilty to driving while intoxicated on February 11, 2013. *Id.* at 700. His sentence included a six-month license revocation. *Id.* Just eleven

days later, however, on February 22, 2013, the current relicensing regulations went into effect, rending him ineligible to reapply for a driver's license for five years after the six-month revocation. *Id.* A Town Court Justice granted defendant's motion for relief under CPL § 440.10(1)(h), and the County Court affirmed, describing defendant's experience as both "an affront to the notion [of] due process" and "patently unfair." *Id.* at 702.[FN3]

Luther, in *dicta*, also observes that an attorney's failure to advise a client about this particular consequence might constitute ineffective assistance: "[B]ut for the revocation consequences at issue being publicly unknown until after defendant's plea and sentencing, the remedy of vacatur on the ground of ineffective assistance may have lied for counsel's failure to disclose." *Id.* at 703. While the Court here need not reach the question whether defendant's due process rights were implicated by her unexpected inability to obtain a conditional license, it agrees that defense counsel's incorrect advice on the question was professionally unreasonable under *Strickland*.

2. Defendant Was Prejudiced

Where a defendant asserts prejudice, "[t]he sufficiency of the defendant's factual allegations as to prejudice should be evaluated with reference to the face of the pleadings, the context of the motion and defendant's access to information." *McDonald*, 1 NY3d at 115, citation omitted. Here, defendant has made a showing of prejudice.

In her affidavit, defendant explains that she is a dancer, and her main concern was that [*4]she be able to continue to drive to work. Olecksi Aff. ¶¶ 4, 11. Defendant lives on Staten Island and does not have readily available public transportation. *Id.* Defense counsel, for his part, has averred that he informed the defendant that a plea to VTL §1192(1) was her only path to a conditional license. Cascione Aff. ¶¶ 8, 16-17. Defendant specifically recalls that her counsel told her that "he had checked the DMV website that very morning and no additional penalty would be added because my prior offenses were too far in the past." Olecksi Aff. ¶ 14. *See also* Cascione Aff. ¶ 15

(confirming this fact, and admitting that counsel failed to notice "the paragraph at the very end [of the website] entitled 'Additional Penalties.'")

Based on her need for a license, and on counsel's advice, defendant pled guilty to violating VTL § 1192(1). However, when she applied for a conditional license, she learned that she was ineligible. Olecksi Aff. ¶ 15. She then also learned of the 25-year "look-back" rule and the mandatory five-year revocation. *Id.* Defense counsel's ignorance of the regulations that produced these results caused him to advise the defendant to plead guilty. Cascione Aff. ¶¶ 15, 21 ("In this case, I not only failed to advise Ms. Olecksi of the consequences of her plea, I affirmatively mis-advised her that she would be able to get a conditional license.")

Defendant has sworn that she pled guilty because she believed that a plea to VTL § 1192(1) was the only way that she could obtain a conditional license, and that if she knew that a conviction of any alcohol-related offense would both render her ineligible for a conditional license and result in an additional administrative revocation, she would have insisted on going to trial. Olecksi Aff. ¶¶ 16-17. The Court finds that the prejudice prong of *Strickland* is satisfied by the assertions of the defendant and her attorney. Defendant has convincingly asserted that her motivating factor for accepting the plea offer was to preserve her driving privileges, and that she would not have pled guilty if her attorney had given her correct advice about the relicensing consequences of her plea. *Cf. McDonald*, 1 NY3d at 115 (affirming denial of relief where counsel's "affirmation makes no factual allegation that, but for [the] error, defendant would not have pleaded guilty").

Given the importance defendant placed upon the continued ability to drive, the Court is convinced that she would not have pled guilty had her attorney correctly advised her that an acquittal after trial was the only sure method of retaining her ability to drive. *E.g.*, *Luther*, 48 Misc 3d at 705 ("defendant may have made a different decision had [the relicensing] consequence been disclosed or otherwise accessible to him at or before the time of his guilty plea and sentencing").

3. Conclusion

The defendant has demonstrated ineffective assistance of counsel under the federal standard.

C. State Constitutional Standard

Having found that the defendant was denied the effective assistance of counsel under the federal standard, the Court will also consider the issue under the less onerous state standard. *Cf. People v. Valle*, 39 Misc 3d 126(A) (App Term 9th & 10th Dists 2013) (not reaching state standard where court concluded that federal standard violated). Here, the Court concludes that, [*5]even if the defendant did not meet the federal standard, she has met the state standard.[FN4]

In evaluating a claim of ineffective assistance of counsel under the state constitution, a court considers whether the defendant was afforded "meaningful representation." *People v. Henry*, 95 NY2d 563, 565 (2000), citations omitted. This standard "is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case." *People v. Benevento*, 91 NY2d 708, 714 (1998). "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation reveal that the attorney provided meaningful representation, the constitutional requirement will have been met." *People v. Baldi*, 54 NY2d 137, 147 (1981). Where the defendant raises a state-law ineffectiveness claim after pleading guilty, she must show that "the alleged ineffective assistance had [an] impact on the plea bargaining process or the voluntariness of the plea," *People v. Dunn*, 261 AD2d 940 (4th Dept 1999), but "need not fully satisfy the prejudice prong of *Strickland*." People v. Stultz, 2 NY3d 277, 284 (2004).

Here, defense counsel failed to provide meaningful representation. Defendant's main concern was a conditional license, and both she and defense counsel indicate that her erroneous belief that pleading guilty was the only way to obtain one was the

sole reason that she did so. Defense counsel admitted that he not only gave incorrect advice when he told her that she could receive a conditional license if she pled guilty, but he also failed enitirely to tell her that her license would be revoked for five more years. And, clearly, this incorrect advice had an impact on the voluntariness of defendant's plea.

Accordingly, there was a violation of the defendant's right to the effective assistance of counsel under the state constitution.

D. Conclusion

Because defendant has established that her attorney's erroneous advice caused her to plead guilty, and that she would not have pled guilty but for that advice, defendant's motion to vacate judgment pursuant to CPL § 440.10(1)(h) is granted.

III. Collateral Consequences

Defendant suggests, in the alternative, that because the unexpected five-year revocation of her driver's license was a direct consequence of the plea, the Court was required to advise her of this, and that its failure to do so also requires vacatur of the judgment. Cascione Aff. ¶ 17.

The Court disagrees:

A trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences ... . The court is not required to engage in any particular litany when allocuting the defendant, but due process requires that the record must be clear that "the plea represents a voluntary and intelligent" choice among the alternative courses of action open to the defendant ... . Manifestly, a criminal court is in no position to advise on all the ramifications of a guilty plea personal to a defendant. Accordingly, the courts have drawn a distinction between consequences of which the defendant must be advised, those which are "direct," and [*6]those of which the defendant need not be advised, "collateral consequences."

People v. Ford, 86 NY2d 397, 402-403 (1995), citations omitted.

Here, the record of the plea colloquy reflects that the Court adequately apprised the defendant of the rights that she was waiving, including her rights under *Boykin v. Alabama*, 395 U.S. 238 (1979). *See People v. Harris*, 61 NY2d 9 (1983). The Court secured a knowing and voluntary waiver of those rights, and also correctly described the direct consequences of the plea - those that would have "a definite, immediate and largely automatic effect on defendant's punishment." *Ford* 86 NY2d at 403. The Court informed the defendant of the financial penalties, the requirement that she attend the Impaired Driver's Program, and the 90-day license suspension that the Court was imposing pursuant to VTL §1193(2)(a)(1).

By contrast, the relicensing ramifications were a collateral consequence, and not a direct consequence, of the plea. *People v. Peque*, 22 NY3d 168, 185 (2013). They were "peculiar to the [defendant's] personal circumstances and ... not within the control of the court system." *Ford*, 86 NY2d at 403. *See also Peque*, 22 NY3d at 184. Since the DMV is not within the control of the court, neither the defendant's ineligibility for a conditional license nor the additional five-year revocation was part of the punishment, and the Court was under no duty to advise the defendant about them.[FN5]

In any event, the defendant's "claims relating to the court's failure to advise [her] of the [license revocation] consequences of [her] plea. . . [are] record-based and therefore may not be raised by way of a CPL 440 motion." *People v. Simpson*, 120 AD3d 412 (1st Dept. 2014), citations omitted; *People v. Llibre*, 125 AD3d 422 (1st Dept. 2015).

For both of these reasons, defendant is not entitled to relief under CPL § 440.10(1)(h) on the ground that the Court did not advise her of the possibility of any adverse actions that the DMV might take against her.

IV. Conclusion

Defendant was denied the effective assistance of counsel under both the federal and state constitutions. She has shown that counsel's failure to inform her of the license revocation consequences of her plea of guilty caused her prejudice. Accordingly, defendant's motion to vacate the judgment on the ground of ineffective assistance of counsel is granted, and the case is restored to its prepleading status. CPL §440.10(8).

This constitutes the Decision and Order of the court.

Dated: September 5, 2017
New York County, New York
Steven M. Statsinger
Judge of the Criminal Court

Footnotes

Footnote 1: The regulation applies to applicants for relicensing with multiple alcohol- or drug- related driving convictions. The instant conviction for driving while ability impaired by alcohol is defendant's third; she was convicted of that same offense in 2004 and 2010.

Footnote 2: Pursuant to 15 NYCRR §134.7(a)(11)(I), a person who has three or more alcohol-related convictions within the past 25 years, which defendant indisputably did, is ineligible for a conditional license. 15 NYCRR §134.7(a)(11)(I). For this same reason, defendant must serve an additional five-year revocation period, after which she may submit an application for relicensing. The Commissioner may then approve the application with an A2 restriction on the driver's license, and the requirement that an ignition interlock device be installed on any motor vehicle that she owns or operates for a period of five years. 15 NYCRR 136.5(b)(3)(ii).

Footnote 3: By contrast, *People v. Wheaton*, 49 Misc 3d 378, 379 (County Court, Seneca County, 2015), found no due process violation in a case where a defendant's license was revoked pursuant to 15 NYCRR 136.5(b) some nine years after entry of his guilty plea.

Footnote 4: Such a finding would not preclude relief. CPL § 440.10(1)(h) applies where the judgment was obtained "in violation of a right of the defendant under the constitution of this state or of the United States."

Footnote 5: Although *Peque* created an exception for immigration consequences, this exception is "quite narrow," and "almost invariably, a [court need inform the] defendant ... of only the direct consequences of a guilty plea and not the collateral consequences." Post-*Peque*, the court "continue[s] to adhere to the direct/collateral framework, and ... do[es] not retreat from [its] numerous decisions holding a variety of burdensome consequences of a guilty plea to be strictly collateral and irrelevant to the voluntariness of the plea." 22 NY3d at 196, citations omitted.

Bottom of Form

AN INTEGRATED PERSPECTIVE ON THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS AND REENTRY ISSUES FACED BY FORMERLY INCARCERATED INDIVIDUALS

MICHAEL PINARD*

* Assistant Professor, University of Maryland School of Law. I am extremely grateful for the comments and suggestions offered by Richard Boldt, Carla Cartwright, Randy Hertz, Sherrilyn Ifill, and Anthony Thompson. I also appreciate the feedback offered by participants at the Southeastern Association of Law Schools Conference, the Seton Hall University School of Law Faculty Workshop, and the Villanova University School of Law Faculty Colloquium. I am particularly indebted to Michael Lafleur for his research assistance as well as to research librarian Maxine Grosshans and library research fellow Susan McCarty at the University of Maryland School of Law. All errors are mine alone.

INTRODUCTION

The past few years have brought dramatically increased attention to the collateral consequences of criminal convictions[1] and the reentry into society of

[1] Collateral consequences are defined simply as the *indirect* consequences that flow from federal and state criminal convictions. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-1.1 (3d ed. 2004), *available at* http://www.abanet.org/crimjust/standards/collateralsanctionwithcommentary.pdf [hereinafter ABA STANDARDS ON COLLATERAL SANCTIONS] (contrasting collateral consequences arising automatically after sentencing with discretionary punishments that are within the control of the sentencing authority); *see* Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 15-17 (Marc Mauer & Meda Chesney-Lind eds., 2002) (contrasting collateral consequences, which are automatically "imposed by operation of law" upon a conviction, with the direct consequences of sentencing, which are imposed "by the decision of the sentencing judge"). For purposes of this Article, collateral consequences refer to the legal consequences of criminal convictions. It is important to recognize, however, that in addition to these legal consequences individuals with criminal records face an array of social consequences, including various forms of isolation from their families and communities. *See* Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 347 (1968) (defining the social consequences of criminal convictions as those that attach "on account of societal disapprobation," such as ostracism or refusal to employ individuals with criminal convictions); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of* Infamia, 46 UCLA L. REV. 1895, 1897 (1999) (discussing the stigma that attaches to convicted felons and describing those who have served time as "a permanent undercaste of people who were once in prison, who are stigmatized as felons, and who are subject to an array of collateral disabilities traditionally associated with the status of being a felon"); Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 10 (1996) (stating that formerly incarcerated individuals experience stigma); Dina R. Rose & Todd R. Clear, *Incarceration, Reentry and Social Capital: Social Networks in the Balance*, *in* PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN,

persons convicted of criminal offenses.[2] Legal scholars, policy analysts, anthropologists, elected officials, advocates, clergy persons, legal organizations, and grassroots organizations are all among those who have begun to explore the myriad issues related to these components. For instance, the American Bar Association has adopted standards[3] that urge jurisdictions to, inter alia, assemble and codify their respective collateral consequences,[4] implement mechanisms to inform defendants of these consequences as part of the guilty plea and sentencing processes,[5] require courts to consider these consequences when imposing sentences,[6] and narrow the range of consequences.[7] Following the ABA's lead, practitioners, advocates, and law school programs in several jurisdictions across the United States have begun to compile their respective collateral consequences,[8] with the aim of educating

FAMILIES AND COMMUNITIES 313, 326-34 (Jeremy Travis & Michelle Waul eds., 2003) [hereinafter PRISONERS ONCE REMOVED] (reporting that recently released individuals often feel stigmatized by their communities and discussing other social reentry problems including problems with finances, identity, and relationships with others).

[2] The terms "reentry" and "reintegration" are often used interchangeably in the literature. However, some commentators have observed these to be two distinct concepts. *See, e.g.*, JEREMY TRAVIS ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 1 (2001), *available at* http://www.urban.org/UploadedPDF/from_prison_to_home.pdf (distinguishing between reentry, which all prisoners who are released experience, and reintegration, which indicates a successful reentry process). Under this framework, reentry is defined as the "process of leaving prison and returning to society." *Id.* at 1. As a result, "[a]ll prisoners experience reentry irrespective of their method of release or form of supervision, if any." *Id.* Reintegration is the end goal, as it connotes successful reentry. *See, e.g.*, *id.* at 2 (asserting that a major goal of this study is "[m]anaging reentry to achieve long-term reintegration," as doing so would bring about "far-reaching benefits" for former prisoners, as well as their families and communities).

[3] *See generally* ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1.

[4] *Id.* Standard 19-2.1.

[5] *Id.* Standard 19-2.3.

[6] *Id.* Standard 19-2.4.

[7] *Id.* Standard 19-2.5 (opining that there should be a process in place to waive or modify collateral sanctions); *id.* Standard 19-2.6 (stating that certain collateral sanctions should not be imposed).

[8] *See generally* CIVIL ACTION PROJECT, THE BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE: A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS AND OTHER ADVOCATES FOR PERSONS WITH CRIMINAL RECORDS 1-29 (2005) [hereinafter THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK], *available at* http://www.nlada.org/DMS/Documents/1110924022.69/Consequences%20of%20Criminal%20Proceedings_Mar05.pdf; CMTY. RE-ENTRY PROGRAM, PUB. DEFENDER SERV. FOR THE DISTRICT OF COLUMBIA, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN THE DISTRICT OF COLUMBIA: A GUIDE FOR CRIMINAL DEFENSE LAWYERS (2004) [hereinafter COLLATERAL CONSEQUENCES IN THE DISTRICT OF COLUMBIA], *available at* http://pdsdc.org/communitydefender/collateral%20consequences%20to%20criminal%20con

various criminal justice actors of their existence.[9]

Simultaneous with these efforts, various governmental and community organizations have begun to explore and implement measures to address the reentry-related needs of individuals exiting correctional facilities and returning to their communities. For instance, several federal and state lawmakers have drafted legislation focused on providing services to these individuals.[10] A number of reentry centers and service providers have proliferated across the country, aiming to coordinate services for individuals transitioning back to society.[11] Similarly, public defense organizations, civil legal services organizations and other community-based advocacy groups have begun to provide reentry-related legal services to these individuals.[12]

The recent focus on these developing fields can be attributed in part to the

victions%20in%20DC.pdf; NANCY FISHMAN, NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE, BRIEFING PAPER: LEGAL BARRIERS TO PRISONER REENTRY IN NEW JERSEY (2003), *available at* http://www.njisj.org/reports/barriers_report.html; REENTRY OF EX-OFFENDERS CLINIC, UNIVERSITY OF MARYLAND SCHOOL OF LAW, A REPORT ON THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN MARYLAND (2004) (on file with author); WASH. DEFENDER ASS'N, BEYOND THE CONVICTION: WHAT DEFENSE ATTORNEYS IN WASHINGTON STATE NEED TO KNOW ABOUT COLLATERAL AND OTHER NON-CONFINEMENT CONSEQUENCES OF CRIMINAL CONVICTIONS (2004), *available at* http://www.defensenet.org/SN/UpdatedBeyondtheConviction.pdf; Kimberly R. Mossoney & Cara A. Roecker, *Ohio Collateral Consequences Project*, 36 U. TOL. L. REV. 611 (2005).

[9] *See, e.g.*, Charles F. Willson et al., *What the Courts May Not Be Telling Defendants*, BOSTON B.J., Jan.-Feb. 2003, at 10, 11-12 (setting forth various collateral consequences under Massachusetts law, which authors urge defense counsel to consider when advising clients about guilty pleas).

[10] *See, e.g.*, Second Chance Act of 2005: Community Safety Through Recidivism Prevention, H.R. 1704, 109th Cong. (2005) (authorizing a grant program and a task force regarding reentry of offenders into the community); Second Chance Act of 2005: Community Safety Through Recidivism Prevention, S. 1934, 109th Cong. (2005) (same); S.B. 1148, 85th Gen. Assem., Reg. Sess. (Ark. 2005) (enacted) (establishing transitional housing for individuals with convictions reentering society); H. 6961, 2005 Legis. Sess. (Ct. 2005) (establishing a prisoner reentry commission); S.J. Res. 273, 2005 Gen. Assem. (Va. 2005) (establishing a joint subcommittee to study prisoner reentry to society).

[11] *See, e.g.*, Jason Feifer, *Re-entry, Ready or Not: After Release, a New Struggle*, WORCESTER TELEGRAM & GAZETTE, Mar. 23, 2005, at A1 (providing an example of a regional reentry center for released inmates in Worcester, Massachusetts, which provides resources such as information about housing, counseling, and medical services); Kate Zernike, *Helping Inmates Kick Drugs (and the Prison Habit)*, N.Y. TIMES, June 26, 2005, at A16 (reporting that Illinois has opened seven reentry centers, which provide "job and treatment support"). For an extensive listing and descriptions of reentry programs across the United States, see generally AMY L. SOLOMON ET AL., OUTSIDE THE WALLS: A NATIONAL SNAPSHOT OF COMMUNITY-BASED PRISONER REENTRY PROGRAMS (2004), *available at* http://www.urban.org/UploadedPDF/410911_OTWResourceGuide.pdf.

[12] *See infra* note 230 (describing the reentry services provided by three important public defense offices).

broadening perspectives of the criminal justice system that have developed over the past two decades. Various advocates and community stakeholders have adopted holistic perspectives that recognize the many overlapping civil and criminal issues that are embedded in the criminal justice system.[13] These holistic perspectives attempt to address the wide-ranging issues that often accompany an individual's involvement with the criminal justice system, and acknowledge the relevance of that individual's family and community in seeking to resolve these issues.[14]

Much of the attention on collateral consequences and reentry is also due to the exploding incarceration levels over the past two decades.[15] From 1973 to 2003, the number of individuals incarcerated in U.S. prisons climbed dramatically, from approximately 200,000 to 1.4 million.[16] As a result, an alarming number of men and women are currently incarcerated in federal and state correctional facilities.[17]

These dramatic imprisonment rates cause concern regarding collateral consequences and reentry because high incarceration rates result in record numbers of prisoners being released from our nation's correctional facilities.[18]

---

[13] *See infra* Part IV.B (explaining the role of many organizations that are taking a holistic approach to reentry, offering legal and non-legal services to assist released prisoners with reentry-related logistics).

[14] *See, e.g.*, Terry Brooks & Shubhangi Deoras, *New Frontiers in Public Defense*, CRIM. JUST., Spring 2002, at 51, 51 (observing that public defenders who practice holistic advocacy "aim[] to address the underlying problems in . . . clients' lives" by providing "counseling, social services, treatment alternatives, and aftercare").

[15] *See, e.g.*, Margaret E. Finzen, Note, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299, 307 (2005) ("Although some collateral consequences laws have been around for a long time, they are now gaining increased awareness as a result of the incarceration explosion, which has led to collateral consequences laws affecting massively greater numbers of individuals.").

[16] JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 23 (2005).

[17] The most recent Department of Justice study indicates that at midyear 2004, 1,390,906 men and 103,310 women were incarcerated in federal and state prisons. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2004 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf.

[18] *See, e.g.*, TRAVIS, *supra* note 16, at 39 (highlighting the fourfold increase of individuals presently being released as compared to twenty-five years ago); U.S. GEN. ACCOUNTING OFFICE, PRISONER RELEASES: TRENDS & INFORMATION ON REINTEGRATION PROGRAMS 7 (2001), *available at* http://www.gao.gov/new.items/d01483.pdf [hereinafter GAO PRISONER RELEASES] (drawing a connection between the dramatically increased incarceration rates and the "record numbers of offenders eventually being released and returned to communities"); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-offender Reentry*, 45 B.C. L. REV. 255, 256 (2004) (tracing the record numbers of individuals being released to the "explosion in incarceration that this country endorsed and experienced over the last two decades"). Overall, approximately ninety-five percent of all

Presently, approximately 650,000 individuals are released each year from federal and state prisons in the United States.[19] In addition, approximately nine million individuals are released each year from local jails.[20] Several studies indicate that disproportionate numbers of these individuals return to certain "core counties"[21] that are located primarily in urban centers.[22] These communities, already burdened by daunting social and economic travails that impact their viability,[23] must confront critical issues stemming from this

prison inmates will eventually be released. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REENTRY TRENDS IN THE U.S. (2003), *available at* http://www.ojp.usdoj.gov/bjs/reentry/growth.htm.

[19] U.S. Dep't of Justice, Learn About Reentry, http://www.ojp.usdoj.gov/reentry/learn.html (last visited Apr. 2, 2006) [hereinafter Dep't of Justice, Learn About Reentry]. Moreover, the number of individuals under some form of correctional supervision – either incarcerated in prisons or jails, or on probation or parole – reached a record 6,889,800 in 2003. LAUREN E. GLAZE & SERI PALLA, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2003 at 1 & tbl. (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus03.pdf. Approximately 3.2% of adults in the United States were incarcerated or on probation or parole at the end of 2003. *Id.* at 1.

[20] Telephone Interview with Allan J. Beck, Ph.D., U.S Dep't of Justice, Bureau of Justice Statistics (Aug. 3, 2005).

[21] JAMES P. LYNCH & WILLIAM J. SABOL, PRISONER REENTRY IN PERSPECTIVE 15 (2001), *available at* http://www.urban.org/UploadedPDF/410213_reentry.pdf.

