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WILEY AUSTIN BRANTON

Each year, Howard University School of Law and the Howard Law Journal pay tribute to the life and legacy of our former dean, Wiley A. Branton. What began as a scholarship award ceremony for the first-year student who completed the year with the highest grade point average has grown into a day-long symposium that focuses on an area of legal significance inspired by Branton’s career as a prominent civil rights activist and exceptional litigator. The symposium is then memorialized in the Journal’s spring issue following the symposium. The expansive nature of Branton’s work has allowed the Journal to span a wide range of symposium topics throughout the years