[22] *See, e.g.*, NANCY G. LA VIGNE & CYNTHIA A. MAMALIAN, PRISONER REENTRY IN GEORGIA 31 (2004), *available at* http://www.urban.org/UploadedPDF/411170_Prisoner_Reentry_GA.pdf (reporting that, of the ninety-five percent of released Georgia prisoners who returned to Georgia, forty-three percent of them returned to eight counties in Georgia); NANCY G. LA VIGNE ET AL., A PORTRAIT OF PRISONER REENTRY IN MARYLAND 2 (2003), *available at* http://www.urban.org/UploadedPDF/410655_MDPortraitReentry.Pdf (finding that, of the ninety-seven percent of individuals released from Maryland correctional facilities who returned to Maryland, nearly sixty percent returned to Baltimore City); LYNCH & SABOL, *supra* note 21, at 19 ("There is reason to believe that the increased geographic concentrations put the burden of reentry disproportionately on a relatively small number of urban areas . . . ."); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1276 (2004) ("Research in several cities reveals that the exit and reentry of inmates is geographically concentrated in the poorest, minority neighborhoods.").

[23] *See, e.g.*, AMY L. SOLOMON ET AL., FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY: A REPORT OF THE REENTRY ROUNDTABLE 13 (2004), *available at* http://www.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf (observing that, in the context of the various employment-related obstacles for individuals released from correctional facilities, "[c]ommunities that receive large concentrations of released prisoners are already struggling with high rates of unemployment and poverty and a dearth of available jobs"); Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1552-53 (2003) (observing that the possible difficulties that returning individuals face with reentering labor markets can "aggravate social and economic disadvantages within areas where former

dramatic reentry wave. This is particularly true because these counties can expect to absorb increasing numbers of formerly incarcerated individuals in the future.[24]

Moreover, dramatic recidivism rates accompany these escalating numbers of individuals leaving correctional facilities: Approximately two-thirds are rearrested within three years of release.[25] This cycle of reentry and recidivism has raised substantial national and local concerns about community safety and viability.[26] These concerns in turn have led several policy analysts to study various reentry issues[27] and several community stakeholders to take steps to aid individuals reentering these communities.[28]

Elected officials, legal scholars, policy analysts, grassroots organizations, and legal organizations have increasingly recognized collateral consequences and reentry as central to the criminal process and to criminal justice policy.[29] Despite this recent concern and attention, however, collateral consequences and reentry are not considered to be *legally* central or even relevant to the criminal process.[30] As a general matter, there is no point along the criminal

inmates are concentrated").

[24] These issues are, of course, quite broad, as the individuals leaving correctional facilities often must confront medical issues as well as the collateral consequences and various stigmas noted in this Article. *See* Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, *in* PRISONERS ONCE REMOVED, *supra* note 1, at 33, 54-56 (highlighting the psychological and medical issues that many former inmates will bring to these communities, including social alienation, reliance on the institutional structure, diminished sense of self-worth, and even post-traumatic stress).

[25] *See* PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002), *available at* www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf.

[26] *See, e.g.*, LYNCH & SABOL, *supra* note 21, at 14, 19 (observing that the reentry of released individuals raise community-based concerns for public safety, particularly as individuals have been incarcerated for longer periods of time). Furthermore, the decline in participation in prison rehabilitation programs could lead to public safety problems, as could the increase in the number of prisoners released unconditionally, without any community supervision. *Id.* at 19.

[27] *See, e.g.*, GAO PRISONER RELEASES, *supra* note 18, at 6 ("Given the record number of ex-inmates leaving prisons and returning to communities, research and policy experts have begun to focus attention on reintegration . . . including the topic of prison reintegration and its relationship to public safety.").

[28] *See* Michael Anft, *Seeking a Smooth Reentry: New Funds and Efforts Help Ex-inmates Return to Society*, 14 CHRON. PHILANTHROPY, June 27, 2002, at 7 (2002) (connecting increased charity and grant maker attention toward reentry issues and the record numbers of individuals exiting correctional facilities); Nora V. Demleitner, *Stopping a Vicious Cycle: Release, Restrictions, Re-Offending*, 12 FED. SENT'G REP. 243, 243 (2000) (stating that concerns regarding recidivism and public safety have led several public and private organizations to provide assistance to individuals upon release).

[29] *See infra* Part II.

[30] Travis, *supra* note 1, at 16.

justice continuum that formally addresses issues related to collateral consequences.[31] For example, neither the federal nor any state criminal process has a formal mechanism that incorporates the scope of these consequences.[32] As a result, defendants often plead guilty[33] to crimes completely unaware of the network of consequences that both can and will attach to their convictions.[34] Moreover, while some legal services and public defense organizations have begun to recognize collateral consequences and provide reentry related services,[35] the criminal defense community overall has yet to fully embrace the relevance of these services to the criminal process.[36]

[31] Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002) (remarking that many courts do not require either the trial judge or defense counsel to explain the collateral consequences of a guilty plea to the defendant).

[32] *See infra* notes 119-125 and accompanying text (discussing how courts have almost universally held that due process does not require that defendants be informed of collateral consequences).

[33] This Article emphasizes collateral consequences as pertaining to the guilty plea process, as this is how the vast majority of cases are resolved. MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2002, tbl. 4.2 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/sc0204st.pdf (indicating that in 2002 ninety-five percent of felony state court cases were resolved by guilty pleas); U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 22 fig.C (2003) (indicating that in 2003 nearly ninety-six percent of federal cases were resolved by guilty pleas); *see also* Brief for the National Ass'n of Criminal Defense Lawyers et al. as Amici Curiae Supporting Respondent at 3, INS v. St. Cyr, 533 U.S. 289 (2001) (No. 00-767) ("Clearly, the criminal justice system relies heavily on the willingness of criminally accused persons to give up their right to a jury trial and other constitutional rights by agreeing to plead guilty."); George Fisher, *A Practice as Old as Justice Itself*, N.Y. TIMES, Sept. 28, 2003, at 11 ("Today the entire criminal justice system depends for its survival on plea bargaining."). The criminal justice system's heavy reliance on guilty pleas has caused some commentators to explore the non-trial related skills that criminal defense attorneys must possess. *See, e.g.*, Chin & Holmes, *supra* note 31, at 698 (opining that "[t]he most important service that criminal defense lawyers perform for their clients is not dramatic cross-examination of prosecution witnesses or persuasive closing arguments for the jury; it is advising clients whether to plead guilty and on what terms"); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 74 (1995) (opining that defense attorneys should "concentrate on becoming effective negotiators" given the prevalence of guilty pleas).

[34] Collateral consequences have been described as "invisible punishments" because they are "imposed by operation of law rather than by decision of the sentencing judge . . . [and] are not considered part of the practice or jurisprudence of sentencing." Travis, *supra* note 1, at 16.

[35] *See infra* Part V (giving examples of public defense groups and other constituencies that have incorporated collateral consequences into their practices).

[36] *See infra* Part IV.A (discussing the traditional philosophies of criminal defense, which focused on narrow legal issues, to explain why the defense community has been slow to

Therefore, although several organizations across the country are beginning to address the array of reentry-related issues and are beginning to provide services, the vast reentry needs of individuals exiting correctional facilities remain unaddressed.[37]

Courts have offered myriad explanations to justify excluding collateral consequences and reentry from the criminal process. For instance, several appellate courts have declared that collateral consequences impose civil restrictions as opposed to criminal penalties, and are therefore detached from the criminal process.[38] Courts have also warned against the burdens of incorporating the vast network of collateral consequences into the criminal process.[39]

Similarly, significant concerns have been raised about incorporating vast reentry needs into the services provided by public defense and civil legal services organizations. Specifically, public defense and civil legal services offices have limited funds[40] and crushing caseloads.[41] In addition, criminal defense attorneys lack the expertise in civil legal services necessary for holistic

expand their focus); *infra* Part IV.B (explaining the movement to a more holistic representation by some defense attorneys, but pointing out that the defense community has not yet fully embraced this idea so as to fully address collateral consequences and reentry).

[37] *See infra* Part I.B (explaining that the existing networks do not have the capacity to address the needs of all individuals in the criminal justice system, due in part to the rising prison population, as well as the fact that many of these measures are still experimental and do not exist in all jurisdictions).

[38] *See infra* Part I.A.1 (discussing legal challenges alleging that certain collateral consequences violate ex post facto and/or double jeopardy principles). Courts have mostly held that collateral consequences are civil, not punitive under the two-prong test set forth in United States v. Ward, 448 U.S. 242 (1980).

[39] *See id.* (discussing the practical explanations courts have provided for excluding collateral consequences from the criminal process, such as the impracticality and burden associated with doing so, given the fact that collateral consequences are constantly changing and are not neatly codified).

[40] *See, e.g.*, Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 430 (2001).

[41] *See, e.g.*, Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1169 (2003) ("Criminal defense lawyers . . . typically carry grossly excessive caseloads and are therefore severely restricted in how much time they can devote to individual clients."); Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 664 (1986) (observing that public defenders frequently indicate that "excessive caseload[s] . . . prohibit[] their having adequate time to prepare their cases"); McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, CLEARINGHOUSE REV., May-June 2003 at 56, 59 (observing that, as a result of high caseloads, public defense offices "are forced to overlook the noncriminal difficulties that lead to or result from involvement with the criminal justice system").

reentry practice.[42]

One other possible explanation for the exclusion of these components from the criminal process has escaped analysis, but attaches to the roots of both components. This explanation is conceptual, as it pertains to the ways in which these components have been perceived: The collateral consequences and reentry components have largely been analyzed in respective vacuums – as *separate*, *individual* processes attached to distinct points along the criminal justice spectrum. Commentators and service providers have tended to address, analyze, and/or critique one component in isolation from the other.[43] Legal scholars have written extensively about collateral consequences, but have devoted scant attention to the connections between these consequences and reentry.[44] Conversely, some defense organizations have begun to work either on collateral consequences or reentry issues, but have not incorporated both components into their practices.[45] Likewise, several organizations and government officials have begun to study and work on various reentry issues – such as employment and housing – without recognizing these as collateral consequences that should be addressed earlier in the criminal process.[46] Nor have these organizations addressed the ways in which the legal barriers imposed by collateral consequences potentially compromise reentry efforts.[47]

In essence, the majority of commentators and advocates have spoken in compartmentalized voices, either focused on collateral consequences or on reentry, without exploring in detail the links between these components.[48] These constituencies have focused their respective energies to address central issues relating to either of these components, without critically engaging the other.[49] As a result, their arguments and perspectives have narrowed the lens through which they view the collateral consequences and reentry components, and have missed opportunities to synergize these components and to develop integrated perspectives that accurately reflect the scope of their interlocking issues.[50]

---

[42] *See, e.g.*, Thompson, *supra* note 18, at 275 (stating that collateral consequences mostly affect indigent individuals and "[b]ecause indigent legal services tend to be provided by areas of specialty (housing or government benefits, family law, or criminal defense), it is unlikely that a single defender would have complete knowledge of the wide range of consequences").

[43] *See id.*

[44] *See infra* Part III.

[45] *See infra* Part III.B.

[46] *See id.*

[47] *See id.*

[48] *See infra* Part III.C.

[49] *See id.*

[50] *But see* discussion *infra* Part V (discussing exceptions to this generalized observation). Some constituencies, particularly policy analysts and national legal organizations such as the American Bar Association, have explicitly recognized the direct relationship between collateral consequences and reentry. *See infra* note 324 and accompanying text. In varying

This Article advances the fusing of these disconnected perspectives by raising a unified voice that consistently articulates collateral consequences and reentry as *interwoven and integrated* components along the criminal justice continuum.[51] These components are critically intertwined, as they heavily influence and directly impact one another.[52] Collateral consequences relate directly to reentry and the formerly incarcerated individual's ability to move on to a productive, law-abiding life.[53] Similarly, reentry is impacted directly by the constellation of consequences confronting the individual upon his or her release.[54] Communities in turn are broadly affected by the influx of returning individuals weighed down by the obstacles imposed by their criminal convictions long after their formal sentences have lapsed.

The Article asserts that marrying these components broadens and strengthens the arguments previously advanced by commentators and advocates, while also providing a clearer scope through which to analyze these connected issues. This unified, integrated perspective more completely articulates the centrality of these components to the criminal justice system. In turn, this perspective will hopefully influence the debates surrounding these components, as well as the many actors in the criminal justice process who are in a position to directly affect collateral consequences and the reentry process. In particular, defense attorneys, prosecutors, trial courts, appellate courts, elected officials, and community stakeholders could benefit from an enhanced understanding of the intertwining issues embedded in collateral consequences and reentry. These actors could use this integrated approach to better shape litigation and practice-based strategies, resulting in more positive outcomes both for the individuals involved and for their communities.

Part I of this Article provides a background of collateral consequences and reentry. Part II offers a look at the literature devoted to both of these components, and provides an overview of various practices related to reentry. Part III sets out the compartmentalization of collateral consequences and reentry: the scholarly focus in the literature on collateral consequences, the focus of appellate court decisions on collateral consequences as opposed to issues implicated in reentry, and the practical focus by community and legal services organizations on strategies devoted to reentry. Part IV offers some potential explanations for these stratified perspectives and practices. Part V explores the direct link between collateral consequences and reentry, and asserts that a unified, integrated perspective broadens the context within which to analyze the intertwining legal and policy issues. The Article concludes that

degrees, these individuals and organizations have written about and analyzed issues regarding collateral consequences as correlative to the vast reentry hurdles that await convicted persons upon completion of their sentences. *Id.*

[51] *See infra* Part V.A.

[52] *See infra* Part III.

[53] *See id.*

[54] *See id.*

while this integrated perspective answers some of the thorny questions regarding collateral consequences and reentry it presents several others that will hopefully be addressed in the near future.

I. COLLATERAL CONSEQUENCES AND REENTRY: THE BACKDROP

A. *Collateral Consequences*

Collateral consequences are the indirect consequences of criminal convictions.[55] These consequences comprise a mixture of federal and state statutory and regulatory law, as well as local policies.[56] Direct consequences include the duration of the jail or prison sentence imposed upon the defendant as well as, in some jurisdictions, the defendant's parole eligibility[57] or imposition of fines.[58] Collateral consequences, by contrast, are not part of the explicit punishment handed down by the court; they stem from the fact of conviction rather than from the sentence of the court.[59] These consequences include a vast network of "civil" sanctions[60] that limit the convicted

[55] Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1073; *see also* Chin & Holmes, *supra* note 31, at 699-700 (contrasting the legal system's approach to direct consequences, such as a prison term or fine, to its approach to collateral consequences, which "can operate as a secret sentence"); Finzen, *supra* note 15, at 305-07 (defining collateral consequences as social and legal penalties that affect individuals convicted or suspected of criminal behavior).

[56] Given these myriad strands of law and policy, commentators have noted the difficulty of grasping the range of collateral consequences that potentially attach to a conviction. *See* Pinard, *supra* note 55, at 1080 n.58.

[57] *See, e.g.*, Michel v. United States, 507 F.2d 461, 463 (2d Cir. 1974) (explaining that defendant must be advised of parole term that automatically attaches to sentence of imprisonment); Craig v. People, 986 P.2d 951, 963 (Colo. 1999) (en banc) ("Mandatory parole is a direct consequence of pleading guilty to a charge which subjects a defendant to immediate imprisonment because it has an 'immediate and largely automatic effect on the range of possible punishment.'" (quoting People v. Birdsong, 958 P.2d 1124, 1128 (Colo. 1998))); People v. Catu, 825 N.E.2d 1081, 1082-83 (N.Y. 2005) (holding that mandatory post-release supervision is a direct consequence that requires notification to defendant).

[58] *See, e.g.*, Duke v. Cockrell, 292 F.3d 414, 417 (5th Cir. 2002) (holding that imposition of a fine is a direct consequence); Parry v. Rosemeyer, 64 F.3d 110, 114 (3d Cir. 1995) (same); Johnson v. State, 654 N.W.2d 126, 135 (Minn. Ct. App. 2002) ("Direct consequences are those that flow definitely, immediately, and automatically from a guilty plea, namely, the maximum sentence to be imposed and the amount of any fine. All other consequences are collateral."), *rev'd on other grounds*, 673 N.W.2d 144 (Minn. 2004).

[59] Travis, *supra* note 1, at 15, 15-17.

[60] *See* Nora V. Demleitner, *"Collateral Damage": No Re-entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1032 (2002) (observing that collateral consequences "are legally classified as civil rather than criminal sanctions").

individual's social, economic, and political access.[61] These sanctions flow from both felony and misdemeanor convictions, irrespective of whether the defendant was sentenced to a term of imprisonment.[62] While several consequences are imposed at the discretion of agencies acting independently of the criminal justice system,[63] many attach automatically upon the conviction by operation of law.[64] These federal and state consequences are vast and wide-ranging. Some of the most notable include temporary or permanent ineligibility for public benefits,[65] public or government-assisted housing,[66] and

[61] *See, e.g.*, Finzen, *supra* note 15, at 307 (observing that collateral consequences limit individuals' "civil, political, social, and economic rights"). Several commentators have also observed that the collateral damage suffered by individuals often extends to their families and communities. *See, e.g.*, Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing – Denial of Benefits to Drug Offenders*, *in* INVISIBLE PUNISHMENT, *supra* note 1, at 37, 48 (illustrating how public housing bans extend to families); William J. Sabol & James P. Lynch, *Assessing the Longer-run Consequences of Incarceration: Effects on Families and Employment*, *in* CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE 3, 4-8 (Darnell F. Hawkins et al. eds., 2003) (describing how incarceration can disrupt family networks and community stability). Moreover, it is important to note that in certain instances detrimental consequences, such as the loss of employment, can attach to an individual's mere arrest, irrespective of the ultimate disposition. *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, 481 (2005).

[62] *See* Walter Matthews Grant et al., Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 955 (1970) (observing that disabilities become active "when the offender has been convicted of a crime enumerated" in the disabling statute, regardless of any imprisonment imposed). However, for a brief discussion of some of the ways in which ex-offenders who have served a period of incarceration are particularly affected, see Marc Mauer, *Introduction: The Collateral Consequences of Imprisonment*, 30 FORDHAM URB. L.J. 1491, 1495-99 (2003).

[63] *See, e.g.*, People v. Ford, 657 N.E.2d 265, 268 (N.Y. 1995) (collateral consequences "are peculiar to the individual and generally result from the actions taken by agencies the court does not control") (citations omitted).

[64] *See* ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, Standard 19-1.1(a)-(b) (defining a collateral sanction as a penalty "automatically upon [a] person's conviction," and a discretionary disqualification as a "penalty, disability or disadvantage . . . that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense").

[65] 21 U.S.C. § 862a (2000) (denying assistance and benefits to those convicted of certain drug-related offenses).

[66] 42 U.S.C. § 13661 (2000) (restricting housing assistance for individuals with drug convictions and individuals abusing drugs and alcohol, and granting authority to public housing agencies to deny admission to criminal offenders); 42 U.S.C.S. § 1437f(d)(1)(B)(iii) (2006) (stating that criminal activity of the tenant, "any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy," with exceptions made for victims of certain types of domestic crimes) (LEXIS through Jan. 5, 2006 amendments). *See* Rubinstein & Mukamal, *supra* note 61, at 43-46 (providing an overview of federal laws hindering those with criminal records

federal student aid;[67] various employment-related restrictions;[68] disqualification from military service;[69] civic disqualifications such as felon disenfranchisement[70] and ineligibility for jury service;[71] and, for non-citizens, deportation.[72]

While the recent focus on collateral consequences might indicate otherwise, such consequences have historically accompanied criminal convictions.[73] Indeed, some organizations have long been concerned about the scope of collateral consequences and their connections to reentry.[74] These organizations have sought to implement measures that facilitate the reentry of ex-prisoners into society.[75] In 1956, for example, the National Conference on Parole ("the Conference") sought to eradicate laws imposing civil restrictions on individuals with criminal records.[76] Furthermore, in 1962, the National

from living in public housing).

[67] 20 U.S.C. § 1091(r) (2000) (suspending eligibility for federal student aid if the student has been convicted of a drug offense under state or federal law), *amended by* Deficit Reduction Act of 2005, Pub. L. No. 171, § 8021, 120 Stat. 4 (suspending, as of July 1, 2006, only those convicted of a drug offense while receiving federal student aid).

[68] For an overview of employment-related restrictions imposed by states, see LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 10-11 (2004), *available at* http://www.lac.org/lac/upload/lacreport/LAC_PrintReport.pdf.

[69] 10 U.S.C.S. § 504(a) (2006) (LEXIS through Jan. 6, 2006 amendments) (declaring that "[n]o person . . . who has been convicted of a felony[] may be enlisted in any armed force," with the qualification that the Secretary of Defense can allow for exceptions in individual "meritorious cases").

[70] Voting restrictions are based on state law. *See* SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1-3 (2005), *available at* http://www.sentencingproject.org/pdfs/1046.pdf.

[71] Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003) (observing that thirty-one states and the federal government exclude felons from jury service).

[72] Guy Cohen, Note, *Weakness of the Collateral Consequences Doctrine: Counsel's Duty to Inform Aliens of the Deportation Consequences of Guilty Pleas,* 16 FORDHAM INT'L. L.J. 1094, 1111-12 (1993) (discussing convictions that expose aliens to deportation).

[73] *See, e.g.*, Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1061-66 (2002); Travis, *supra* note 1, at 17-18. For a detailed history of civil disabilities, including their origins in ancient Greece and Rome, as well as developments in English legal history and early jurisprudence in the United States, see Grant et al., *supra* note 62, at 941-50 (1970).

[74] *See, e.g.*, Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM. URB. L.J. 1705, 1707-17 (2003) (tracing the historical movements and organizations that advocated reforming or eliminating collateral consequences from the 1950s to the present).

[75] *See id.*

[76] Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 155 (1999). The

Council on Crime and Delinquency drafted a Model Act calling "for the discretionary expungement of criminal records, which would restore the individual to the legal position he held prior to his conviction."[77] In the nearly twenty years that followed these efforts, various commissions further explored issues regarding collateral consequences, and states implemented measures that allowed automatic restoration of civil rights upon completion of sentence.[78] In 1981, following this period of exploration and advocacy, the American Bar Association and the American Correctional Association jointly issued the Standards on the Legal Status of Prisoners.[79] These standards implored jurisdictions to adopt "a judicial procedure for expunging criminal convictions, the effect of which would be to mitigate or avoid collateral disabilities."[80]

Much of the recent attention devoted to collateral consequences can be attributed to shifts over the last couple of decades toward more punitive, less individualized sentencing schemes, and the proliferation of related federal and state laws that have expanded the reach of collateral consequences.[81] These shifts, epitomized by the "tough on crime" and "war on drugs" movements that began in the 1980s and 1990s,[82] significantly broadened the scope and reach of these consequences, as various federal and state civil sanctions were imposed to punish those convicted of certain offenses.[83] During this time, for instance,

National Conference on Parole argued that collateral consequences caused a deprivation of civil rights and contradicted goals of the modern corrections system. *Id.*

[77] *Id.*

[78] *See* Love, supra note 74, at 1713 n.33 (listing the various commissions and professional organizations that have addressed "collateral consequences and their effect on offender reintegration").

[79] *Id.* at 1713-14.

[80] ABA STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS Standard 23-8.2 (2d. ed. 1983), *available at* http://www.abanet.org/crimjust/standards/prisoners_status.html. This has recently been superseded by ABA Standards dealing specifically with collateral sanctions, which similarly implore legislatures to provide for subsequent relief from collateral disabilities. ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, Standard 19-2.5. For a discussion of the various current mechanisms for relief from civil disabilities among the states, see *id.* at 1717-26.

[81] *See* ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, at 8 (highlighting that collateral consequences "have been increasing steadily in variety and severity for the past [twenty] years"); TRAVIS, *supra* note 16,at 67-70 (discussing state and federal laws enacted in the 1980s and 1990s that expanded the reach of collateral consequences); Fox Butterfield, *Freed from Prison, but Still Paying a Penalty*, N.Y. TIMES, Dec. 29, 2002, at 18 (discussing the wide range of collateral consequences and reporting that "[m]ost of the sanctions were passed by Congress and state legislatures in the 1990's to get tough on crime"). Any progress made to limit the effect of collateral consequences in the 1960s and early 1970s was "halted, if not reversed" in the late 1980s and 1990s due to the new "'get tough' approach to crime." Demleitner, *supra* note 76, at 155.

[82] Demleitner, *supra* note 76, at 155.

[83] *See* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of*

Congress passed laws that temporarily or permanently disqualified persons convicted of felony drug-related offenses from receiving certain federal welfare benefits,[84] and disqualified those convicted of any drug-related offense from receiving federal educational grants.[85] In addition, Congress passed laws declaring individuals (and their households) ineligible for federal housing assistance if they have been convicted of specified criminal activity or otherwise have been found to have engaged in criminal activity.[86] Moreover, Congress gave vast discretion to local housing authorities to establish their own eligibility standards regarding criminal records.[87] As a result, collateral consequences have reached unprecedented breadth in recent decades.[88]

Despite their proliferation, however, collateral consequences remain

Criminal Conviction, 6 J. GENDER RACE & JUST. 253, 259 (2002) (observing that drug offenses "are subjected to more and harsher collateral consequences than any other category of crime"); Demleitner, *supra* note 60, at 1033 (observing that those convicted of drug offenses are disproportionately affected by collateral consequences because "many . . . consequences target them specifically" and that the range of civil sanctions applicable to drug offenses has greatly increased in recent years).

[84] 21 U.S.C. § 862a (2000).

[85] 20 U.S.C. § 1091(r) (2000) (suspending eligibility for federal student aid if an individual has been convicted of a drug offense under state or federal law), *amended by* Deficit Reduction Act of 2005, Pub. L. No. 171, § 8021, 120 Stat. 4 (suspending, as of July 1, 2006, only those convicted of a drug offense while receiving federal student aid).

[86] There are two categorical, lifetime bans from receiving federal housing assistance. 42 U.S.C. § 13663(a) (2000) (denying eligibility for federally assisted housing to an individual – and by extension to his or her household – "who is subject to a lifetime registration requirement under a State sex offender registration program"); 24 C.F.R. § 966.4(l)(5)(i)(A) (2006) (mandating immediate termination of tenancy if any household member has been convicted of manufacturing or producing methamphetamine on the premises). In addition, broad categories of criminal activity could render individuals ineligible for housing assistance, irrespective of conviction. *See* 42 U.S.C.S. § 1437f(d)(1)(B)(iii) (2006) (LEXIS through Jan. 5, 2006 amendments) (providing for termination of public housing assistance if tenant or tenant's family member engages in drug crime or other crime that threatens other tenants); 42 U.S.C. § 13661(a) (2000) ("Any tenant evicted from federally assisted housing [because] of drug related criminal activity . . . shall not be eligible for [such] housing [for three years], unless the evicted tenant successfully completes a rehabilitation program approved by the public housing agency . . . ."); 42 U.S.C. § 13661(c) (2000) (authorizing public agencies to deny admission to the federal housing program if the applicant or a member of the applicant's household is or was "engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents").

[87] United States Department of Housing & Urban Development Directive No. 96-16, Notice PIH 96-16 (HA) (Apr. 12, 1996), *available at* http://www.hud.gov/offices/pih/publications/notices/96/pih96-16.pdf (providing "guidance to enhance the ability and related efforts of public housing agencies to develop and enforce stricter screening and eviction as a part of their anti-drug, anti-crime initiatives").

[88] Chin & Holmes, *supra* note 31, at 699 ("[T]he imposition of collateral consequences has become an increasingly central purpose of the modern criminal process.").

excluded from the criminal process.[89] No procedural mechanisms – state or federal – incorporate them.[90] As a result, various constituencies remain unaware of their existence and scope.[91] Perhaps most crucially, even institutional actors such as judges, prosecutors, and defense attorneys are often unaware of the array of consequences that can attach to a criminal conviction.[92] This unawareness means that information regarding collateral consequences often does not reach criminal defendants.[93] Thus, defendants often plead guilty or are otherwise sentenced, aware only of the "direct" or immediate consequences that flow from their convictions, while unaware of the "indirect," but perhaps more lasting, consequences.[94]

1. The Legal Challenges

Collateral consequences have been subjected to two primary groups of legal challenges. The first group contains expansive challenges to the very *fairness and propriety* of certain collateral consequences, on the grounds that they are unfairly punitive and that they disproportionately affect particular population segments. Thus, legal claims have been brought challenging consequences such as the civil commitment of sex offenders, sex offender registration, felon disenfranchisement, and ineligibility for federal welfare benefits, on due

[89] *See infra* Part I.A.1.

[90] *See id.*

[91] There are several reasons for this collective unawareness. The main one, perhaps, is that many collateral consequences are not codified in state and federal criminal codes; instead they are scattered throughout various other statutory or regulatory provisions. *See* ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, Standard 19-2.1 cmt. at 21 ("Collateral sanctions have been promulgated with little coordination in disparate sections of state and federal codes, making it difficult to determine all of the penalties and disabilities applicable to a particular offense."). As a result, these consequences are not intuitively or even easily accessible to institutional actors. Moreover, in most instances, collateral consequences "are imposed by operation of law rather than by decision of the sentencing judge." Travis, *supra* note 1, at 16. Accordingly, these consequences are not considered as part of the sentencing process, because they never enter into the sentencing formula. *See id.*

[92] *See, e.g.*, Thompson, *supra* note 18, at 273.

[93] *Id.*; *see also* Lucien E. Ferster & Santiago Aroca, *Lawyering at the Margins: Collateral Civil Penalties at the Entry and Completion of the Criminal Sentence*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES 203, 208 (Christopher Mele & Teresa A. Miller eds., 2005) (arguing that, given criminal caseloads and the necessity of plea bargains, defense counsel and courts have an institutional disincentive to notify defendants of collateral consequences).

[94] *See* Robert H. Gorman, *Collateral Sanctions in Practice in Ohio*, 36 U. TOL. L. REV. 469, 469 (2005) (observing that defendants are often unaware of the collateral sanctions, which "may be more severe than the judge-imposed sanctions"); ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, at 7 (stressing that defendants "often do not appreciate . . . that their convictions will expose them to numerous additional legal penalties and disabilities, some of which may be far more onerous than the sentence imposed by the judge in open court").

process,[95] equal protection,[96] double jeopardy,[97] and ex post facto[98] grounds.[99]

Courts have assessed the relevant legal claims using analyses drawn from traditional due process and equal protection case law. For instance, *Turner v. Glickman* involved a class action challenge to 21 U.S.C. § 862a, which renders individuals convicted of felony drug offenses ineligible to receive certain federal welfare benefits, including food stamps.[100] In analyzing the equal protection claims, the Seventh Circuit first found that the statute does not involve any fundamental right or suspect classification.[101] As a result, the court used rational basis review and upheld the statute, declaring there to be a rational relationship between the disparity of treatment afforded by the statute and the legitimate governmental purposes of deterring drug use and reducing food stamp fraud.[102] The court similarly used rational basis review to reject the due process claims.[103]

The legal issue in double jeopardy and ex post facto challenges has been whether the collateral consequences are an imposition of criminal penalties (in which case the challenge succeeds) or civil penalties (in which case the challenge fails). Most claims have been rejected under a two-pronged analysis set forth in *United States v. Ward*.[104] This analysis calls for courts to first look to whether Congress, in enacting the statute, "indicated either expressly or impliedly a preference" for labeling the penalty civil or criminal.[105] When Congress has indicated an intention to impose a civil sanction, courts are then to determine whether the statutory scheme is "so punitive either in purpose or effect as to negate [Congress's] intention."[106] A number of courts, following

[95] U.S. CONST. amends. V, XIV.

[96] U.S. CONST. amend. XIV.

[97] U.S. CONST. amend. V.

[98] U.S. CONST. art. I, § 9, cl. 3.

[99] This Article summarizes legal challenges to collateral consequences brought in the past few decades. However, collateral consequences have long (and frequently) been subject to constitutional challenges, including claims that they violate the bill of attainder clause and constitute cruel and unusual punishment. *See* Grant et al., *supra* note 62, at 1190-98.

[100] 207 F.3d 419, 422-23 (7th Cir. 2000).

[101] *Id.* at 424.

[102] *Id.* at 425.

[103] *Id.* at 426-27.

[104] 448 U.S. 242 (1980). The Supreme Court has laid out several tests to determine whether a penalty is criminal or civil. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (articulating seven-prong test for punishment); Trop v. Dulles, 356 U.S. 86, 96 (1958) (declaring that a statute is "penal" if it "imposes a disability for the purposes of punishment – that is, to reprimand the wrongdoer, to deter others, etc.," but is "nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose") (footnotes omitted).

[105] *Ward*, 448 U.S. at 248.

[106] *Id.* at 249. *Turner* also involved a double jeopardy challenge to the federal welfare

Ward, have found that the intent behind a statute was non-punitive, that the purpose and effect of the statute did not negate this intent, and that the statute therefore imposed non-punitive civil penalties rather than criminal sanctions.[107]

The second group of legal challenges contains narrower legal claims that have not questioned the propriety of any particular consequence, but rather have challenged *the process* by which consequences were imposed on individual defendants.[108] Specifically, this group contains numerous

ban. In assessing whether the statute functioned as a criminal punishment, the Seventh Circuit analyzed Congress's intent. While acknowledging that the statute is listed in the criminal code section setting out various drug laws, the court observed that Congress had no role in the decision to place it there. Rather, the Office of Law Revision Counsel made the decision. *Turner*, 207 F.3d at 428. In further analyzing congressional intent, the court turned to the statute's enforcement provisions. The court found that the statute was enforced not through the criminal process, but by state agencies responsible for administering the benefits program. *Id.* at 429. The court then looked to whether the statutory scheme was "'so punitive in purpose or effect'" that it constituted a criminal penalty. *Id.* (quoting *Ward*, 448 U.S. at 249). After weighing the seven factors set out in *Mendoza-Martinez*, the court held that the appellants did not meet their burden of showing "'the clearest proof'" that the statute amounted to a criminal penalty. *Id.* at 431 (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)).

[107] *See* Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (holding that Kansas's civil commitment law did not violate the double jeopardy clause or the ex post facto clause, because it did not constitute criminal punishment); Smith v. Doe, 538 U.S. 84, 105 (2003) (rejecting ex post facto challenge to Alaska's sexual offender registration requirement, as the law did not constitute criminal punishment). Other cases have referenced *Ward* while relying on the traditional seven-part test set forth in *Mendoza-Martinez*. *See, e.g.*, *Turner*, 207 F.3d at 430 (finding that that the denial of certain welfare benefits to felony drug offenders does not constitute criminal punishment); *see also* Nora V. Demleitner, *A Vicious Cycle: Resanctioning Offenders*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 93, at 185, 186 ("Despite their debilitating impact on ex-offenders' lives, courts have generally declined to find such collateral sanctions punishment for constitutional purposes, largely because legislatures justify them in terms of public safety rather than retribution."). Because sex offender registration is not considered to constitute punishment, various state courts have held that defendants need not be informed of their duty to register as part of the guilty plea process. *See, e.g.*, People v. Montaine, 7 P.3d 1065, 1067 (Colo. Ct. App. 1999) (insisting that the duty to register as a sex offender is not a direct consequence of the guilty plea because, "[a]lthough the duty to register flows directly from defendant's conviction . . . it does not enhance defendant's punishment for the offense"). *But see* Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1686 (2003) (opining that "it is not always clear that the primary legislative motivation for a collateral sanction is civil rather than punitive, nor is it always a simple matter to discern the primary motivation").

[108] The interpretation of a particular sanction as either an individual or a group-based deprivation potentially affects perceptions of the deprivation's scope and reach. *See, e.g.*, Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1149 (2004):

[O]nce the right to vote is cast in group terms, rather than in purely individual ones,

challenges brought by appellants seeking to overturn their convictions on the ground that they were not informed of the consequences attaching to their convictions until after they entered guilty pleas. Some appellants argued that their defense counsel had an affirmative duty to inform them of relevant collateral consequences, and that failure to do so was a violation of the right to effective assistance of counsel.[109] Others have asserted that the trial court had a duty to inform, and that its failure to do so rendered the plea unknowing.[110]

These particular legal challenges have involved numerous collateral consequences, including civil commitment,[111] deportation,[112] sex offender registration,[113] ineligibility for federal health programs,[114] ineligibility for employment-related licenses and employment,[115] inability to vote,[116] termination of parental rights,[117] and suspension of driving privileges.[118]

criminal disenfranchisement statutes can be seen not only to deny the vote to particular individuals but also to dilute the voting strength of identifiable communities and to affect election outcomes and legislative policy choices.

[109] U.S. CONST. amend. VI.

[110] *E.g.*, Commonwealth v. Shindell, 827 N.E.2d 236, 238-39 (Mass. App. Ct. 2005) (rejecting defendant's request to withdraw her guilty plea because the trial judge did not warn her that she would have to register as a sex offender).

[111] *E.g.*, Ames v. Johnson, No. CL04-413, 2005 WL 820305, at *3 (Va. Cir. Ct. Mar. 28, 2005) (concluding that trial counsel's failure to warn of civil commitment collateral consequence did not violate defendant's right to effective assistance of counsel).

[112] *E.g.*, Gonzalez v. State, 83 P.3d 921, 923-25 (Or. Ct. App. 2004) (involving a successful ineffective assistance of counsel claim stemming from counsel's failure to adequately warn of collateral deportation consequences).

[113] *E.g.*, *Shindell*, 827 N.E.2d at 237.

[114] *E.g.*, State v. Merten, 668 N.W.2d 750, 754-55 (Wis. Ct. App. 2003) (refusing defendant's request to withdraw a plea due to trial court's failure to warn of resulting denial of Medicare and Medicaid benefits).

[115] *E.g.*, State v. Wilkinson, No. 20365, 2005 WL 182920, at *2 (Ohio Ct. App. Jan. 28, 2005) (denying defendant's motion to withdraw his guilty pleas because he was not informed that his pleas could "preclude him from any future employment at any facility providing care to older adults," and could also "jeopardize his nursing license"); Henry v. State, No. 207, 2003 Del. LEXIS 507, at *6 (Oct. 7, 2003) (rejecting defendant's request to withdraw a *nolo contendere* plea based on counsel's failure to "inform him of the possible revocation of his Mortgage Loan Broker License").

[116] *E.g.*, People v. Boespflug, 107 P.3d 1118, 1121 (Colo. Ct. App. 2004) (dismissing defendant's argument that "he should be allowed to withdraw his pleas because the court did not advise him that he would lose his right to vote while he was imprisoned").

[117] *E.g.*, Slater v. State, 880 So. 2d 802, 803 (Fla. Dist. Ct. App. 2004) (rejecting defendant's claim that "the trial judge should have set aside his pleas of no contest because the sentencing court and his attorney failed to advise him that as a result of a plea, his parental rights would be terminated").

[118] *See* Commonwealth v. Duffey, 639 A.2d 1174, 1175 (Pa. 1994) (rebuffing defendant's claim that his plea was invalid because he was not told that his license would be suspended).

Almost universally, appellate courts have rejected these challenges, declaring that neither trial courts[119] nor defense attorneys[120] are obligated to inform defendants of collateral consequences. Rather, these consequences are considered to be the "indirect" ramifications of criminal convictions,[121] as they

[119] *See Boespflug*, 107 P.3d at 1121 (holding that the trial court was not required to inform the defendant that he would lose the right to vote while incarcerated, because such loss does not constitute punishment and is therefore a "collateral consequence of a guilty plea for which no advisement is required"); *Duffey*, 639 A.2d at 1176 (holding that the trial court was not required to inform the defendant that his license would be suspended, because "loss of driving privileges is a civil collateral consequence"); *Merten*, 668 N.W.2d at 754 (holding that the trial court was not required to inform the defendant that he would be ineligible for Medicare and Medicaid benefits, because "any consequence arising under [federal] law was collateral to the state court proceedings").

[120] *See* Chin & Holmes, *supra* note 31, at 699 (observing that the vast majority of federal circuits, the majority of states, and the District of Columbia "have held that lawyers need not explain collateral consequences," and that "[a]pparently no court rejects the rule"). To prevail on an ineffective assistance of counsel claim, an appellant must generally show that defense counsel's performance fell below that of a reasonably competent attorney, and that, but for counsel's performance, there is a reasonable probability that the outcome of the case would have been different. Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). This analysis has been extended to the guilty plea context. Hill v. Lockhart, 474 U.S. 52, 57 (1985). An appellant raising an ineffective assistance of counsel claim in the guilty plea context must prove deficient performance, as in *Strickland*, and must also prove that, but for counsel's performance, "there is a reasonable probability that . . . [the appellant] would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

However, several federal and state courts have distinguished between counsel providing no advice and providing *wrong* advice about collateral consequences. In the latter instance, several courts have held that misinforming a defendant constitutes ineffective assistance of counsel. *See, e.g.*, United States v. Cuoto, 311 F.3d 179, 188 (2d Cir. 2002) (holding that affirmative misrepresentation "meets the first prong of the *Strickland* test"); Roberti v. State, 782 So. 2d 919, 920 (Fla. Dist. Ct. App. 2001) ("Affirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea."); People v. Becker, 800 N.Y.S.2d 499, 505 (N.Y. Crim. Ct. 2005) (holding that misadvice on potential loss of housing constitutes deficient representation); Gonzalez v. State, 83 P.3d 921, 925 (Or. Ct. App. 2004) (upholding ineffective assistance claim where defense counsel misinformed the defendant by stating that pleading guilty "may" lead to deportation, given that "the current immigration scheme all but requires that aliens convicted of aggravated felonies be deported").

[121] Some penalties are considered indirect specifically because they are imposed by agencies independent of the criminal justice system. *See, e.g.*, Moore v. Hinton, 513 F.2d 781, 782 (5th Cir. 1975) (holding that Alabama defendants need not be informed that pleading guilty to driving while intoxicated will result in suspension of driving privileges, as the suspension is imposed by the Alabama Department of Public Safety under a separate proceeding); People v. Ford, 657 N.E.2d 265, 268 (N.Y. 1995) ("The failure to warn of . . . collateral consequences will not warrant vacating a plea because they are peculiar to the individual and generally result from the actions taken by agencies the court does not control."); Commonwealth v. Shindell, 827 N.E.2d 236, 238 (Mass. App. Ct. 2005) (holding

impose "civil" rather than "criminal" penalties.[122] Courts routinely rely on these civil/criminal or direct/indirect distinctions to interpret and limit the constitutional parameters of the attorney-client relationship, holding that attorneys are not constitutionally obligated to give clients information regarding collateral consequences when advising them about the ramifications of pleading guilty.[123] Moreover, these distinctions shield trial judges from having to inform defendants of collateral consequences when accepting guilty pleas or pronouncing sentences.

Rather, due process requires that defendants in both federal[124] and state courts be informed only of the conviction's direct consequences.[125] To a certain extent, an exception to this rule has emerged at the state level in the deportation context: many states now require trial judges to warn defendants of potential deportation consequences prior to accepting guilty pleas.[126] In

that a defendant need not be informed that he might have to register as a sex offender, because "an entity outside the court [the sex offender registry board] decides whether the defendant ultimately must register"); *Slater*, 880 So. 2d at 804 (finding that termination of parental rights is a collateral consequence because "[i]t is not automatic, but instead entails the discretion of the Department of Children and Families").

[122] For this reason, Professor Chin observes that the classification of a sanction as either a regulatory measure or a criminal penalty is "critical to [its] constitutionality." Chin, *supra* note 107, at 1685.

[123] *See, e.g.*, Henry v. State, No. 207, 2003 Del. LEXIS 507, at *4 (Oct. 7, 2003) (holding that counsel need not tell defendant that pleading guilty could lead to revocation of his Mortgage Loan Broker License, because revocation was "correctly classified . . . as a collateral consequence"); State v. Carney, 584 N.W.2d 907, 910 (Iowa 1998) (holding that counsel's failure to inform defendant that a guilty plea could lead to his license being revoked did not constitute ineffective assistance, because "the consequence of license revocation is collateral"); Ames v. Johnson, No. CL04-413, 2005 WL 820305, at *3 (Va. Cir. Ct. Mar. 28, 2005) (insisting that trial counsel had no "constitutional or professional duty" to inform client about the civil commitment process under Virginia's Sexually Violent Predators Act, because "any possible civil commitment . . . would not flow directly from [the] *nolo contendere* plea but, rather, from a separate civil proceeding").

[124] *See* FED. R. CRIM. P. 11(b) (stating that federal courts must "inform the defendant of, and determine that the defendant understands" direct consequences, such as the nature of each charge and the maximum and any minimum sentence, prior to accepting guilty pleas).

[125] *See* Brady v. United States, 397 U.S. 742, 755 (1970) (stating that the voluntariness standard requires that the defendant be made "'fully aware of the direct consequences'" of a guilty plea (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957), *rev'd on other grounds*, 356 U.S. 26 (1958))).

[126] *See, e.g.*, CAL. PENAL CODE § 1016.5(a) (West 1985); CONN. GEN. STAT. ANN § 54-1j(a) (West 2001 & Supp. 2006); D.C. CODE. § 16-713(a) (2001); GA. CODE ANN. § 17-7-93(c) (2004); HAW. REV. STAT. § 802E-2 (LexisNexis 2003); ME. R. CRIM. P. 11(b)(5); MD. RULE 4-242(e) (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 278, § 29D (West 1998 & Supp. 2005); N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2002); N.C. GEN. STAT. § 15A-1022(a)(7) (2005); OHIO REV. CODE ANN. § 2943.031(A) (LexisNexis 2003); OR. REV. STAT. § 135.385(2)(d) (2003); R.I. GEN. LAWS § 12-12-22(a)-(b) (2002); TEX. CODE

addition, while federal courts have long held deportation consequences to be collateral,[127] recent changes in federal law have rendered deportation a virtual certainty for many non-citizens convicted of felonies.[128] Accordingly, many have called for deportation to be recategorized as a direct consequence.[129] Also, isolated exceptions regarding other consequences exist in a handful of federal and state jurisdictions.[130]

CRIM. PROC. ANN. art. 26.13(a)(4) (Vernon 1989 & Supp. 2004-05); WASH. REV. CODE ANN. § 10.40.200(2) (West 2002); WIS. STAT. ANN. § 971.08(1)(c) (West 1998).

[127] *E.g.*, Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976). Because they are considered collateral, federal trial judges are not required to inform non-citizen defendants of possible deportation consequences following guilty pleas. *Id.*

[128] In 1996, Congress enacted two statutes that significantly expanded the category of crimes for which non-citizens could be deported, and that in large measure eliminated the availability of discretionary waivers. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 8 U.S.C. § 1228(a)(3) (2000)) (accelerating removal proceedings for individuals convicted of "aggravated felonies"); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 304(a)(3), 110 Stat. 3009-546, 3009-587, 3009-594 (codified at 8 U.S.C. § 1229b(a) (2000)) (implementing the new "cancellation of removal" remedy in place of the broader and more generous deportation waiver remedy); *see* Anjali Parekh Prakash, Note, *Changing the Rules: Arguing Against Retroactive Application of Deportation Statutes*, 72 N.Y.U. L. REV. 1420, 1431-37 (1997) (detailing how Congress greatly narrowed the deportation remedies available to aliens). As a result, "it is now virtually certain that an aggravated felon will be removed." United States v. Amador-Leal, 276 F.3d 511, 516 (9th Cir. 2001).

[129] *See* Lea McDermid, Comment, *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CAL. L. REV. 741, 762 (2001) (arguing that due to "the harsh 1996 amendments limiting discretionary relief and judicial review," it is "no longer appropriate" to characterize deportation consequences as collateral). For a discussion of how federal circuit courts have addressed this question to date, see Pinard, *supra* note 55, at 1079 n.56.

[130] For instance, one federal circuit court has held that the automatic denial of federal welfare benefits upon conviction for a felony drug offense renders the consequence direct rather than collateral. United States v. Littlejohn, 224 F.2d 960, 969 (9th Cir. 2000). A few states require trial judges to provide information about possible registration requirements to defendants pleading guilty to sexual offenses. *See, e.g.*, AK. R. CRIM. P. 11(c)(4) (2005) (requiring trial courts to inform defendants of registration requirements before accepting guilty pleas to sex offenses or child kidnapping); LA. REV. STAT. ANN. § 15:543(A) (2005) (requiring trial courts to provide written notification of registration requirements "to any defendant charged with a sex offense"); MASS R. CRIM. P. § 12(C)(3)(B) (requiring trial courts to inform defendants that they "may be required to register as . . . sex offender[s]"); WASH. SUPERIOR CT. CRIM. R. § 4.2(g)(6)(l) (requiring courts to notify defendants, in writing, that pleading guilty to sex offenses could result in required registration). Also, the New Jersey Supreme Court has held that trial judges must inform defendants pleading guilty to predicate sex offenses that they face possible civil commitment upon the conclusion of their sentences. State v. Bellamy, 835 A.2d 1231, 1238 (N.J. 2003) (insisting that the trial court inform the defendant "when the consequence of a plea may be so severe that a defendant may be confined for the remainder of his or her life"). While the court reiterated

In addition to these legal distinctions, appellate courts have offered practical explanations for continuing to exclude collateral consequences from the criminal process. Some have asserted that it is simply too impractical for trial courts to first gather the relevant consequences attendant to each individual conviction, and then inform defendants of the consequences.[131] The task is particularly burdensome given the expansive dockets that stifle criminal courts.[132] It is made even more complicated by the fact that collateral consequences are not centralized, but rather are scattered throughout federal and state statutes, state and local regulatory codes, local rules, and local policies.[133] As one commentator has noted:

> One central problem with collateral consequences is the unstructured and ad hoc manner in which they are identified and imposed. No one knows, really, what they are, not legislators when they consider adding new ones, not judges when they impose sentence, not defense counsel when they advise clients charged with a crime, and not defendants when they plead guilty or are convicted of a crime and have no idea how their legal status has changed.[134]

Courts have opined that similar burdens would befall defense attorneys if they were required to inform their clients of the vast array of collateral consequences that either could or would accompany conviction.[135] Other

---

that civil commitment is a collateral consequence, it "conclude[d] that fundamental fairness requires that the trial court inform a defendant of the possible consequences under the [New Jersey Sexually Violent Predator] Act." *Id.*

[131] *See, e.g.*, *Fruchtman*, 531 F.2d at 949 (holding that trial judges need not inform defendants of possible deportation consequences, because "[t]he collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant of such a consequence . . . would impose an unmanageable burden on the trial judge"); State v. Byrge, 614 N.W.2d 477, 494 (Wis. 2000) ("The distinction between direct and collateral consequences essentially recognizes that it would be unreasonable and impractical to require a circuit court to be cognizant of every conceivable consequence before the court accepts a plea.").

[132] Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 96 (1997).

[133] *See* Pinard, *supra* note 55, at 1080 n.58 (noting commentators' frequent observations on the difficulty of even ascertaining the relevant collateral consequences in a given case).

[134] Chin, *supra* note 83, at 254.

[135] *See* United States v. Yearwood, 863 F.2d 6, 8 (4th Cir. 1988) (holding that defense attorney's failure to advise client of deportation consequences did not constitute ineffective assistance, because "[t]o hold otherwise would place the unreasonable burden on defense counsel to ascertain and advise of the collateral consequences of a guilty plea"). *But see* People v. Becker, 800 N.Y.S.2d 499, 504-05 (N.Y. Crim. Ct. 2005):

> Although it may be objectively unreasonable to require an attorney to be familiar with all of the various possible collateral consequences which may emanate from a particular guilty plea, it is not objectively unreasonable to require an attorney to consult with an expert or complete relevant research to help the attorney accurately and properly advise a defendant regarding potential collateral consequences . . . .

courts have warned that requiring notification of collateral consequences could potentially provide windfalls to defendants on appeal.[136]

2. The Policy Perspectives

In addition to these legal challenges, many have raised various policy arguments regarding collateral consequences. Some groups have asserted that certain collateral consequences benefit society.[137] However, others have countered that many collateral consequences are overly broad, attaching automatically to classes of individuals irrespective of the relationship (or lack thereof) between the consequences and the individual's underlying conduct or circumstances.[138] These constituencies have observed that collateral consequences spill expansively across vast spectra of criminal convictions, and are not tailored toward particularized conduct.[139] In response to this concern, some scholars and legal organizations have asserted that trial courts should have the discretion to *not* impose consequences in particular circumstances,[140] and that consequences should be imposed only if necessary and directly related to the defendant's underlying conviction.[141]

[136] *See Fruchtman*, 531 F.2d at 949 (refusing to require notification of deportation consequences, because to do so would "'only sow the seeds for later collateral attack'" (quoting *United States v. Sherman*, 474 F.2d 303, 305 (9th Cir. 1973))). Courts have also expressed concern that a notification requirement might be applied retroactively, opening possible avenues for scores of appellants to seek to overturn their pleas. *See* Chin & Holmes, *supra* note 31, at 736 (pointing out that "[c]ourts are justifiably reluctant to consider implementing a change that could render uncertain large numbers of convictions").

[137] *See* ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, at 9 ("Collateral consequences may serve an important and legitimate public purpose, such as keeping firearms out of the hands of persons convicted of crimes of violence, protecting children from individuals with histories of abuse, or barring persons convicted of fraud from positions of public trust.").

[138] A group of political scientists surveyed public perception regarding collateral consequences for felony offenders, and discovered a strong preference for more individualized collateral consequences. Milton Heumann et al., *Beyond the Sentence: Public Perceptions of Collateral Consequences for Felony Offenders*, 41 CRIM. L. BULL. 24, 31 (2005).

[139] *See, e.g.*, Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1598-99 (2004) (observing that "blanket provisions" impose the same penalties on "non-violent, first-time offenders" as they do on "hardened criminals").

[140] *See* Demleitner, *supra* note 60, at 1027-28.

[141] The American Bar Association has adopted the following standard, recommending that any collateral consequence be tailored to the underlying conduct:

> The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified.

Some groups have also argued against the duration of collateral consequences. Many types of consequences outlast the formal criminal sentence, and potentially span the lifetimes of individuals with criminal records.[142] In response, commentators have proposed certificates of rehabilitation,[143] criminal record "expungement,"[144] pardons,[145] and various other mechanisms[146] intended to provide relief.[147]

Still other constituencies have raised broad philosophical concerns regarding collateral consequences. They have argued that such consequences serve to further punish and stigmatize those convicted of criminal offenses.[148]

ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, Standard 19-2.2.

[142] *See* 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, 1705 (2003) ("The collateral consequences of a criminal conviction linger long after the sentence imposed by the court has been served . . . .").

[143] *See, e.g.*, CAL. PENAL CODE § 1203.4(a) (West 1985) (allowing a defendant to petition for a certificate of rehabilitation if he "has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section"); MISS. CODE ANN. § 97-37-5(3) (1993); N.Y. CORRECT. L. § 701(1) (McKinney 2003) ("A certificate of relief from disabilities may be granted . . . to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offenses specified therein.").

[144] *See* Demleitner, *supra* note 76, at 162 (urging "expungement of criminal records" to relieve individuals of collateral consequences).

[145] ABA JUSTICE KENNEDY COMM'N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 64-75 (2004), *available at* http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf (tracing history of the pardon power, finding that it has been underutilized, and recommending that it be revitalized to foster reintegration by relieving eligible individuals of the collateral consequences of their convictions).

[146] *See, e.g.*, TRAVIS, *supra* note 16, at 77 (arguing that individuals should have the right to seek judicial relief from collateral sanctions).

[147] *See* ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, Standard 19-2.5 (advancing legislative, judicial, and administrative mechanisms to waive or modify collateral consequences, or to relieve individuals from consequences already imposed). *But see* Demleitner, *supra* note 107, at 186 (explaining that, while "state and federal law hold out the promise" of mechanisms to provide relief, the mechanisms often are not panaceas); Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Economic Rights for Ex-Offenders*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2006) (manuscript at 8, on file with author) (arguing that relief mechanisms do not adequately address "the critical period following release during which ex-offenders and their families most desperately need temporary supports and employment opportunities").

[148] *See, e.g.*, Grant et al., *supra* note 62, at 1230 (lamenting that an individual's release into the community is often met with "distrust, suspicion and hostility," and that "[c]ivil disabilities play a significant role in fostering these attitudes by affixing an additional stigma

Furthermore, they assert that by denying or limiting these individuals' social, economic, and civic access, collateral consequences continue to treat them as outcasts long after their formal sentences have expired.[149]

B. *Reentry of Individuals with Criminal Records*

The criminal justice system's commitment to reintegrating formerly incarcerated individuals into communities has wavered along political and philosophical currents.[150] While certain facets of the criminal justice system are designed to aid individuals through the reentry process, the relationship between the criminal process and reintegration has become attenuated due to practical constraints and due to philosophical shifts over the past three decades.[151]

However, concerns have emerged at national, state, and local levels over the past few years regarding the release of individuals from correctional facilities and their return to communities. The concerns perhaps reached their apex during the 2004 State of the Union Address, when President George W. Bush announced an initiative to focus on reentry issues, and committed $300 million over four years to fund various reentry programs.[152] This commitment has received bipartisan support,[153] and has stimulated related legislative[154] and

on the offender's already inferior status"); Angela Behrens, Note, *Voting – Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231, 236 (2004) (discussing the historical stigma attached to disenfranchisement and other collateral consequences).

[149] *See, e.g.*, Demleitner, *supra* note 76, at 160 (stating that collateral consequences "label the ex-offender an 'outcast,' and frequently make it impossible for her ever to regain full societal membership").

[150] *See* TRAVIS, *supra* note 16, at xvii-xviii, 17-20 (explaining that the goal of reintegration has wavered depending on which philosophies of punishment are dominant).

[151] *See infra* notes 188-193 and accompanying text (elaborating on the shift from indeterminate sentencing to determinate sentencing).

[152] President George W. Bush, State of the Union Address (Jan. 20, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html. This initiative proposes that agencies, including the Department of Labor, the Department of Housing and Urban Development, and the Department of Justice coordinate programs and services aimed to "help ex-offenders find and keep employment, obtain transitional housing and receive mentoring." U.S. Dep't of Labor, President Bush's Prisoner Re-entry Initiative: Protecting Communities by Helping Returning Inmates Find Work, http://www.dol.gov/cfbci/reentryfactsheet.htm (last visited Apr. 5, 2006). In addition, the Attorney General, as a follow-up to this initiative, has announced a pilot program in seven cities that will "provide money for one staffer in the U.S. attorney's office to assess and coordinate re-entry programs in that area." Lila T. Mills, *Ashcroft Touts Efforts to Help Ex-Prisoners Re-Enter Society*, CLEV. PLAIN DEALER, Sept. 21, 2004, at B2.

[153] *See, e.g.*, Adam Cohen, Editorial Observer, *Charles Colson and the Mission That Began with Watergate*, N.Y. TIMES, Jul. 25, 2005, at A18 (reporting that the Second Chance Act of 2005 "is supported by some of the most liberal members of Congress, and some of the most conservative, and by groups ranging from George Soros's Open Society Institute to

governmental efforts.[155]

President Bush's call was preceded by efforts at the national level to address reentry issues. In 2002, the United States Department of Justice distributed funds to support reentry efforts across the United States as part of its Serious and Violent Offender Reentry Initiative, also known as the Going Home Program.[156] The program's purpose is to study the myriad reentry-related issues and to devise and implement programs that aim to address the obstacles that formerly incarcerated individuals and their communities must resolve to foster successful reintegration.[157] These funds have created Reentry Partnership Initiatives in eight jurisdictions.[158] The partnerships are comprised of criminal justice personnel, social services personnel, and community groups. These personnel and groups study and work through various reentry obstacles, and devise legal, legislative, and grassroots strategies to address these issues.[159]

---

the Christian Coalition"); *Ways Sought to Aid Released Inmates*, CHI. TRIB., May 9, 2005, at Metro 3 (reporting that Illinois Governor Blagojevich established a bipartisan commission to "find ways to steer recently released inmates . . . toward education and job training"); Jennifer Warren, *National Movement Favors Rehabilitation of Prisoners*, SEATTLE TIMES, Mar. 28, 2005, at A6 (relating emerging bipartisan support for various rehabilitative measures including reentry programs).

[154] *See, e.g.*, Second Chance Act of 2005: Community Safety Through Recidivism Prevention, H.R. 1704, 109th Cong. (2005) (establishing programs to assist individuals with reentry).

[155] *See, e.g.*, Samiha Khanna, *City Offers Aid with Re-Entry; For Former Inmates – A Chance to Work*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 29, 2005, at B1 (reporting that city officials in Durham, North Carolina, will "keep at least five entry-level jobs in the Public Works Department open specifically to ex-offenders").

[156] *See* Office of Justice Programs, U.S. Dep't. of Justice, Reentry: State Activities and Resources, http://www.ojp.usdoj.gov/reentry/sar/welcome.html (last visited Apr. 5, 2006) (detailing each state's reentry-related activities and resources).

[157] *See* Dep't of Justice, Learn About Reentry, *supra* note 19.

[158] The eight jurisdictions are: Baltimore, Maryland; Burlington, Vermont; Columbia, South Carolina; Kansas City, Missouri; Lake City, Florida; Las Vegas, Nevada; Lowell, Massachusetts; and Spokane, Washington. *See* DOUGLAS YOUNG ET AL., NAT'L INST. OF JUSTICE, ENGAGING THE COMMUNITY IN OFFENDER REENTRY 2 (2002), *available at* http://www.ncjrs.org/pdffiles1/nij/grants/196492.pdf. The Justice Department has subsequently awarded grants to other cities and organizations. For instance, through the Office of Community Oriented Policing Services, and as part of its Value-Based Reentry Initiative, the Justice Department has awarded grants to five organizations located in Boston, Detroit, Kansas City, Oakland, and Washington, D.C. The grants will allow these organizations to continue programs aimed at reentering individuals, and to serve as model programs that could be replicated in other jurisdictions. COMMUNITY ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, VALUE-BASED INITIATIVE AND VALUE-BASED REENTRY INITIATIVE (2004), *available at* http://www.cops.usdoj.gov/mime/open.pdf?item=1026.

[159] *See* LAVIGNE ET AL., *supra* note 22, at 4 (describing the collaborations fostered by the Maryland Re-entry Partnership Initiative).

In addition, these funds created the Reentry Court Initiative, designed to start or assist experimental reentry courts in several jurisdictions across the United States.[160] These courts are designed to provide "judicial oversight" of the reentry process.[161] Specifically, these courts provide resources for formerly incarcerated individuals during the reentry process, with the aim of reducing recidivism and enhancing public safety.[162]

Various efforts have also begun at the state level to study and address reentry issues. For instance, the National Governors Association's Center for Best Practices launched the Prisoner Reentry State Policy Academy during the summer of 2003.[163] The Academy's stated goal is "to help Governors and other state policymakers develop and implement effective prisoner reentry strategies that reduce recidivism rates by improving access to key services and supports."[164] Seven states were selected to participate in this program,[165] with the purpose of gathering information regarding pertinent reentry obstacles in their respective jurisdictions and recommending strategies for improving services.[166]

Several other reentry programs have blossomed in cities and counties across the United States.[167] Like those begun as part of the Reentry Partnership

[160] The courts exist in California, Colorado, Delaware, Florida, Iowa, Kentucky, New York, Ohio, and West Virginia. CHRISTINE LINDQUIST ET AL., NAT'L INST. OF JUSTICE, REENTRY COURTS PROCESS EVALUATION (PHASE 1) FINAL REPORT 3-5 (2003), *available at* http://www.ncjrs.org/pdffiles1/nij/grants/202472.pdf.

[161] TRAVIS, *supra* note 16, at 59 (comparing the judicial oversight reentry courts provide for the reentry process to the judicial oversight a drug court provides for an addict's treatment process).

[162] *See* LINDQUIST ET AL., *supra* note 160, at 1. For a description of the various reentry courts' "core elements," see *Reentry Courts*, CRIM. JUST., Spring 2002, at 15, 15.

[163] *See* NGA CENTER FOR BEST PRACTICES, APPLICATION GUIDELINES FOR THE PRISONER REENTRY STATE POLICY ACADEMY, *available at* http://www.nga.org/cda/files/042403PRISONERREENTRY.pdf.

[164] *Id.*

[165] These seven states are Georgia, Idaho, Massachusetts, Michigan, New Jersey, Rhode Island, and Virginia. NANCY G. LAVIGNE ET AL., URBAN INST., VOICES OF EXPERIENCE: FOCUS GROUP FINDINGS ON PRISONER REENTRY IN THE STATE OF RHODE ISLAND 1 (2004), *available at* www.urban.org/UploadedPDF/411173_Prisoner_Reentry_RI.PDF.

[166] As an example of the studies that have been done pursuant to this program, researchers from the Urban Institute surveyed community service organizations and recently released individuals in Rhode Island regarding the obstacles to reentry. The survey identified several obstacles, including lack of prerelease planning, lack of identification upon release, various housing-related obstacles including lack of affordable housing and housing restrictions based on drug trafficking convictions, lack of employment opportunities, lack of heath care access, and child support arrearages. *See generally id.*

[167] *See* Roberto Santiago, *Putting Faith in Ex-cons*, MIAMI HERALD, Feb. 20, 2005, at 1BR (reporting the goals of a newly formed eight-county reentry task force). In addition to these governmental programs, private enterprise has become involved with reentry programs. *See, e.g.*, Julie Poppin, *Reinventing Re-Entry: BI Inc. Seeks to Improve the*

Initiatives, some of these programs involve broad coalitions working together to address reentry issues.[168] Others were initiated by state and local correctional departments across the United States[169] that have implemented expansive reentry programs both inside and outside of correctional facilities.[170]

Transition from Prison Life, ROCKY MOUNTAIN NEWS, Dec. 20, 2004, at 2B (reporting that the Boulder, Colorado-based Behavioral Interventions established reentry services across the United States through government contracts and that "[r]e-entry services are now [its] fastest-growing business component"). Although this Article focuses on the emergent emphasis on reentry, there are long-standing reentry programs scattered throughout the United States. *See, e.g.*, Mills, *supra* note 152, at B2 (describing a reentry program in Cleveland that has been in existence for about thirty years).

[168] *See, e.g.*, Riva Brown, *Parolees Aided in Transition*, CLARION-LEDGER (Jackson, Miss.), Oct. 17, 2004, at 1B (reporting that the recently formed Mississippi Collaborative Interagency Reentry Team is comprised of law enforcement, education, and social service officials who collaborate to help eligible adults and teenagers reenter their communities); Jeremy Travis et al., *Prisoner Reentry: Issues for Practice and Policy*, CRIM. JUST., Spring 2002, at 12, 13 (describing collaborations between police departments, faith institutions, corrections agencies, prosecutors, youth groups, and crime victims). *See also* REENTRY POLICY COUNCIL, CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY 5 (2005), *available at* http://www.reentrypolicy.org/report/report-pdf.php (observing the increased recognition by community organizations and service providers in "non-criminal justice sectors" of the broad needs of individuals exiting correctional facilities).

[169] *See* Reginald A. Wilkerson, *Offender Reentry: A Storm Overdue*, 5 CORRECTIONS MGMT. Q. 46, 46 (2001), *available at* http://www.drc.state.oh.us/web/Articles/article66.htm ("The concept of offender 'reentry' is beginning to take the corrections world by storm – a much overdue storm.").

[170] *See, e.g.*, Texas Dep't of Criminal Justice, Serious and Violent Offender Reentry Initiative Program, http://www.tdcj.state.tx.us/pgm&svcs/pgms&svcs-serious-offender-pgm.htm (last visited Apr. 6, 2006) (announcing Texas Department of Criminal Justice program, to be overseen by the Department's Rehabilitation and Reentry Program Division, which will begin working with inmates in Administrative Segregation on reentry-related issues six months prior to their release); Jim Collar, *Prisons are Part of Pilot, Federal Program Targets Recidivism*, OSHKOSH NORTHWESTERN, July 10, 2005 (reporting that staff, managers, social workers, and parole officials from the Wisconsin Department of Corrections will undergo training to improve reentry as part of a federal pilot program aimed at reducing recidivism); Wilson Lievano, *Smoothing Their Reentry: Ex-inmates Get Help for Transition to Society*, BOSTON GLOBE, Jan. 20, 2005, at 1 (describing the recently formed Regional Reentry Center Initiative in Massachusetts as a joint program between the state Department of Correction and Parole Board that helps former inmates who are not on parole navigate the reentry process, and observing that the program begins ninety days before the individual is released); Zernike, *supra* note 11, at A1 (describing an Illinois program that focuses on reducing recidivism of repeat offenders, in which parole agents work closely with recently released individuals to help them secure housing, employment, and identification). Several stakeholders have urged that an individual's reentry-related issues need to be addressed during the early stages of incarceration, rather than waiting until the moment of release. *See, e.g.*, PHILADELPHIA CONSENSUS GROUP ON REENTRY &

Other programs provide direct legal services to individuals through public defense offices and through civil legal services organizations who have incorporated the reentry component into their practices by representing clients in civil matters related to various legal obstacles upon release.[171] Still other programs provide broader individual and community-based services, which include working with incarcerated individuals on issues that will impact their reentry, assisting recently released individuals and their families as they work through various economic, social and health issues, and undertaking studies and adopting policies designed to cultivate model reentry practices.[172]

The spread of so many new and diverse organizations stems from the record number of individuals leaving correctional facilities annually.[173] Currently, approximately 650,000 individuals are released each year from federal and state prisons.[174] An additional nine million individuals are released each year from local jails.[175] While these individuals return to various communities across the United States, several studies illustrate that certain "core counties"[176] within a few large states disproportionately absorb this influx of

REINTEGRATION OF ADJUDICATED OFFENDERS, THEY'RE COMING BACK: AN ACTION PLAN FOR SUCCESSFUL REINTEGRATION FOR OFFENDERS THAT WORKS FOR EVERYONE 13, *available at* http://www.fcnetwork.org/reading/philadelphiareentry.pdf [hereinafter PHILADELPHIA CONSENSUS GROUP ACTION PLAN] ("[W]aiting until release is imminent would be to squander what is, for offenders and the service providers who wish to help them, a golden opportunity for intervention."). Moreover, candidates to manage correctional facilities have articulated that preparing inmates for reentry is a vital component of correctional services. *See* Kristin Zaguski, *Finalists Seek to Enrich Inmates: The Candidates to Lead the Douglas County Jail Say Preparing Inmates for Release is Critical*, OMAHA WORLD-HERALD, June 28, 2005, at 05B (reporting that all three finalists to lead the Douglas County jail expressed the importance of preparing inmates for reentry by, inter alia, addressing inmates' mental health and substance abuse needs).

[171] *See infra* notes 230-232 and accompanying text (describing the reentry programs of several public defense offices and service organizations).

[172] *See* Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59, 77 (2004) (describing the goals of the nascent East Harlem Reentry Initiative as helping ex-offenders and their families deal with a wide range of issues, shaping model practices and policies, and educating various constituencies of the need for "better-coordinated reentry services").

[173] *See, e.g.*, Eric Cadora et al., *Criminal Justice and Health and Human Services: An Exploration of Overlapping Needs, Resources, and Interests in Brooklyn Neighborhoods*, *in* PRISONERS ONCE REMOVED, *supra* note 1, at 285, 285 ("As unprecedented numbers of people return home from prison, state officials, government agencies, community-based programs, and neighborhood residents all face a new set of challenges in maximizing these prisoners' successful reentry into the freeworld [sic]."); Thompson, *supra* note 18, at 256 (stating that inmates have long had problems successfully reintegrating into their communities upon release, but "[w]hat is new, though, is the scale of the current problem").

[174] Dep't of Justice, Learn About Reentry, *supra* note 19.

[175] Interview with Allan J. Beck, *supra* note 20.

[176] *See supra* note 21 and accompanying text.

returning individuals.[177] These communities already confront various social obstacles and suffer from a lack of resources, problems which are themselves compounded by the escalating numbers of individuals returning from correctional facilities.[178]

The escalating numbers of reentering individuals have heightened long-standing concerns of correctional personnel regarding modes of release,[179] and have raised critical issues regarding recidivism and public safety.[180] This is because approximately two-thirds of individuals released from correctional facilities in many states across the country are rearrested for new crimes within three years of release.[181] This convergence of escalating reentry and recidivism presents significant public safety concerns.[182]

Some mechanisms of the criminal process are designed to address reentry-related issues.[183] For instance, the parole system is technically aimed at

[177] JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 7 (2003) (stating that Los Angeles County receives approximately one-third of the prisoners released on parole in California).

[178] *See* SOLOMON ET AL., *supra* note 23, at 13 (observing that "[c]ommunities that receive large concentrations of released prisoners are already struggling with high rates of unemployment and poverty").

[179] *See, e.g.*, PETERSILIA, *supra* note 177, at 15 (observing that correctional officials have long been concerned with how to facilitate successful transitions, but that they have never dealt with the sheer numbers of individuals currently being released).

[180] *See id.* at 6 ("Some policymakers worry that prisoner *reentry* equates with prisoner *recidivism* and may serve to increase crime in the community.").

[181] LANGAN & LEVIN, *supra* note 25, at 1 (finding, in a study covering two-thirds of all U.S. prisoners, that 67.5% of those released in 1994 were subsequently rearrested for a new offense).

[182] *See, e.g., Federal Offender Reentry and Protecting Children from Criminal Recidivists: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 7 (2004) (statement of Rep. Portman) ("First and foremost, offender reentry is about preventing crime and keeping our communities safe."); Sara B. Miller, *A Shift to Easing Life After Prison,* CHRISTIAN SCI. MONITOR, Feb. 23, 2005, at 1 (reporting that states are "increasingly focusing attention" on supporting individuals as they leave prison "[i]n an effort to reduce troubling rates of crime by former inmates"); Dennis Tatz, *State Hopes to Curb Crime with Reentry Centers; Aims to Prevent Ex-convicts from Returning to Crime,* THE PATRIOT LEDGER (Quincy, Mass.), Oct. 9, 2004, at 20 (reporting that state parole board offices in eight communities across Massachusetts have opened reentry centers aimed at reducing recidivism); Editorial, *A High Bar After Prison*, BOSTON GLOBE, Oct. 6, 2004, at A18 (linking the possibility of reducing recidivism to preparation for reentry).

[183] In fact, the federal government requires that, if possible, federal inmates serve the latter portions of their incarceration in "pre-release custody," which is geared toward reentry. Specifically,

> [t]he Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a

facilitating reintegration[184] by reducing the stigma attached to imprisonment,[185] by providing direct services to parolees,[186] and by facilitating personalized and individualized relationships between parole agents and parolees.[187] However, the criminal justice system's philosophical and practical shift in the 1970s and 1980s away from both the rehabilitative model[188] and indeterminate sentencing schemes[189] wrought radical changes for the parole concept at both the federal and state levels. Since the 1970s, several states have abolished their discretionary parole systems.[190] In addition, several states along with the federal government have shifted away from indeterminate sentencing, resulting

> reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

18 U.S.C. § 3624(c) (2000).

[184] PETERSILIA, *supra* note 177, at 88 (observing that parole was originally designed to facilitate the transition from prison to the community). *See* State v. Jordan, 817 N.E.2d 864, 871 (Ohio 2004) ("[P]ostrelease control furthers the goal of successfully reintegrating offenders into society after their release from prison.") (citation omitted).

[185] *See* John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities and Prisoners*, 26 CRIME & JUST. 121, 126 (1999) ("Historically, the development of probation and parole was intended to offer the prospect of reintegration to criminal offenders as alternatives to the stigma of imprisonment.") (citation omitted).

[186] Thomas J. Bamonte, *The Viability of* Morrissey v. Brewer *and the Due Process Rights of Parolees and Other Conditional Releasees*, 18 S. ILL. U. L.J. 121, 125-26 (1993) (describing the historical function of parole boards in providing individualized services to parolees).

[187] *See* Latta v. Fitzharris, 521 F.2d 246, 249 (9th Cir. 1975):

> In order to fulfill his dual responsibilities for helping the parolee to reintegrate into society and evaluating his progress . . . it is essential that the parole officer have a thorough understanding of the parolee and his environment, including his personal habits, his relationships with other persons, and what he is doing, both at home and outside it.

[188] *See* Andrew Von Hirsch, *Penal Theories*, *in* THE HANDBOOK OF CRIME & PUNISHMENT, 661-62 (Michael Tonry ed., 1998) (chronicling the shift away from the "traditional model"); Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 6 (2003) (observing that rehabilitation was "the central professed goal of American criminal justice . . . until the final quarter of the twentieth century").

[189] *See, e.g.*, Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 14 (1999) (recounting some of the concerns raised in the 1970s regarding indeterminate sentencing, and how ideologically diverse groups came to embrace determinate sentencing structures).

[190] *See* TIMOTHY A. HUGHES ET AL., U.S. DEP'T OF JUSTICE, TRENDS IN STATE PAROLE, 1990-2000, at 1 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/tsp00.pdf (reporting that by the end of 2000, sixteen states had abolished discretionary parole for all offenders and four additional states had abolished discretionary parole "for certain violent offenses or other crimes against a person").

in the substantial diminishing of the discretionary parole releases that accompanied indeterminate sentences.[191] Instead, inmates now serve higher percentages of their sentences under determinate sentencing schemes, and increasing numbers are released after having served their full terms.[192] These particular inmates are then released without any parole supervision.[193]

Simultaneously, however, the sheer volume of individuals who are now imprisoned as a result of the three-decade rise in incarceration has increased parole officers' caseloads dramatically.[194] These bulging caseloads have transformed the nature of parole over the last couple of decades from the traditional individualized counseling-oriented model to a less individualized and more surveillance-based model.[195] As a result, parole supervision has strayed from a more cooperative, parolee-centered relationship to one in which the parole officer's focus is to ensure that the parolee abides by the parole conditions.[196] Thus, both philosophical shifts and practical constraints have

[191] *See* LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2002, at 6 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus02.pdf ("Discretionary releases of prisoners to parole supervision by a parole board have decreased from 50% of adults entering parole in 1995 to 39% . . . in 2002.").

[192] TRAVIS, *supra* note 16, at 54-55 (observing that in 2001 one-fifth of released prisoners were not supervised upon release, which author attributes in part to prisoners who were required to serve their full sentences and prisoners who decided to be released without supervision).

[193] *See* LYNCH & SABOL, *supra* note 21, at 12-13 (reporting that out of approximately 600,000 individuals released from prison in 1998, 126,000 were released without any supervision after having served their full sentences); Thompson, *supra* note 18, at 257 ("These individuals will not be on parole; they will not be subject to any release conditions; they will have no duty to report to – or work with – a parole officer.").

[194] *See, e.g.*, GLAZE & PALLA, *supra* note 19, at 5 (reporting that the number of individuals on parole increased 3.1% in 2003, nearly double the average annual increase since 1995); HUGHES ET AL., *supra* note 190, at 1 (observing that even with the shift away from discretionary parole policies in several states, the number of individuals under parole supervision increased threefold from 1980 to 2000); *A Stigma That Never Fades*, THE ECONOMIST, Aug. 10, 2002, at 25 (estimating that parole officers' caseloads have doubled since the 1970s).

[195] PETERSILIA, *supra* note 177, at 77 (claiming that parole officers have shifted to a surveillance model); *see* Latta v. Fitzharris, 521 F.2d 246, 250-51 (9th Cir. 1975) (concluding that, due to the "special" relationship, parole officers need not obtain a warrant to search a parolee's home). David Garland argues that this is a broader managerial shift that has changed the ways in which all aspects of the criminal justice system – from policing to incarceration policies – are administered. He then focuses on both parole and probation, arguing that these agencies have "de-emphasized the social work ethos that used to dominate their work and instead present themselves as providers of inexpensive community-based punishments, oriented towards the monitoring of offenders and the management of risk." DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 18 (2001).

[196] *See, e.g.*, Emily Bazelon, *Catch and Release*, LEGAL AFF., Mar.-Apr. 2004, at 36, 36

transformed the parole system into one that centers on monitoring behavior and ensuring compliance with parole conditions.[197]

Other traditional mechanisms of the criminal justice system are simply ill-equipped to handle the massive needs of an ever-increasing reentry population. For instance, while most prisons offer some form of rehabilitation-focused programming – such as educational and vocational training – that obviously relate to reentry,[198] these programs reach only a small percentage of incarcerated individuals.[199]

Also, more recently developed programs have not yet reached the mainstream. While reentry courts hold some promise for alleviating the crushing caseloads that confront parole officers,[200] they remain at the experimental stage and have yet to expand beyond a few jurisdictions.[201] In addition to reentry courts, several jurisdictions have prerelease facilities, where

(reporting that "[b]eleaguered parole officers complain that heavy caseloads render meaningful supervision impossible, forcing them to make due with hectoring lectures and spot curfew checks"); Richard P. Seiter, *Prisoner Reentry and the Role of Parole Officers*, 66 FED. PROBATION, Dec. 2002, at 50, 51 (stating that because of their increased caseloads, parole officers have shifted from providing individualized services "to concentrat[ing] on surveillance, and the impersonal monitoring of offenders").

[197] Some commentators have argued that the monitoring role has essentially limited the parole officer's function to violating parolees when they stray from the rules. Some have even argued that the need to reduce crushing caseloads create incentives for parole officers to violate parolees. Irrespective of the reasons, significant numbers of prison admissions are the result of parole violations. *See, e.g.*, TRAVIS, *supra* note 16, at 32 (stating that approximately one third of prison admissions in 2000 resulted from parole violations); CALIFORNIA LITTLE HOOVER COMMISSION, BACK TO THE COMMUNITY: SAFE AND SOUND PAROLE POLICIES 8 (2003), *available at* http://www.lhc.ca.gov/lhcdir/172/report172.pdf (reporting that approximately seventy percent of California parolees return to prison for parole violations). *See also* JAMES M. BYRNE ET AL., EMERGING ROLES AND RESPONSIBILITIES IN THE REENTRY PARTNERSHIP INITIATIVE: NEW WAYS OF DOING BUSINESS 12 (2003), *available at* http://www.bgr.umd.edu/pdf/Roles%20and%20Responsibilities.pdf ("Correctional administrators recognize that it is probation and parole failures, not new prison admissions . . . that fuel our current prison-crowding crisis").

[198] *See* TRAVIS, *supra* note 16, at 169 (stating that "the primary rationale for these programs is that they reduce the recidivism rates of prisoners once they return home").

[199] PETERSILIA, *supra* note 177, at 184 (reporting that in 2002 only twelve percent of individuals released from state prisons had participated in a prerelease program).

[200] *See generally* Terry Saunders, *Staying Home: Effective Reintegration Strategies for Parolees*, 41 JUDGES J. 34 (2002), *reprinted in* JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 67 (Bruce J. Winnick & David B. Wexler eds., 2003) (discussing a reentry court in Harlem that is implementing different supervisory techniques to assist parolees' successful reintegration).

[201] Cait Clarke and James Neuhard, Paper, *"From Day One": Who's in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 28 n.45 (2004) (noting that reentry courts currently exist in only nine states).

inmates spend the latter portions of their sentence in anticipation of release.[202] Some of these facilities provide a range of services that seek to ease the transition from facility to community.[203] However, these facilities usually take a limited number of inmates, and thus the demand far outstrips capacity.[204]

So while the past few years have brought widespread attention to the various reentry issues pertaining to formerly incarcerated individuals, their families, and their communities, the capacities of the various traditional and contemporary networks in the criminal justice system that are designed specifically to address these issues have yet to meet the needs of the expanding reentry population.

II. COLLATERAL CONSEQUENCES AND REENTRY: THE LITERATURE, THE PRACTICE, AND THE INTERPRETATION

Concerns regarding collateral consequences and reentry have led legal scholars, policy analysts, elected officials, advocates, and the media to address these issues in differing contexts. These issues also illuminate the converging criminal and civil issues embedded in the criminal justice system. This has led legal organizations, public defense organizations, civil legal services organizations, and other community-based advocacy groups to explore and implement policy and practice-based strategies addressing these issues. The efforts of these disparate groups have been shaped by the complex and expansive issues relating to collateral consequences and reentry, and have helped to set out, clarify, and focus issues requiring further exploration.

For the most part, legal scholars have focused on collateral consequences and have not explored in-depth the multitudinous issues surrounding reentry. These scholars have offered detailed legal and policy arguments regarding collateral consequences, and have laid the groundwork for further exploration

---

[202] *See, e.g.*, Texas Dep't of Criminal Justice, *supra* note 170 (detailing state program that will begin working with inmates in Administrative Segregation six months prior to their release on reentry-related issues).

[203] *See, e.g.*, MARTA NELSON & JENNIFER TRONE, VERA INSTITUTE OF JUSTICE, WHY PLANNING FOR RELEASE MATTERS 2 (2000), *available at* http://vera.org/publication_pdf/planning_for_release.pdf (describing services offered by the Montgomery County Pre-release Center in Maryland, which include family centered counseling, a relapse prevention course, and coordinating release plans with probation and parole officers); Ayelish McGarvey, *Reform Done Right: A Chicago Program Demonstrates the Logic of Preparing Prisoners for Life on the Outside*, AM. PROSPECT, Dec. 2003, at 42, 44 (describing services provided by the Safer Foundation's North Lawndale Adult Transition Center, a work-release program in Chicago that provides education courses, job readiness courses, and substance abuse treatment, with the aim of preparing inmates for employment).

[204] *See* PETERSILIA, *supra* note 177, at 99 (observing that "halfway homes or community reentry centers . . . have never reached more than a small number of prison releasees"); McGarvey, *supra* note 203, at 43 (reporting that three percent of formerly incarcerated persons in Illinois went through a work-release program).

of their various permutations. For instance, several scholars have set out the numerous consequences attached to criminal convictions. They have highlighted both the *legal* consequences of criminal convictions that are imposed automatically by operation of law or at the discretion of agencies independent of the criminal justice system,[205] as well as the *social* consequences of criminal convictions for individuals released from correctional facilities.[206] In doing so, these scholars have articulated the various ways in which criminal convictions can marginalize these individuals and constrain their economic, legal, and social opportunities.

Some scholars have addressed these broad legal and social issues by analyzing the fairness and propriety of collateral consequences, and by exploring the purposes of these consequences in the context of punishment theory. For instance, Professor Nora Demleitner has thoroughly analyzed the fit between the various legal consequences of criminal convictions and the traditional justifications for punishment.[207]

Other scholars have written expansively about punishment in this context by highlighting the sustained social stigmatization that results from criminal

[205] *See* Chin, *supra* note 83, at 259 (stating that felons lose fundamental rights such as the right to serve on federal juries and the right to vote in some states).

[206] *See* Regina Austin, *"The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 176 (2004) ("Whatever respite from disgrace and embarrassment the incarcerated may enjoy while confined in prison or jail with others similarly situated, the stigma reattaches when the convicted are released from physical custody or freed from the supervision of the criminal justice system.").

[207] Professor Demleitner argues that collateral consequences, at least in their present form, do not serve rehabilitative, deterrent, or preventative purposes. Demleitner, *supra* note 76, at 160-61. They do not serve rehabilitative purposes, she asserts, because they negatively constrain the individual's ability to reenter. *Id.* They do not serve deterrent purposes in part because the public is generally unaware of their existence. *Id.* at 161. She further asserts that collateral consequences are too broad to serve preventative purposes. *Id.* Professor Demleitner points to some evidence that collateral consequences have a retributive function, *see id.* at 160, but argues that "[i]f that is the case, collateral sentencing consequences should be clearly designated as part of the sentence at the time punishment is imposed and explicitly considered part of the penalty." *Id.* Other scholars have similarly argued that collateral consequences do not fit within traditional penal justifications. *See, e.g.*, Fletcher, *supra* note 1, at 1896 (arguing that the registration requirement for sex offenders "hardly make[s] sense under any standard rationale for punishment").

Professor Demleitner has also addressed this issue specifically in the civil commitment of sex offender context, arguing that the punitive nature of commitment should mandate that the issue be addressed at the sentencing phase. She argues that this "would fulfill the goals of the traditional punishment regime, provide predictability to criminal defendants, assure visibility, and place sanctions that pursue traditional punishment goals squarely into the criminal arena." Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment &* Sicherungverwahrung, 30 FORDHAM URB. L.J. 1621, 1641 (2003) [hereinafter Demleitner, *Abusing State Power*].

convictions. As part of this broader punishment argument, some scholars have challenged the legal distinctions between criminal and civil penalties.[208] Specifically, scholars have critiqued appellate court classifications of certain consequences as indirect "civil" penalties that do not constitute "criminal" punishment.[209]

Other scholars have focused on narrower legal issues by exploring collateral consequences in the context of the criminal process and the attorney-client relationship. These commentators have opined that, irrespective of their legal status, collateral consequences are a core component of the criminal process because of their attachment to criminal convictions.[210] Some have observed, for instance, that criminal convictions are the sole trigger for certain consequences and, more narrowly, that some consequences, such as the ineligibility for federal welfare benefits or federal students loans, attach only to drug offenses.[211] These scholars have challenged the expansiveness of these consequences[212] and have critiqued both the fact that they are not included in the criminal process and that criminal justice actors are generally unaware of their existence and scope.[213]

Specifically, these commentators have highlighted the criminal justice

[208] As noted above, this distinction is critical because it determines the set of rights and procedures that will attach to a particular penalty. *See* Chin, *supra* note 83, at 253 (arguing that although the formal sentence associated with a drug conviction may be insignificant, the "real sentence comes like a ton of bricks in the form of a series of statutes denying convicted felons a variety of rights").

[209] *See* Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 101 (2002) (asserting that the federal law denying grants and loans to college students who have been convicted of drug offenses could be construed as punishment, but that recent Supreme Court decisions have often "allowed Congress to escape all of these constitutional strictures simply by characterizing its sanctions as 'civil disabilities' rather than punishment"); Demleitner, *supra* note 207, at 1635-41 (citing scholars who have critiqued the Supreme Court's classification of post-sentence confinement of sex offenders as a civil penalty, and broadly critiquing the fact that such confinement is not considered to be part of the criminal punishment); Karlan, *supra* note 108, at 1151-55 (arguing that disenfranchisement is punishment and critiquing Supreme Court precedent declaring this sanction a regulatory measure).

[210] *See* Archer & Williams, *supra* note 147 (manuscript at 1) ("Virtually every felony conviction carries with it a life sentence."); Chin, *supra* note 83, at 253 (asserting that "collateral consequences may be the most significant penalties resulting from a criminal conviction").

[211] *See* Archer & Williams, *supra* note 147 (manuscript at 4); Chin, *supra* note 83, at 254 (observing that drug convictions "are associated with the greatest number and severity of collateral sanctions").

[212] *See, e.g.*, Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339, 356 (2005) (arguing that collateral consequences "lack any proportionality").

[213] *See, e.g.*, Demleitner, *supra* note 76, at 154.

system's heavy reliance on guilty pleas,[214] and have explored and critiqued the lack of information regarding collateral consequences provided to criminal defendants during the plea process.[215] These commentators have argued that defendants should be informed of these consequences as part of their constitutional right to either effective assistance of counsel or due process.[216] Thus, some have challenged the body of appellate decisions declaring the lack of information provided to defendants regarding these consequences to be of no constitutional moment.[217] These scholars have taken issue with not only the constitutional parameters set out by the courts regarding these issues but also the practical constraints offered by courts to maintain the exclusion of collateral consequences from the criminal process.[218]

As both an alternative and supplement to these constitutional arguments, several scholars have argued that defense counsel has various ethical obligations to impart information regarding collateral consequences to their clients. These scholars have argued that defense attorneys have a duty to inform their clients because knowledge of the true breadth of their criminal convictions would allow clients to better assess the costs and benefits of

[214] *See supra* note 33.

[215] *See, e.g.*, Chin & Holmes, *supra* note 31, at 698-703 (exploring the information problems presented by the current view of collateral consequences and the lawyer-client relationship).

[216] *See, e.g.*, *id.* at 736-41.

[217] Professor Gabriel Chin and Richard Holmes opine that "[t]his wall of precedent is surprising because it seems inconsistent with the framework that the Supreme Court has laid out for analyzing claims of ineffective assistance of counsel." *Id.* at 701. Specifically, they argue that the collateral consequences doctrine, which essentially holds that attorneys need not advise clients about collateral consequences, is inconsistent with the Court's analysis in *Strickland v. Washington*, which looks to the norms of the legal profession as a factor in assessing professional competence. *Id.* at 701-02; *see* Strickland v. Washington, 466 U.S. 668, 671 (1984) (concluding that courts should look to "prevailing norms of practice" as one guide in judging the effectiveness of counsel). They look to sources that "suggest that lawyers should be concerned about collateral consequences," such as ABA standards, treatises, and other practitioner resources to support their position that the norms of the legal profession require attorneys to advise their clients of these consequences. Chin & Holmes, *supra* note 31, at 704.

[218] For instance, one commentator has highlighted the burdens that some courts have warned about if federal trial judges were required to inform defendants of all collateral consequences – specifically, that judges might not be aware of all consequences, as they differ from state-to-state, or that defense attorneys might be in a better position to inform the defendant of these consequences. Priscilla Budeiri, Comment, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 HARV. C.R.-C.L. L. REV. 157, 192 (1981). She then critiques these perspectives by arguing that federal trial judges can become familiar with these consequences; that the states, as they are imposing these consequences, should take responsibility for warning defendants of their existence; and that defendants pleading guilty to criminal offenses are not always represented by counsel. *Id.*

entering guilty pleas versus proceeding to trial.[219] Some of these scholars have confined their analysis to deportation, singling out this consequence as the most severe and life-altering.[220] Others, meanwhile, have raised more expansive arguments that consider the obligations of defense counsel to inform defendants of all collateral consequences attending their convictions.[221]

Unlike legal scholars, who have extensively detailed the complex legal and social issues flowing from collateral consequences, other commentators have written richly of various issues related to the reentry component. These commentators, who include psychologists, policy analysts, and service providers, have offered numerous insights and critiques of various reentry policies, and have articulated several recommendations for successful reintegration.[222]

In addition, correctional departments across the United States have begun brainstorming and implementing extensive reentry programs, as well as providing direct and individualized reentry services.[223] These various efforts and programs seek to address reentry-related issues through all stages of incarceration, due to the increasing recognition of the correlation between individualized prerelease planning and successful reintegration.[224] As a result,

---

[219] *See, e.g.*, Chin & Holmes, *supra* note 31, at 704 (arguing that according to standards of professional conduct, "counsel has an obligation to offer legal advice on all of the legal considerations that might be relevant to the client's decision," including collateral consequences).

[220] *See, e.g.*, Cohen, *supra* note 72, at 1096 (asserting that defense attorneys have constitutional obligation to inform clients of guilty pleas' immigration consequences); John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 2003 U. MICH. J.L. REFORM. 691, 734 (arguing that trial courts should advise defendants of possible deportation consequences, as deportation "is unique in its severity and certainty"); McDermid, *supra* note 129, at 768-71 (arguing that defense attorneys should have an affirmative duty to investigate their clients' potential deportation consequences and to advise clients about those consequences); L. Griffin Tyndall, Note, *"You Won't Be Deported . . . Trust Me!" Ineffective Assistance of Counsel and the Duty to Advise Alien Defendants of the Immigration Consequences of Guilty Pleas*, 19 AM. J. TRIAL ADVOC. 653, 672 (1996) (arguing that the consequence of deportation is "direct" and that a defense attorney has a constitutional obligation to warn a non-citizen client of the probability of deportation).

[221] *See generally* Chin & Holmes, *supra* note 31 (exploring constitutional and ethical obligations). In addition, at least one federal judge has argued that defense attorneys have an obligation to inform clients of collateral consequences, and that courts should ensure that attorneys have done so. Harold Baer Jr., *Outside Counsel: Alerting the Federal Defendant to the Breadth of Civil Disabilities*, N.Y. L.J., Dec. 22, 2003, at 4.

[222] *See, e.g.*, Stephanie S. Covington, *A Woman's Journey Home: Challenges for Female Offenders*, *in* PRISONERS ONCE REMOVED, *supra* note 1 at 67, 85-89 (recommending various reentry services for women that should begin at the outset of their sentences).

[223] *See infra* notes 225-226 (describing some example programs established by corrections departments).

[224] *See, e.g.*, PETERSILIA, *supra* note 177, at 15 (reporting that correctional departments in

some departments have implemented programs during the early incarceration stages,[225] while others have begun to formulate concrete plans for release toward the later stages of incarceration.[226]

Numerous governmental and community organizations have also focused on the needs of individuals post-release. These organizations' services encompass a range of interrelated needs of individuals leaving correctional facilities, and include assistance with family-related issues, housing, employment, public benefits, mental health treatment, and substance-abuse treatment.[227] These organizations help individuals obtain the documentation necessary to access services such as photographic identification, birth certificates, social security cards, and drivers' licenses.[228]

In addition to the non-legal assistance highlighted above, some public defense organizations have begun to represent clients on reentry-related matters as they exit correctional facilities or complete community-based sentences. These organizations provide an array of overlapping services that include housing-related assistance, public benefits assistance, employment assistance, and assistance expunging criminal records.[229] As criminal defense

Maryland, Pennsylvania, and Washington have developed new risk indicators that "tie prison programs with postrelease risks and needs").

[225] *See, e.g.*, Reginald Wilkinson et al., *Prison Reform Through Offender Reentry: A Partnership Between Courts and Corrections*, 24 PACE L. REV. 609, 628 n.102 (2004) (describing Ohio's correctional processes' shift toward a philosophy that begins preparation for the inmate's eventual release "immediately upon [his or her] arrival into the state prison system through the development of an individualized reentry accountability plan designed to identify and target offender risk and need areas").

[226] *See, e.g.*, Alan Gustafson, *500 Prisoners Nearing Their Release Date Attend a Transition Fair*, STATESMAN J. (Salem, Or.), Oct. 15, 2004, at 1C (describing a "transitional fair" held at Oregon's largest pre-release facility that provided potential employment opportunities and coordinated various services for inmates who were within six months of release).

[227] *See, e.g.*, Vera Institute of Justice, *Project Greenlight: The Process*, http://www.vera.org/project/project1_9.asp?section_id=3&project_id=46&sub_section_id=24 (last visited Apr. 6, 2006) (describing the services provided by the program implemented in the Queensboro Correctional Facility in New York City by Project Greenlight).

[228] For example, the Vera Institute for Justice has implemented a program in conjunction with the New York City Department of Correction and the Center for Employment Opportunities to coordinate release planning in New York City jails at the intake stage. The planning includes providing inmates with identification documents and other services related to employment training, substance abuse treatment, and housing. For a fuller description of this project, see Vera Institute of Justice, *Project Greenlight: Overview*, http://www.vera.org/project/project1_1.asp?section_id=3&project_id=46&sub_section_id=1 (last visited Apr. 6, 2006).

[229] *See* Clarke, *supra* note 40, at 34-35 (describing a Kern County (California) Public Defender program that helps expunge misdemeanor convictions, and a Sonoma County (California) Public Defender program that helps welfare recipients expunge criminal records to allow them to apply for certificates of relief or qualify for employment); Arlene Mckanic,

attorneys have not traditionally been trained to address the vast civil issues that comprise reentry practice, some defense organizations have formed civil teams that handle these matters.[230] Others have partnered with civil legal service organizations and/or other community-focused organizations to provide these services.[231]

Likewise, several legal services organizations provide representational services to individuals on reentry-related matters. Many of these organizations provide assistance on issues similar to those that public defense organizations have begun to address, helping clients navigate housing, employment, child support, and public benefits obstacles.[232]

In addition to these services, federal and state legislatures have sought ways to recognize and address multiple issues involving reentry. Several recent legislative initiatives have been geared towards reentry issues, including numerous bills aimed at implementing services to prepare inmates for release,[233] developing reentry strategies focusing on productively transitioning

Harlem Group Helps Ex-Felons Win Rights and Jobs, AMSTERDAM NEWS, July 21, 2004, *available at* http://www.indypressny.org/article.php3?ArticleID=1562 (describing the Neighborhood Defender Service of Harlem's newly instituted Reentry Advocacy Project as an interdisciplinary program that combines social work and legal advocacy to address various reentry issues for clients who have been released from correctional facilities, including housing and employment).

[230] Three noted public defense offices – the Neighborhood Defender Service of Harlem, the Bronx Defenders, and the Public Defender Service of the District of Columbia – have long established civil teams that handle an array of matters. *See* Neighborhood Defender Service of Harlem, NDS Programs, http://www.ndsny.org/programs.htm (last visited Apr. 6, 2006) (detailing civil and criminal services offered); The Bronx Defenders, The Civil Action Project, http://www.bronxdefenders.org/comm/006.html (last visited Apr. 6, 2006) (describing the Defenders' integrated civil and criminal programs, designed to "minimize the severe and often unforeseen fallout from criminal proceedings and facilitate the reentry of our clients into the community"); The Public Defender Service for the District of Columbia, The Civil Division, http://www.pdsdc.org/Civil/index.asp (last visited Apr. 6, 2006) (explaining the role of the new Civil Division in helping to alleviate collateral consequences).

[231] *See, e.g.*, Patricia Puritz & Wendy Shang, *Juvenile Indigent Defense: Crisis and Solutions*, CRIM. JUST., Spring 2000, at 22, 25 (providing an example of a public defense office that refers clients to civil legal aid organization for representation on matters including housing, mental health, and school expulsion).

[232] For example, Community Legal Services, Inc., in Philadelphia, provides legal assistance to individuals with criminal records on civil matters, including employment, public benefits, and public housing. COMMUNITY LEGAL SERVICES, INC., *Information for Ex-Offenders*, http://www.clsphila.org/Ex-Offenders_Information.htm (last visited Apr. 7, 2006). While some legal services organizations do not necessarily tailor their services specifically to individuals with criminal records, significant overlap exists between this population and the need for these particular services.

[233] *See*, e.g., Assemb. B. 629, 2005-06 Leg., Reg. Sess. (Cal. 2005) (calling for establishing reentry services pilot program in Alameda County); H.B. 04-1074, 63d Gen.

recently released individuals,[234] studying the viability of already existing reentry programming,[235] or continuing to support (and expand) existing reentry services.[236]

III. THE MISSING LINKS AND INCOMPLETE BRIDGES: THE COMPARTMENTALIZATION OF COLLATERAL CONSEQUENCES AND REENTRY

Legal scholars, policy analysts, legal service organizations, and assorted governmental and community groups have devoted substantial thought, energy, and resources to addressing the thorny legal, social, individual, and community-rooted issues stemming from collateral consequences and reentry.[237] However, for the most part these various constituencies have addressed either the collateral consequences or reentry component in relative

Assem., Reg. Sess. (Colo. 2004) (enacted) ("The Department of Corrections shall administer appropriate programs for offenders prior to and after release to assist offenders with reentry into society based upon the assessed need as determined by the Director of the Department of Corrections."); H.B. 376, 2004 Leg., Reg. Sess. (Ky. 2004) (enacted) (developing a homelessness prevention pilot program aimed at preparing a limited number of individuals being released from a state prison for reentry into the community, and providing employment, social, housing, educational, medical, mental health, and "other community services"); S.B. 594, 2004 Leg., Reg. Sess. (La. 2004) (enacted) (calling for State of Louisiana to establish programs with non-governmental organizations "to ensure the disciplined preparation of offenders for their responsible roles in the open community," which includes the operation of post-release facilities that "shall utilize the supporting resources of probation and parole services, the cooperation of personnel in the fields of welfare, health, education and employment and the participation of the citizens of the state . . . in attempts to achieve increased public safety and to lower rates of recidivism"); S.B. No. 1486, 2004 Leg., Reg. Sess. (Okla. 2004) (enacted) (authorizing creation of reentry program within the Department of Corrections to "provide a continuum of services to meet the needs of offenders assigned or required to complete the program"); H. 1763, 2005 Leg., Reg. Sess. (Va. 2005) (enacted) (calling on the Secretary of Public Safety to coordinate and plan transitional services).

[234] *See, e.g.*, S.B. 384, 85th Gen. Assem., Reg. Sess. (Ark. 2005) (enacted) (focusing on transitional housing); S.B. 983, 2005 Gen. Assem., Reg. Sess. (Conn. 2005) (focusing on transitional housing); H. 1763, 2005 Gen. Assem., Reg. Sess. (Va. 2005) (enacted) (calling on Secretary of Public Safety to coordinate transitional and reentry services to recently released individuals, specifically highlighting treatment, employment, and housing opportunities).

[235] *See* S.J. Res. 273, Gen. Assem., Reg. Sess. (Va. 2005) (enacted) (establishing joint committee to study Virginia's reentry programs, and to "identify[] and develop[] strategies to address key needs and overcome barriers for offenders, prior to and upon leaving prison, to reduce the incidence of reincarceration and increase their successful social adaptation and integration into their communities").

[236] *See* Second Chance Act of 2005, H.R. 1704, 109th Cong. (2005) (reauthorizing the grant program to the Department of Justice to continue the offender reentry program).

[237] *See* discussion *supra* Part II.

isolation of the other.[238] While there are exceptions, generally these individuals and groups have failed to recognize that these components are mutually dependant and intertwined, together imposing often impenetrable barriers for individuals leaving correctional facilities, and presenting confounding issues for the communities to which they return.[239] This section first describes these individualistic approaches, and then turns to how these approaches have unduly narrowed the scope of these components and have constrained the ways in which the various interrelated legal issues have been recognized, perceived, and interpreted.

A. *The Scholarly Focus on Collateral Consequences*

As illustrated above, several legal scholars have explored richly the vast legal and social intricacies of collateral consequences.[240] In doing so, they have laid the important and critical base to support further exploration of these consequences' myriad dimensions. However, in articulating their various legal and policy arguments – whether addressing broad-based constitutional and philosophical concerns relating to conceptions of punishment, or raising somewhat narrower constitutional and ethical concerns relating to the exclusion of these consequences from the criminal process – scholars have yet to analyze critically the numerous connections between collateral consequences and reentry. Rather, scholars have focused almost exclusively on the various constitutional and ethics-based issues rooted in the collateral consequences component.[241]

Several of these legal scholars have acknowledged connections between collateral consequences and reentry. They have observed that collateral consequences present numerous reentry-related obstacles for individuals exiting correctional facilities, and thus impede their ability to return successfully to their communities.[242] For instance, some scholars have noted the negative effect of collateral consequences on employability and the ability of individuals to lead productive, crime-free lives.[243] More broadly, they have

---

[238] *See id.*

[239] *See id.*

[240] *See* discussion *supra* Part II.

[241] *See* Christopher Mele & Teresa A. Miller, *Collateral Civil Penalties as Techniques of Social Policy*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 93, at 9, 11.

[242] Demleitner, *supra* note 60, at 1027 (stating that collateral consequences of drug convictions "hinder individual offenders' rehabilitation and reintegration into society by restricting welfare benefits, employment and skills training opportunities").

[243] Sabra Micah Barnett, Commentary, *Collateral Sanctions and Civil Disabilities: The Secret Barrier to True Sentencing Reform for Legislatures and Sentencing Commissions*, 55 ALA. L. REV. 375, 375 (2004) ("Additionally, these sanctions can act as barriers to reintegration and rehabilitation and can serve as enablers for high recidivism rates."); Chin, *supra* note 83, at 254 ("What is clear is that these collateral sanctions may make it impossible for convicted persons to be employed, to lead law-abiding lives, to complete

also articulated the social stigma resulting from criminal convictions by highlighting the extent to which collateral consequences further marginalize individuals with criminal records.[244] Because of the impediments that such stigmas impose, some scholars have urged the elimination of those consequences that are not related to the defendant's conviction and that unduly interfere with his or her ability to successfully reintegrate.[245]

For the most part, however, these scholars have not explored in detail the extent to which these collateral consequences compromise reintegration. Specifically, the legal arguments presented thus far have been process-oriented, as they have focused on the lack of information provided to defendants with regard to these consequences, and/or have critiqued the notion that such consequences do not constitute *legal* punishment.[246] In presenting their arguments, however, scholars have not embraced the reentry component as *additional support* for their propositions. As such, these arguments have essentially neglected the *results-oriented* functionality of collateral consequences. Rather, the reentry component has been noted only at the margins, usually to indicate the additional hurdles these consequences will present upon release.[247] In short, the reentry component has not been incorporated as *central* to the various legal arguments raised against collateral consequences and/or the processes by which they are imposed.

There are exceptions to this generalization, as a few legal scholars have explored in-depth the connections between collateral consequences and reentry. Professor Anthony C. Thompson, for example, has critiqued the "fragmented" approach to reentry, observing that "[t]he criminal justice and civil justice actors and service providers have yet to develop a coordinated approach to providing both front-end recognition of the range of consequences as well as delivery of services for individuals reentering society."[248] Accordingly, Professor Thompson has addressed the various obstacles to

probation, or to avoid recidivism."); Demleitner, *supra* note 60 at 1048 (opining that there is a partial connection between collateral consequences and recidivism).

[244] Demleitner, *supra* note 76, at 157-60; Thompson, *supra* note 18, at 273 ("These social exclusions not only further complicate ex-offenders' participation in the life of their communities, but they also quite effectively relegate ex-offenders to the margins of legitimate society, stigmatizing them and further highlighting their separation from law-abiding members of society."). One scholar argues that collateral consequences "such as social stigmatization as a criminal and harm to future employment" also create disincentives for innocent defendants to plead guilty. Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 987 (1989).

[245] Demleitner, *supra* note 76, at 161-62 (arguing that "[e]ffective collateral consequences require a coherent theoretical framework and a public, proportionate, narrowly targeted, and individualized application," and that such consequences "that serve merely exclusionary purposes should be limited in scope or abolished entirely").

[246] *See supra* notes 242-244 and accompanying text.

[247] *See id.*

[248] Thompson, *supra* note 18, at 275-76.

successful reentry and, in that context, set forth and incorporated the collateral consequences component. However, his focus was not to address the various legal and policy arguments pertaining to collateral consequences, but rather to urge service providers – specifically, public defense and civil legal services organizations – to incorporate "comprehensive reentry programming."[249] He has articulated that reentry programming includes both the front-end collateral consequences component and the back-end reentry component.[250]

Also, Professors Deborah N. Archer and Kele S. Williams have rigorously exposed the ways in which collateral consequences converge to impede individuals as they reenter their communities.[251] Specifically, they have detailed the impact these consequences have on individuals, families, and communities, and have explained the relationship between these consequences, reentry, and recidivism.[252] Professors Archer and Williams argue that reform-based litigation strategies are necessary "to truly dismantle this crippling web of collateral sanctions and to restore ex-offenders to full citizenship."[253] They assert that litigation under state law theories holds the most promise for systemic change and then offer several potential litigation strategies.[254]

B. *The Practice of Reentry*

In contrast to legal scholars, various legal services organizations, public defense organizations, community-based service providers, and community and government-based coalitions have focused primarily on issues relating to the reentry component.[255] Specifically, these groups provide legal and social services that aim to facilitate the individual's reintegration into his or her community.[256] Some of these groups are also attempting to address reentry obstacles through community education, the mobilization of communities to prepare for the return of individuals from correctional facilities, the expansion

[249] *Id.* at 290-306.

[250] Professor Thompson acknowledges the practical hurdles, including lack of resources, training, and expertise, as well as the philosophical hurdles to full incorporation of the reentry component. However, he offers possible solutions to these obstacles, such as structuring finely-tuned referral processes that would allow coordination among different legal service organizations based on particular areas of expertise. *Id.* at 293-94. He further suggests developing law school clinics centered on the cross-cutting needs of returning individuals with criminal convictions. *Id.* at 298-99. Thus, Professor Thompson's focus relates to the incorporation of collateral consequences and reentry into criminal and civil law practices, rather than on the policy and analytical dimensions of these components.

[251] *See generally* Archer & Williams, *supra* note 147.

[252] *Id.* at 3-8.

[253] *Id.* at 2.

[254] *Id.* at 32-54.

[255] *See* discussion *supra* Part II.

[256] *See id.*

of services to recently released individuals, and legislative strategies.[257]

In large measure, however, groups are providing these various reentry services and brainstorming ways to address these myriad obstacles without critically engaging the often insurmountable hurdles to reintegration imposed by the extensive and far-reaching legal sanctions that accompany criminal convictions and shadow individuals once the "formal" portion of their sentences have concluded.[258] Specifically, these groups have tended to work *around* these collateral consequences issues, rather than formulate ways to work *through* these issues. As a result, these groups, to the extent they have considered collateral consequences have perceived these legal sanctions as a separate, individualized component to be addressed, if at all, in a separate forum.

For instance, the various reentry-focused coalitions, including the reentry partnerships funded by the Department of Justice, tend to focus on the manifold transitional needs that encompass reentry, including housing, health care, mental health issues, substance abuse treatment and employment.[259] While addressing these needs is indispensable to successful reentry, these groups have attempted to do so without engaging critically the collateral consequences component at the front end of the criminal justice system; specifically, through ways that seek to educate core constituencies about these consequences so that informed decisions are made during the early stages of the criminal process or plans are implemented at these early stages to coordinate reentry services in light of these consequences.

Similarly, some public defense organizations have begun to provide reentry services to clients upon completion of their criminal sentences without incorporating collateral consequences into their practices at the plea bargaining stage, or without gaining an institutional knowledge of the extent and scope of these consequences.[260] As a result, criminal defendants are largely unaware of these consequences at the guilty plea or sentencing stage.[261] A few public defense organizations are amassing the various collateral consequences in their respective jurisdictions with the aims of incorporating these consequences into their practices and educating various constituent communities.[262] However, these organizations are relatively few in number and are eclipsed by organizations that are either focusing on certain aspects of the reentry

[257] *See id.*

[258] *See* discussion *supra* Part III (describing the compartmentalization of the issues of reentry and collateral consequences).

[259] *See* Faye S. Taxman et al., *With Eyes Wide Open: Formalizing Community and Social Control Intervention in Offender Reintegration Programmes, in* AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION 233, 240-45 (Shadd Maruna & Russ Immarigeon, eds. 2004).

[260] *See supra* notes 229-231 and accompanying text.

[261] *See supra* note 94 and accompanying text.

[262] *See supra* note 8.

component, or have yet to engage meaningfully either of these components.

Likewise, civil legal service organizations are providing reentry-related representation on obstacles relating to housing, employment, and public benefits without confronting the formal legal barriers imposed by collateral consequences relating directly to these obstacles.[263] While some of these organizations involved in impact litigation, community education, and/or policy work do recognize these connections, many others are providing narrow, individualized services without engaging the broader legal issues that impact reentry.

C. *The End Result: The Disconnection Between Collateral Consequences and Reentry*

The end result of the foregoing is that in large measure legal commentators, governmental and community groups, and legal services organizations are exploring and engaging the collateral consequences and reentry components in relative isolation of the other.[264] These isolated strategies and approaches have compartmentalized these components. As a result, these approaches have distorted the analytical and perceptual lenses through which these components are viewed and interpreted. Perhaps most importantly, the gaps in these perspectives, strategies, and approaches have constricted both the ways in which individualized services are provided in these contexts[265] as well as how other critical constituencies perceive and interpret these issues, thereby cutting off possible avenues of reform.

For instance, appellate courts have considered countless legal claims brought by appellants challenging their guilty pleas on the ground that they were not informed of the particular consequences attached to their convictions during the guilty plea process. Some appellants have argued that their defense attorneys' failure to convey this information abridged their constitutional right to effective assistance of counsel. Others have asserted that this duty to inform rested with the trial court. In all instances, however, the *legal* issue pertained to whether or not the appellant had to have been informed of the specific consequence at issue[266] as part of the guilty plea process.

---

[263] *See supra* note 232 and accompanying text.

[264] *See* discussion *supra* Part II (relating the work of these groups on either one or the other component, but not both simultaneously).

[265] *See* Smyth, *supra* note 61, at 486 (declaring that a legal services gap disables clients from dealing with collateral consequences, observing that existing services in this area "are fragmented and marked by a lack of coordination and communication," and that "when clients are able to access services, the providers are often uninformed about the wide-ranging consequences of criminal proceedings, particularly those outside the provider's narrow practice areas").

[266] To date, appellate courts have only confronted a particular collateral consequence in their rulings reinforcing the indirect and non-punitive nature of collateral consequences. That is, appellants have challenged either the constitutionality of a particular consequence,

The vast majority of these appellate courts have rejected the appellants' claims, declaring these consequences to be non-direct and detached from the criminal process – either because the consequences were imposed by agencies outside the criminal justice system,[267] or because the consequences inflicted were deemed to be civil, rather than criminal, penalties.[268] In so holding, however, appellate courts have confined their analyses to the moment at which the defendant entered the plea, without considering the longer-term reentry – and therefore more lasting – ramifications attached to the conviction.[269] That is, similar to the arguments offered by legal commentators,[270] appellate decisions in this regard have been *process-oriented* rather than *result-focused.* By isolating their analyses to this moment, appellate courts have not considered the innumerable ways in which the collateral consequence(s) at issue will impede these appellants upon reentry. Indeed, this reentry dimension is particularly crucial because it is there that the *effects* of the criminal conviction upon the individual materialize.[271]

As a result, when assessing whether defense attorneys or trial courts were obligated to inform appellants about the collateral consequences of their convictions, appellate courts have missed the critical constitutional dimension: the punitive and long-lasting effects of these consequences once the "formal" criminal sentence has expired. In essence, by rooting the analyses to the moment that the guilty plea was entered, appellate courts have ignored the constitutional due process issues attached to these consequences in the long-term, and have instead both narrowed the legal inquiry and illuminated the practical difficulties of implementing systems to inform defendants of these consequences.

Moreover, these constrained perspectives have affected the ways in which elected officials perceive these components. The flurry of recent state legislation has focused on studying various reentry-related obstacles, developing generalized reentry services,[272] or on addressing discrete reentry

such as sex offender registration or civil commitment, *see supra* notes 95-107 and accompanying text, or the lack of notification regarding a particular consequence. *See supra* notes 108-130 and accompanying text. No appellate court has yet dealt with the constellation of consequences that often converge upon an individual with a criminal conviction.

[267] *See, e.g.*, People v. Ford, 657 N.E.2d 265, 268 (N.Y. 1995) (collateral consequences "are peculiar to the individual and generally result from the actions taken by agencies the court does not control").

[268] *See supra* notes 105-107 and accompanying text.

[269] *See* Chin & Holmes, *supra* note 31, at 700 ("The real work of the conviction is performed by the collateral consequences.").

[270] *See supra* Part II.

[271] *See* Chin & Holmes, *supra* note 31 at 699-700 (giving examples of the collateral consequences that accompany a conviction or guilty plea).

[272] For instance, a bill introduced in the California Assembly in February 2005 charges the Department of Correction to establish and operate a reentry services pilot program in

issues.[273] While these initiatives pointedly recognize the need to assemble the various reentry obstacles that individuals with criminal records must confront, as well as the impact these obstacles have on recidivism and community safety, they have yet to connect the multitudinous ways in which the legal barriers imposed by collateral consequences impact reentry.[274]

The failure to appreciate fully the relationship between collateral consequences and reentry is perhaps best exemplified by statutes or court rules in several states that isolate the deportation consequence. These statutes and rules require that defendants, either at the guilty plea or sentencing stage, be warned that the conviction could result in deportation.[275] This warning recognizes the permanent effects that the criminal conviction could potentially have on a non-citizen's ability to remain in the United States.[276] Accordingly, this requirement is reentry-focused, as it recognizes the conviction's lasting effects. However, states have implemented this requirement without extending notice to defendants of other potential consequences.[277] By doing so, these

Alameda County. The aim of the program is to "prepare participants for successful reintegration into society." Assemb. B. 629, 2005-06 Leg., Reg. Sess. (Cal. 2005). However, only those convicted of violent offenses would be eligible for the services, which would include assessments of individualized needs and developing reentry plans based on those needs, including housing, education, and substance abuse treatment. *Id.* Similarly, a bill introduced in the Connecticut General Assembly called for the establishment of a permanent commission on the reentry of prisoners. H.B. 6961, 2005 Gen. Assem., Reg. Sess. (Conn. 2005).

[273] *See supra* note 234 (focusing on services for recently released individuals).

[274] However, there are exceptions, as a few legislatures have recognized the connections between collateral consequences and reentry. For instance, the Virginia legislature passed a joint resolution in 2002 to create a subcommittee to study collateral consequences. S.J. Res. 86, 2002 Leg., Reg. Sess. (Va. 2002) (enacted). Also, the Illinois Legislature recently passed a bill that permits the sealing of residents' non-violent felony convictions to facilitate reentry after incarceration. *See* S.B. 3007, 93d Gen. Assem., Reg. Sess. (Ill. 2003). The bill is "designed to help former prisoners find work by allowing them to avoid reporting their nonviolent crimes to prospective employers." *Legislature Approves Bill to Seal Some Felony Convictions; Advocates Say for More Than 36,000 Former Prisoners Each Year, Finding Work Will Be Easier*, PR NEWSWIRE, Nov. 10, 2004. However, records will still be available to those screening for certain jobs, such as child care workers and school bus drivers. *See id.*

[275] *See supra* note 126; *see also* People v. Becker, 800 N.Y.S.2d 499, 502 (2005) (observing that "much of the attention regarding collateral consequences has focused on the extraordinary, and often irrevocable, consequence of deportation").

[276] However, one commentator warns that these statutes are "largely ineffective" because "the admonition is a blanket warning for every defendant, citizen or not, delivered as part of the plea mantra and done without any inquiry about whether this is a topic the defendant has discussed with her counsel." Florian Miedel, *Increasing Awareness of Collateral Consequences Among Participants of the Criminal Justice System: Is Education Enough?* N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2006) (manuscript at 7, on file with author).

[277] *See id.* (observing that New York law only requires warnings regarding possible

statutes have separated the deportation consequence from the myriad other consequences that can or will attach to convictions. This hierarchal perspective of collateral consequences ignores both the centrality of other critical collateral consequences to reentry as well as the ways in which those consequences can collapse to impose often insurmountable barriers to reintegration.[278]

Perhaps most crucially, the compartmentalized perspective is the lens through which the criminal justice system's institutional actors – namely prosecutors, defense attorneys, and judges – perceive the relevance of these components to their duties.[279] Because collateral consequences are not considered to be legally relevant to the criminal process,[280] these actors have no legal obligation to consider and incorporate the vast majority of these consequences into their respective practices at the charging,[281] counseling,[282] negotiation,[283] or sentencing stages.[284] Moreover, they similarly have no institutional responsibility to incorporate the reentry component, as this is construed to be the separate and detached "back end" of the criminal process.

deportation consequences, thereby "leaving out a whole range of other potentially devastating collateral consequences").

[278] One commentator observes that the arguments detailing the harshness of the deportation consequence could be extended to the "harmful nature" of many other collateral consequences. Jamie Ostroff, Note, *Are Immigration Consequences of a Criminal Conviction Still Collateral? How the California Supreme Court's Decision* In re Resendiz *Leaves this Question Unanswered,* 32 SW. U. L. REV. 359, 378-79 (2003). This commentator warns, however, that "[t]he inevitable result will be a shift from the present bright-line rule of direct versus indirect consequences, to a purely subjective entanglement surrounding the question, 'How harsh is too harsh?'" *Id.* at 379.

[279] *See* Miedel, *supra* note 276 (manuscript at 3) ("[S]ince courts treat collateral consequences as exactly that – collateral – and do not hold lawyers responsible for their failures to inform clients about them, it is not surprising that defense lawyers take their cue from the courts and also treat these concerns as secondary.").

[280] *See* Travis, *supra* note 1, at 16 (observing that collateral consequences "are not considered part of the practice or jurisprudence of sentencing").

[281] *But see* Robert M.A. Johnson, *Collateral Consequences*, PROSECUTOR, May-June 2001, at 5, 5 (arguing that prosecutors should consider collateral consequences when making charging decisions).

[282] *See generally* Smyth, *supra* note 61 (advising defense lawyers to become better counselors and negotiators in light of the plea bargaining/collateral consequences model of criminal justice).

[283] Several commentators have observed that a working knowledge of collateral consequences could help defense attorneys negotiate with prosecutors. Glen Edward Murray, *Civil Consequences of Criminal Conduct,* N.Y.S.B.J., Nov. 1991, at 28, 30; Smyth, *supra* note 61, at 494 (explaining how attorneys in one public defense office have secured more favorable plea deals for clients by educating prosecutors about the collateral consequences that attach to the clients and their families); Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM. L. REV. 1461, 1502 (2003).

[284] *See* Demleitner, *Abusing State Power*, *supra* note 207, at 1634-41.

IV. DEMYSTIFYING THE CATEGORIZATION OF COLLATERAL CONSEQUENCES AND REENTRY

There are potential explanations for the categorization of the collateral consequences and reentry components. Legal scholars might be focused on identifying, examining, and critiquing the underlying theories and structures that, above the surface, allow for the imposition of collateral consequences and, below the surface, allow for the imposition of these consequences without notice. As such, scholars might be focused on the *process* by which these penalties are imposed rather than on the *application* of these consequences at the reentry stage. Conversely, service providers might be focused on creating avenues for meaningful reentry services, rather than – or, even in light of – the legal barriers that attach automatically to criminal convictions. Other potential explanations are more complex, as they are rooted in traditional philosophies of indigent lawyering. These traditional philosophies stratify broad-ranging legal and social services by instead focusing on the narrow issues that most align with particular training and specialization.

A. *Traditional Philosophies of Criminal Defense and Civil Legal Services Lawyering*

Criminal defense lawyering has traditionally focused on the narrow *legal* issues presented by the individual client's interaction with the criminal justice system.[285] The lawyer's role under the traditional model is quite simple: secure the best legal result for his or her client.[286] Thus, the traditional model's main focus rests on the client's *legal* situation related to the criminal charge, rather than on the factors that possibly led to or contributed to that situation.[287] As a result, this model largely leaves unaddressed the client's broader social needs, as well as other *legal* needs that parallel the criminal charge.[288]

This relatively narrow lawyering methodology is not unique to criminal defense. Rather, while lawyers were historically general practitioners who handled an array of legal matters,[289] the dramatic influx of lawyers following World War II fostered a movement toward specialization.[290] This influx, coupled with the complexities that came with newly developing legal fields

---

[285] *See, e.g.*, Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 123-24 (2004).

[286] *See id.*

[287] *See id.* (positing that traditional defense attorneys leave social work to others).

[288] *See id.* (remarking that social intervention is limited to allowing the lawyer to achieve case dispositions for their clients).

[289] *See* SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR. ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 29 (1992) (reporting that historically, "[t]he lawyer was . . . a generalist, personally ready to render whatever legal service a private client might require").

[290] *See id.* at 13.

and changing law, very much demanded that lawyers develop expertise in isolated areas.[291]

The public defense and legal services movements that blossomed in the 1950s and 1960s came on the heels of this increased specialization. Lawyers in both the criminal and civil arenas developed expertise in their respective areas.[292] As a result, both public defense and civil legal services offices were organized around specialty areas,[293] and rigid role identification soon became the norm.

In addition, funding restrictions have also significantly constrained the boundaries of both criminal and civil legal services. Both public defense offices and civil legal services providers have funding streams that limit the range of services they can offer as well as issues they can address.[294] These restrictions have helped to rigidify the division between "criminal" and "civil" issues in these practice contexts, as providers have been forced to tailor services to their respective funding constraints.[295] These circumstances have in large measure atomized "criminal" and "civil" issues. By separating and isolating these strands, the traditional lawyering model fails to recognize the ways in which these issues often overlap and converge on individuals, their families, and their communities.[296]

In much the same way, the rigid perspectives fostered by specialization have influenced and shaped the ways that criminal defense practitioners have both envisioned their role and addressed their clients' legal issues. In what Professor Kim Taylor-Thompson describes as the "individualized vision of practice,"[297] criminal defense attorneys have focused their objectives on individual clients, working independently of other institutions and groups with whom there are potential synergies.[298] On the practice side, the traditional

[291] *See id.* at 40 (observing that "changing law and new complexities have put an increasing premium on specialization to maintain competence and to keep abreast of subject matter").

[292] *See id.* at 41, 53 (observing that criminal defense and prosecution "have become a discrete specialty in most large urban and metropolitan suburban areas" and that "[u]nder the umbrella of the Legal Services Corporation, poverty law . . . has become a complex collection of specialties with various sub-specialties").

[293] *See* Thompson, *supra* note 18, at 292 (attributing the organizing around specialty areas in part to the "ever-increasing complexity of legal cases").

[294] *See e.g.*, Smyth, *supra* note 41, at 59 (arguing that that decrease in government spending on civil legal services in the 1990s, coupled with restrictions on representation of prisoners by programs with Legal Services Corporation funding, caused many civil legal services organizations to avoid representing individuals involved with the criminal justice system).

[295] *Id.*

[296] *See supra* notes 285-288 and accompanying text.

[297] Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 162 (2004).

[298] *See id.* (concluding that public defenders view themselves as independent actors

model of representation in this context has focused on a narrow, albeit critical, aspect of the client's life – the legal issue that is the direct cause of the client's interaction with the criminal justice system.[299] The attorney's sole function, in this model, is to resolve that issue in a way that best serves the client's interest.[300] This model does not address the client's "whole" needs, which include both the factors that contributed to his or her involvement with the criminal justice system and the forward-looking strategies needed to prevent the client's return to the criminal justice system.[301]

By extension, the traditional model has potentially influenced the ways in which practitioners and courts have considered the relevance of both collateral consequences and reentry to their duties, as well as the connection between these two components. As the traditional model separates "criminal" and "civil" issues, criminal practitioners as well as both trial and appellate courts simply have not recognized the relevance of the "civil" collateral consequences to the criminal process.[302] Rather, traditional stratification narrowly constructs the "criminal" issues to the exclusion of all other potential issues.[303] These isolated perspectives, in turn, account for the countless appellate decisions that view these other related consequences as "collateral," "civil," and "indirect," despite the fact that many consequences attach to the individual automatically (or virtually automatically) as a result of his or her criminal conviction.[304]

Moreover, the traditional model of representation has restrained criminal practitioners from extending their services to the reentry component. Again, the services and obligations under the traditional model conclude with the disposition of the *legal criminal* matter and do not encompass *civil* issues.[305] Thus the various reentry hurdles – the *civil* issues that collapse on the individual post-disposition – fall outside the traditional model of representation.

In much the same way, the collateral consequences and reentry components have been perceived as distinct and specialized fields. Indeed, the rigid line between "criminal" and "civil" issues as well as between "legal" and "non-legal" services is particularly manifest in this context. As a result, legal

serving individual clients, to the extent that many "cannot imagine . . . how they might work with other institutions, groups, and individuals"). Professor Taylor-Thompson suggests that part of the reason for these individualized perspectives might reside with the evolution of legal rights that the Warren Court attached to the criminally accused in the 1960s. *Id.* at 163. These expanded rights "seemed to set an expectation that a new, more invigorated role for the defense would become the norm." *Id.*

[299] *See supra* notes 285-288 and accompanying text.

[300] *See id.*

[301] *See id.*

[302] *See id.*

[303] *See id.*

[304] *See* discussion *supra* Part III.C.

[305] *See* Smyth, *supra* note 41, at 56 ("Most public defenders do not think beyond the termination of the pending criminal case.").

scholars have concentrated on the legal principles underlying collateral consequences.[306] Service providers have tended to focus either on collateral consequences or on reentry, rather than on developing a coordinated approach that incorporates both.[307] Accordingly, these stratified perspectives have failed to recognize fully the connections between these two components.

B. *The Movement Toward a Holistic Perspective*

Even with the funding restrictions noted above, certain quarters of the criminal defense community have moved over the past few decades toward a holistic approach.[308] This approach expands the provision of legal services to address issues that could have either contributed to the client's initial involvement with the criminal justice system, or that could impact the client's ability to remain away from the system once the criminal matter has concluded.[309] Specifically, several public defense offices have expanded their roles to address non-criminal legal matters – such as housing and employment – as well as non-legal matters, such as psychological, socioeconomic, and family issues that impact their clients' lives.[310] Some of these defense organizations have also broadened their identities by establishing offices in their clients' communities and/or by otherwise forging ties with the communities in which they are located or in which their clients reside.[311] Through these efforts, defenders have reconceptualized themselves as problem-solvers and community stakeholders, rather than solely as individualized legal services providers.[312]

This holistic movement in the criminal defense context is part of a broader response to traditional forms of legal services lawyering. Indeed, the benefits of a more holistic form of representation – one that focuses on problem-solving

---

[306] *See* discussion *supra* Part II.

[307] *See* Thompson, *supra* note 18, at 275-76 (describing attempts to address reentry as "fragmented").

[308] An apt description of holistic lawyering is that it "analyze[s] the whole client (past, present, and future), not just the narrow legal problem." Edward D. Shapiro, *Fresh Perspectives: The Practice of Holistic Lawyering*, CBA REC., Feb-Mar. 2002, at 38, 38.

[309] For a brief description of this development, see Pinard, *supra* note 55, at 1067-68.

[310] For an in-depth explanation of holistic or "whole-client" representation, see Clarke, *supra* note 40, at 429-36.

[311] *See* Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141, 1146 n.10 (2003) (drawing a link between the community defender movement and holistic representation); Kim Taylor-Thompson, *Individual Actor vs. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2458 (1996) (observing that "public defender offices traditionally have ignored" community relationships and that "[i]n contrast, the community defender office sees its clients as individuals with ties to the community, who should be understood in the context of that community, and thereby rejects a wholly individualized conception of its role").

[312] For examples of defense organizations that have begun programs and provide services that include broader communities, see Clarke, *supra* note 40, at 445-53.

and the client's broader needs – have been recognized throughout various sectors of legal services.[313] As a result, there has been a trend to look beyond the specific legal issues of the particular client's situation to address broader issues that might explain, at least to a certain extent, the reasons for the client's involvement with the particular system, as well as help find solutions to these overlapping issues.[314]

However, while the holistic lawyering concept has transformed the provision of legal services, and particularly the defense role vis-à-vis clients and client communities,[315] this concept has yet to embrace, on a broad scale, the collateral consequences and reentry components of the criminal justice system.[316] As a result, mainstream criminal defense services – even some services that are considered to be "holistic" – do not include *full* representation on the collateral consequences and reentry components.[317]

The relative lack of *lawyer* focus on these components may well correlate to the lack of attention that trial courts have afforded these components, as well as the ways in which appellate courts have interpreted the legal issues pertaining to collateral consequences.[318] The attorney's function is to focus on the clients' needs, legal or otherwise.[319] Indeed, the attorney's role as

[313] *See supra* note 230 (describing the broader civil units of three public defense offices); Brooks & Deoras, *supra* note 14, at 51 (describing holistic advocacy in public defense offices).

[314] *See supra* note 308 and accompanying text.

[315] *See* Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 302 (2002) (observing that the increasing spread of holistic practice has led defense attorneys to view their roles differently).

[316] Pinard, *supra* note 55, at 1069. One commentator has asserted that while the federal government, numerous community groups, law enforcement representatives, and faith institutions have begun to work on various reentry issues, "little attention has been paid to the role that the legal community should play." Thompson, *supra* note 18, at 260. However, one commentator has noted the shortcomings of the holistic model, *see* Brooks Holland, *Holistic Advocacy: An Important but Limited Institutional Role*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2006) (manuscript at v-xi, on file with author) (detailing the practical, professional, and ethical constraints upon holistic lawyering by public defenders), and another commentator has keenly observed the shortcomings of the holistic model in the collateral consequences context. *See* Laura Johnson, *Collateral Consequences of Criminal Convictions: Do We Mean What We Do?*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2006) (manuscript at 4, on file with author) ("The reality is that even the best trained, most sensitive, most holistically-oriented lawyer will, in the end, often have nothing but some very hard choices to offer a client facing criminal charges.").

[317] *See* Johnson, *supra* note 316 (manuscript at xi-xii) (setting forth the inherent limitations of the holistic lawyering approach).

[318] *See supra* note 266 and accompanying text (critiquing the courts' failure to recognize collateral consequences as part of the legal process).

[319] *But see supra* notes 285-288 and accompanying text (relating the traditional lawyering model that rejects the notion that a lawyer should address a client's social needs).

counselor and advisor is designed to create a relationship that allows the client to reveal his or her needs, which the attorney then incorporates into the representation. One of the attorney's chief functions is to *translate* the client's legal issues and other needs to the court.

Conversely, the court's main focus is to address the legal issues presented in the case, rather than to focus on, or even to consider, the defendant's broader needs. While the trial court is concerned with the defendant's needs, such concern is usually limited to how those needs relate to the legal mechanisms needed to ensure fair process.[320] Appellate courts are focused on needs only to the extent that they relate to the process needed to secure related constitutional or statutory rights. Quite simply, if the attorney does not focus on the client's needs then no one else will, unless the attorney's failure to do so is so egregious that it abridges the client's right to effective assistance of counsel.[321]

V. THE INEXTRICABLE LINK BETWEEN COLLATERAL CONSEQUENCES AND REENTRY: THE NEED FOR AN INTEGRATED PERSPECTIVE

The holistic mindset has transformed the ways in which public defenders represent clients.[322] These defenders now take an expansive representational approach that appreciates and attempts to address the often multiple legal and non-legal issues that contribute to the client's interaction with the criminal justice system.[323] A similar approach is necessary to appreciate fully the connections between collateral consequences and reentry. In essence, appreciating these connections requires the recognition of all the legal *and* non-legal issues that are embedded within these components.

Fortunately, examples of integrated perspectives in this context abound as several policy analysts, policy organizations, and legal organizations have contributed rich literature that addresses the multifaceted issues pertaining to collateral consequences and reentry.[324] In contrast to legal scholars, who have

---

[320] *See supra* notes 124-130.

[321] *See supra* note 120 (detailing the usual rejection of ineffective assistance of counsel claims predicated on failure to warn of collateral consequences).

[322] *See supra* note 315 and accompanying text.

[323] *See supra* note 308 and accompanying text (defining holistic lawyering).

[324] *See, e.g.*, ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, at 8-9 (recognizing that the increasing number of collateral consequences will affect the expanding numbers of individuals who will ultimately be released from prisons); Jeremy Travis & Michelle Waul, *Prisoners Once Removed: The Children and Families of Prisoners*, *in* PRISONERS ONCE REMOVED, *supra* note 1, at 22-25 (tying the reentry-related hurdles faced by formerly incarcerated individuals and their families directly to some of the various collateral consequences, including ineligibility for public housing and federal welfare benefits); *see also* Gary Fields, *Arrested Development: After Prison Boom, a Focus on Hurdles*, WALL ST. J., May 24, 2005, at A1 (reporting that some of the most significant reentry hurdles are imposed by federal, state, and local governments through various legal restrictions); *see generally* Nkechi Taifa, *Roadblocked Re-entry: The Prison After Imprisonment*, NAT'L BAR ASS'N MAG., May-June 2004, at 20 (setting out in detail the

focused their writings on issues relating to collateral consequences, several of these analysts and organizations have connected collateral consequences and reentry by exploring in detail the extent to which these consequences hamper the ability of individuals to reintegrate successfully upon the conclusion of their criminal sentences.

One group that has explored these connected issues is the Philadelphia Consensus Group on Reentry and Reintegration of Adjudicated Offenders.[325] This group, which met in 2002, included prison officials, faith-based community members, law enforcement officers, health officials, service providers, and representatives from several community groups, the district attorney's office, the public defense office, and the probation department.[326] The purpose of the meeting was to make specific findings regarding the various reentry hurdles confronting individuals leaving Philadelphia's prisons and to recommend various measures aimed toward facilitating safe and productive reintegration.[327] The group produced several recommendations, one of which called upon the Philadelphia criminal justice system to "examine and eliminate legal and administrative barriers that unduly inhibit successful offender reintegration."[328]

In addition, several public defense offices have incorporated collateral consequences into their practices, recognizing the post-dispositional effects of these consequences on their clients. The Bronx Defenders, a community public defense office in New York City, perhaps has the most established structure. Its Civil Action Project has assembled the range of collateral consequences in New York that attach to arrests, misdemeanor convictions, and felony convictions.[329] Lawyers from the Civil Action Project train the office attorneys on these consequences, consult with the attorneys in necessary instances, and develop strategies for incorporating these consequences into negotiations and plea discussions with prosecutors.[330] The Civil Action Project has also developed statewide educational materials on these issues.[331] Other

interplay between various collateral consequences and reentry).

[325] PHILADELPHIA CONSENSUS GROUP ACTION PLAN, *supra* note 170, at 2-4 (summarizing the background, goals, and mission statement of the Philadelphia Consensus Group).

[326] *Id.* at 1.

[327] *Id.* at 2 (identifying the group's mission statement to "make Philadelphia a better, safer, more financially responsible city" and to "develop and promote pragmatic and concrete measures to enhance participation in society of men and women leaving the Philadelphia Prison System").

[328] *Id.* at 17.

[329] *See generally* THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK, *supra* note 8 (explaining the effect of arrests and convictions on an individual's ability to secure employment, housing, public benefits, and various other necessities).

[330] *See* Smyth, *supra* note 61, at 494-95 (asserting that "prosecutors and judges respond best to consequences that offend their basic sense of fairness," particularly in the areas of housing, employment, student loans, and immigration).

[331] *See generally* THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK, *supra*

defense organizations have likewise developed materials on collateral consequences and have incorporated reentry into their practices.[332]

Moreover, the New York State judiciary has begun exploring the connections between collateral consequences and reentry. Concerned about the lack of generalized knowledge regarding collateral consequences, New York Court of Appeals Chief Judge Judith S. Kaye organized a colloquium to explore these issues as part of the New York State Judicial Institute Academy.[333] This full day program brought together practitioners, judges, and law school clinicians to explore ways to educate each other about these consequences, including how these consequences interface with reentry.[334]

Various other constituencies have begun examining the effects of collateral consequences on individuals, families, and communities, and have shaped strategies and formulated opinions pertaining to the various aspects of collateral consequences and reentry.[335] These strategies and opinions have already influenced the ways in which various actors – including courts, legislatures, and various community stakeholders – perceive these aspects of the criminal justice system.[336]

For instance, legislation proposed in Congress recognizes the connections between collateral consequences and reentry. The Second Chance Act of 2005[337] seeks to address the reentry-related needs of former offenders with the

note 8 (suggesting practice tips for criminal defense attorneys for dealing with different types of collateral consequences); The Bronx Defenders: The Civil Action Project, http://www. bronxdefenders.org/comm/006.html (last visited Apr. 7, 2006).

[332] For instance, the Public Defender Service for the District of Columbia (PDS) has incorporated collateral consequences and reentry through its Community Re-entry Program. Attorneys from this program have written a guide that outlines the collateral consequences of D.C. convictions. *See generally* COLLATERAL CONSEQUENCES IN THE DISTRICT OF COLUMBIA, *supra* note 8. In addition, these attorneys handle civil matters stemming from these consequences and provide transition services to recently released individuals. The Public Defender Service for the District of Columbia, The Civil Division, http://www.pdsdc.org/Civil/index.asp (last visited Apr. 6, 2006); *see also* Smyth, *supra* note 61, at 499-500 (referring to various defender groups providing resources to guide defense attorneys on collateral consequences and reentry concerns).

[333] Partners in Justice Colloquium, http://www.nycourts.gov/ip/partnersinjustice (last visited Mar. 30, 2006) (linking to the working papers, agenda, and participants of the forum, all of which focus on developing connections between courts, clinical programs, and the practicing bar).

[334] *Id.*

[335] Smyth, *supra* note 61, at 499-500 (listing groups that have compiled resources discussing collateral consequences and reentry).

[336] *See id.* at 494 (asserting that defenders have been successful when "they are able to educate prosecutors and judges on the draconian hidden consequences for the clients and their families").

[337] This legislation was introduced into the House of Representatives on April 19, 2005, and into the Senate on October 27, 2005. *See* Second Chance Act of 2005: Community Safety Through Recidivism Prevention, H.R. 1704, 109th Cong. (2005) (concerning

goal of reducing recidivism and enhancing public safety.[338] As a result, the legislation considers the needs of former offenders and their victims, as well as the needs of their respective families and communities.[339] The legislation seeks to establish or improve various reentry mechanisms, including the ways in which state and local correctional agencies facilitate the reentry of individuals leaving prison or jail.[340] More narrowly, this includes resolving discrete reentry obstacles, such as ensuring that each individual has documentation (such as identification),[341] addressing various employment-related hurdles,[342] and helping individuals to "secur[e] permanent housing upon release or following a stay in transitional housing."[343]

This legislation also calls for the Attorney General, in consultation with various governmental agencies and community stakeholders, to form an interagency task force that would submit a report with recommendations regarding the various barriers to reentry.[344] Specifically, the legislation charges the task force to "identify Federal and other barriers to successful reentry of offenders into the community and analyze the effects of such barriers on offenders and on children and other family members of offenders."[345] This task force would report on such issues as eligibility for federal housing programs,[346] eligibility for various federal public benefits such as food stamps,[347] and employment-related barriers.[348] As a result, this

"Federal programs and activities relating to the reentry of offenders into the community"); Second Chance Act of 2005: Community Safety Through Recidivism Prevention, S. 1934, 109th Cong. (2005) (largely mirroring the House version of the bill).

[338] Second Chance Act of 2005: Community Safety Through Recidivism Prevention, H.R. 1704, 109th Cong. § 2 (2005).

[339] *Id.* § 3(a) (listing various methods for improving the reentry process).

[340] *Id.* § 3(a)(1)(A).

[341] *Id.* § 3(a)(1)(D) (addressing obstacles to obtaining such documents as identification papers, referrals to services, medical prescriptions, and job training certificates).

[342] *Id.* § 3(a)(8)(C) (seeking to facilitate collaboration between corrections, schools, and employment sectors, in order to reduce barriers to employment).

[343] *Id.* § 3(a)(5).

[344] *Id.* § 4(a), (c) (requiring that the report be submitted within one year after enactment of the Act).

[345] *Id.* § 4(c).

[346] *Id.* § 4(c)(1) (including admissions and evictions).

[347] *Id.* § 4(c)(3) (listing also Social Security and Veterans benefits).

[348] *Id.* § 4(c)(7). Moreover, the legislation calls for states, local governments, territories, or Native American tribes to apply for grants to develop long-term reentry plans in their respective jurisdictions. *Id.* § 3(d)(1). Among the requirements for securing the grant are that the applicant (1) provide a plan for analyzing existing laws, regulations, and practice that impose reentry hurdles, (2) make recommendations regarding laws, regulations, and practices that inhibit employment and "full civic participation," and (3) "identif[y] and make[] recommendations with respect to those laws, regulations, rules or practices *that are not directly connected to the crime committed* and the risk that the ex-offender presents to

legislation offers an integrated perspective by recognizing the difficulties that collateral consequences present for reentry.

The recent focus on these components has also broadened the traditional perceptions of the criminal justice system. The holistic perspective has already dramatically altered perspectives relating to criminal defense lawyering and the ways that other aspects of the criminal justice system can serve the defendant's broader social needs.[349] In addition, the recent focus on collateral consequences and on reentry has further extended these perspectives. Various constituencies have reshaped the roles of criminal justice actors by focusing on the relationships between collateral consequences and due process.[350] They have adopted broader perspectives that recognize the overlapping criminal and civil issues embedded in the criminal justice system, as well as how those issues impact individuals with criminal records, their families, and their communities long after the formal sentence has concluded.[351]

Despite these efforts, the integrated perspective that recognizes the overlapping criminal and civil issues embedded in the collateral consequences and reentry components has not extended to the majority of jurisdictions. However, we have reached a critical moment, given the record numbers of individuals who are both incarcerated and released each year into communities nationwide.[352] This critical moment calls for reframing the perspectives regarding collateral consequences and reentry toward an integrated vision that recognizes both their interdependence to each other and their centrality to the criminal justice system. This holistic perspective attempts to contextualize the intertwined issues that have heretofore been compartmentalized, both in the literature setting out and critiquing various strands of the components and in the practice-based perspectives that have categorized these components.

A. *The Benefits of an Integrated Perspective*

1. More Accurate Narratives Provide the Contextual Bases for the Need to Understand and Incorporate Collateral Consequences into the Criminal Process

An integrated perspective that consistently couples collateral consequences

---

the community." *Id.* § 3(f)(4) (emphasis added); *see also id.* § 3(f) (listing the other requirements to secure a grant); Second Chance Act of 2005: Community Safety Through Recidivism Prevention, S. 1934, 109th Cong. § 3(e) (2005) (listing, in the Senate version of the legislation, identical requirements for securing a grant).

[349] *See* Bernhard, *supra* note 315, at 302 ("New defender offices are emphasizing a holistic approach to client representation, and the federal government is encouraging this development.").

[350] *See supra* note 130 (listing situations where defendants must be informed of certain collateral consequences).

[351] *See supra* notes 324-332.

[352] *See supra* notes 16-20 and accompanying text.

and reentry provides the more accurate narrative necessary to understand and work through these interrelated issues. It provides a broad vision of the criminal process and recognizes at all points the intersection of "criminal" and "civil" issues that abound throughout. An integrated perspective in this regard recognizes the centrality of collateral consequences to the criminal process, particularly because these consequences shape the long-term effects of the conviction.[353] Therefore, recognition of these consequences molds the reentry dimension as they directly impact the options and opportunities available to individuals upon the conclusion of their sentences.

2. More Informed Charging Decisions

An integrated perspective also assists prosecutors with charging decisions and plea negotiations. Several commentators have explored the vast powers afforded the prosecution through their charging discretion.[354] These powers are particularly broad because the vast majority of cases in both the state and federal systems are resolved through guilty pleas.[355] As a result, commentators have observed that the prosecutor's decision as to the actual criminal charge often dictates the ultimate disposition of the entire case.[356]

Detailed recognition and knowledge of the collateral consequences of criminal convictions and of how those consequences impact reentry would assist prosecutors tremendously in their charging decisions. For instance, a prosecutor might decide in a given case that charging the defendant with a misdemeanor, rather than a felony, would both lessen the collateral consequences that could potentially attach to a conviction while recognizing that *some* collateral consequences would *still* attach to that conviction.[357]

---

[353] *See supra* notes 60-71 and accompanying text.

[354] *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM. L. REV. 13, 21 (1998) (explaining prosecutorial charging powers); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 671 (1992) ("No government official can effect a greater influence over a citizen than the prosecutor who charges that citizen with a crime."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525 (1981) ("Decisions whether and what to charge, and whether and on what terms to bargain, have been left in prosecutors' hands with very few limitations.").

[355] *See supra* note 33.

[356] *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2120 (1998) (arguing that, given the prevalence of plea bargaining, the prosecutor "acts essentially in an inquisitorial mode"); Vorenberg, *supra* note 354, at 1526 (asserting that the prosecutor's charging decision is "the key to the prosecutor's control over plea bargaining").

[357] For example, in the possession of narcotics context, a prosecutor could decide to charge a defendant with misdemeanor, rather than felony possession, recognizing that a guilty plea to the felony charge would result in a range of collateral consequences, including ineligibility for food stamps, public housing, and federal student loans, while also recognizing that a guilty plea to the misdemeanor charge would not exclude the defendant

Accordingly, fundamental notions of fairness would inform these charging decisions, as prosecutors would be better able to consider the true *individualized* impact of the resulting convictions.[358]

3. More Informed Plea Negotiations and Dispositions

An integrated perspective would also better inform plea negotiations between prosecutors and defense counsel. Given the primacy of plea bargains in the criminal justice system,[359] plea negotiations between opposing counsel are a critical and often dispositive dimension of criminal practice. Incorporating the collateral consequences and reentry components into these negotiations would allow defense attorneys to more accurately lay out both the immediate and long-term effects of the particular disposition.[360] 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.[361]

4. More Accurately Reveals the Legal Issues Embedded in the Collateral Consequences and Reentry Components

The integrated perspective would also more accurately set out the potential

from obtaining food stamps, but, as with the felony charge, could render the defendant ineligible for public housing and student loans. *See supra* notes 62-67 and accompanying text; *see also* THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK, *supra* note 8, at 9-13, 19-20 (comparing the collateral consequences of felony and misdemeanor convictions in New York). Of course, if the prosecutor believes the situation warrants, he or she could decide not to institute particular charges, believing that the collateral consequences that would attach to the conviction are overly burdensome to the particular defendant. For other examples of how prosecutors could and should use collateral consequences to inform charging decisions, see Catherine A. Christian, *Awareness of Collateral Consequences: The Role of the Prosecutor*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2006) (manuscript at 3-4, on file with author).

[358] *See, e.g.*, Thompson, *supra* note 18, at 274 ("Although prosecutors may not have an express professional obligation to consider the real impact of a conviction, practical concerns about fairness, as well as the societal concern about creating obstacles to the reentry of ex-offenders who have paid their debt to society, may impose such a duty.").

[359] *See supra* note 33.

[360] *See* Chin & Holmes, *supra* note 31, at 715-16.

[361] *See* Chin & Holmes, *supra* note 31, at 718-19 (arguing that a defense lawyer who "[i]dentif[ies] and explain[s] collateral consequences to the prosecutor or court may influence the decision to bring charges at all, the particular charges that are brought, the counts to which the court or prosecution accept a plea, and the direct consequences imposed by the court at sentencing"); ABA STANDARDS ON CRIMINAL SANCTIONS, *supra* note 1, Standard 19-2.1, cmt. at 22 ("Prosecutors when deciding how to charge, defendants when deciding how to plead, defense lawyers when advising their clients, and judges when sentencing should be aware, at least, of the legal ramifications of the decisions they are making.").

legal issues involving the lack of notice provided to defendants regarding collateral consequences. As noted above, lawyers, and consequently courts, have confined their analyses of whether or not appellants were required to have been informed of a particular consequence to the moment at which he or she entered the guilty plea. However, an integrated perspective recognizes that the more accurate analysis considers first the long-term reentry-related effects of the particular consequence. As such, this perspective broadens the legal claims that are presented to courts. It also invites more accurate longitudinal analyses that incorporate the reentry dimension into the legal question of informing defendants about the range of consequences that might attach to the conviction as a result of the guilty plea.

5. Exposes the True Effects of Collateral Consequences

Lastly, the integrated perspective would, at the very least, bring collateral consequences to the surface. Doing so would more accurately expose the reentry-related obstacles tied to these consequences and would provide both criminal justice actors and the public with a richer understanding of the criminal process.[362] This richer understanding would, in turn, stimulate meaningful conversations regarding the breadth – and perhaps even the necessity – of these consequences.[363]

B. *Some Questions Raised by Adopting an Integrated Perspective of Collateral Consequences and Reentry*

While the benefits of advancing an integrated perspective that envisions collateral consequences and reentry as interwoven components are plentiful, it is important to recognize that this perspective also raises questions regarding the legal and logistic issues that would soon follow. This section sets out two potential issues.[364] However, the Article does not attempt to resolve these

[362] Two commentators have made a similar observation, albeit in a much different context. They assert that litigation should be brought challenging the network of consequences that, even if ultimately unsuccessful, would alert policymakers and the general public to their existence. Archer & Williams, *supra* note 147 (manuscript at 2) (arguing that a "state specific litigation strategy, coordinated with legislative and public education efforts" would, even if unsuccessful, act "as a counter to the lack of political will and negative public opinion that often hinders legislative reform in this area").

[363] *See, e.g.*, Johnson, *supra* note 316 (manuscript at 4) (incorporating collateral consequences at sentencing "could represent the beginning of a true public discourse or debate about the wisdom of the actual disabilities that we impose on persons convicted of crimes").

[364] Certainly these are only two of several potential issues. However, commentators have explored at least two other issues that flow from a holistic perspective: first, redefining (and broadening) the criminal defense attorney's role; and second, finding ways to incorporate a holistic perspective regarding these components even in the face of challenging resource constraints. For a discussion regarding the broadening of the defense attorney's role, see Thompson, *supra* note 18, at 294-96. For some suggestions on incorporating these

issues, but rather urges that these issues deserve deliberative analyses.

1. Does the Integrated Perspective Change the Current Status of Collateral Consequences as "Civil" and "Indirect" Sanctions that Do Not Comprise Criminal Punishment?

As discussed above, appellate courts have routinely rejected broad legal challenges to collateral consequences, holding them to be non-punitive civil penalties rather than criminal sanctions.[365] More narrowly, appellate courts have relied on the direct/indirect and civil/criminal distinctions to hold that neither defense attorneys nor trial courts are required to inform defendants of these consequences as part of the guilty plea or sentencing process.[366] As a result, the non-criminal nature of these consequences separates them from the *criminal* punishment imposed upon the defendant.

The conceptualization of punishment is critical because its existence triggers various constitutional protections for those accused or convicted of crimes.[367] However, the punishment question is particularly murky because of the various definitions and explanations that courts and commentators have offered.[368] Many commentators have espoused and debated punishment perspectives in an attempt to cleanly distinguish between criminal and civil systems, with some having observed that the distinctions between these systems are fluid and have changed over time.[369]

In the criminal context, perhaps the most crystallized observation is that punishment incorporates only "those sanctions specifically imposed by the state as a result of a criminal conviction."[370] Accordingly, punishment relates to the penalties imposed under the auspices of the criminal justice system. Conversely, penalties imposed by agencies *outside* of the criminal justice

components, even with resource constraints, see Pinard, *supra* note 55, at 1092-93.

[365] *See supra* note 107.

[366] *See supra* notes 119-124 and accompanying text.

[367] *See, e.g.*, *supra* note 107 and accompanying text (observing courts' refusal to find constitutional violations where penalties were not "criminal punishment"). This distinction is constitutionally important because, for instance, the Double Jeopardy Clause of the United States Constitution forbids a person from being punished twice for the same crime. U.S. CONST. amend. V. Similarly, the Ex Post Facto Clause forbids punishment or increased punishment to be exacted upon a person for an act committed at a time prior to the existence of such punishment. U.S. CONST. art 1, § 10, cl. 1.

[368] *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 12 (3d ed. 2001) ("[T]here is no universally accepted non-arbitrary definition of the term 'punishment.'").

[369] *See, e.g.*, Chin, *supra* note 107, at 1686 (proposing that a sanction can be distinguished as criminal or civil based on whether it is imposed because of conviction or conduct); Demleitner, *supra* note 60, at 1032 (discussing the punitive nature of collateral consequences).

[370] Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 32 (2003).

system are not, as a general rule, considered to constitute punishment.[371]

One question that then emerges is whether an integrated perspective, envisioning collateral consequences and reentry as interwoven components, changes the punishment equation. Some commentators have argued that collateral consequences, standing alone, constitute punishment because they are imposed on those convicted of criminal acts.[372] However, the reentry component illustrates how these penalties actually bear upon these individuals by manifesting the ways in which collateral consequences converge to limit, if not stifle, the individual's social, political, and economic access. In essence, does this manifestation transform the collateral consequences into *criminal* punishment?

2. Does the Integrated Perspective Require Prosecutors to Undertake a Larger Role Regarding Collateral Consequences and Reentry Components?

Several scholars have argued that both trial courts and defense attorneys have duties to inform criminal defendants of collateral consequences.[373] Some commentators have also urged that courts (in the form of reentry courts) and defense attorneys have roles in facilitating the release of individuals from correctional facilities back to their communities.[374] However, what role, if any, should prosecutors have in a system that envisions collateral consequences and reentry as integrated and integral components of the criminal process?[375]

One commentator, while serving as president of the National District Attorneys Association, asked a similar question in the collateral consequences context.[376] He urged that prosecutors consider these consequences in order "to

---

[371] DRESSLER, *supra* note 368, at 12 (giving as examples the disbarment of a lawyer or the actions of a lynch mob). *See In re* Resendiz, 19 P.3d 1171, 1179 (Cal. 2001) (asserting that some California courts have "called 'collateral' any consequence . . . that 'does not inexorably follow from a conviction of the offense involved in the plea'" (quoting People v. Crosby, 5 Cal. Rptr. 2d 159, 160 (Cal. Ct. App. 1992))). For this reason, Professor Gabriel J. Chin observes that the standard response to the complaint that collateral consequences represent unfair punishment is that they "are not punishment at all; rather, they are civil regulatory measures designed to prevent undue risk by proven lawbreakers." Chin, *supra* note 107, at 1685.

[372] TRAVIS, *supra* note 16, at 64 (arguing that collateral consequences constitute punishment because "they are legislatively defined penalties imposed on individuals convicted of crimes, resulting in serious, adverse consequences").

[373] *See supra* Part II.

[374] *See* Pinard, *supra* note 55, at 1092-94 (focusing on defense attorneys); Travis, *supra* note 16, at 272-74 (focusing on reentry courts).

[375] I thank Professor Alan Hornstein for suggesting that I consider whether or not prosecutors should have a duty to inform defendants of collateral consequences.

[376] Johnson, *supra* note 281, at 5 ("In the performance of our duties as prosecutors, should we . . . consider the consequences of the accused outside of the justice system, that

see that justice is done."[377] However, even assuming that prosecutors should have a role regarding these components, several questions arise as to the extent of this role.

For instance, in the collateral consequences context, the American Bar Association has adopted standards requiring defense attorneys to inform their clients of all possible consequences that attach to their convictions.[378] However, given that prosecutors institute the charges that lead to these convictions, should they have a similar duty to inform defense counsel about the range of consequences that will or can attach? Such a duty would especially benefit defendants in jurisdictions that do not provide counsel at the initial appearance. These defendants often enter guilty pleas without consultation.[379] While judges inform these individuals of the constitutional rights they waive by so pleading, judges are not obligated to inform defendants of these collateral consequences.[380] Should the prosecutor in this instance, as part of his or her role as "minister of justice,"[381] inform the unrepresented defendant of these consequences? If so, how would prosecutors balance these additional duties with their caseloads and various resource constraints?

Similarly, to what extent should prosecutors become involved in reentry? Specifically, should the prosecution's role extend to developing, administering, and/or participating in reentry-focused programming that focuses on individuals released from correctional facilities, victims of criminal acts, and/or their respective communities?[382]

---

are imposed upon conviction as a matter of law?").

[377] *Id.*

[378] ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY, Standard 14-3.2(f) (3d ed. 1999), *available at* http://www.abanet.org/crimjust/standards/guiltypleas_blk.html#3.2 ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.").

[379] *See* STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE iv (2004), http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/execsummary.pdf ("[T]housands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation.").

[380] *See supra* note 119.

[381] MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1999) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

[382] Some prosecutors do believe their function extends to the reentry component, and have established reentry-related programs. *See, e.g.*, Bruce Western, *Lawful Re-entry*, AM. PROSPECT, Dec. 1, 2003, at 54 (describing a program run by the Brooklyn, New York, district attorney's office that has fostered collaboration between law enforcement and community organizations to address public safety issues, and that has implemented various programs for individuals exiting correctional facilities, including job placement and education programs).

CONCLUSION

The perspectives offered in this Article recognize that the criminal justice system (as well as the literature and practices that are both reactive to and reflective of these overlapping criminal and civil issues) has reached a transformative moment that will shape the perceptions of the individuals, families, and communities that are affected by and operate within the system. These perceptions could potentially influence philosophical perspectives on punishment and debates involving the viability or applicability of collateral consequences and reentry practices. This influence could extend to administrative and practice-based measures aimed at incorporating either or both of these components into the criminal process, to litigation strategies related to these components' various strands, and to appellate court perceptions of the various legal issues tied to these consequences. These perceptions could also influence the legal and non-legal services provided to individuals exiting correctional facilities. Perhaps most importantly, they can influence community perspectives of the legal and social obstacles imposed upon these individuals and how those obstacles further stigmatize reentering individuals and potentially impact community safety. Moreover, these perspectives will be shaped at a critical moment as increasing numbers of individuals exit correctional facilities, as collateral consequences impede their ability to successfully reintegrate, and as these complex issues present numerous public safety and social concerns for the various communities to which these individuals return.

As a result, collateral consequences and reentry are inseparable components. Those practicing or otherwise participating in the front end of the criminal justice system must understand the full scope of collateral consequences, given their direct impact on the individual's ability to reenter society upon the conclusion of his or her sentence. Similarly, those practicing in the various back-end reentry-related efforts must explicitly bring collateral consequences within their efforts. While several groups have worked doggedly to address these various consequences upon reentry, these groups can use their learned lessons to further inform those working at the front end about the true and lasting effects of criminal convictions.

However, this integrated perspective is not a panacea to the manifold questions that persist with regard to both of these components. While an integrated perspective would resolve some issues regarding these components, it would present a host of new questions regarding the nature of criminal punishment as well as the heretofore rigidly defined roles of various criminal justice actors. As a result, it leaves open for robust debate questions that converge at the intersection of the criminal and civil divide.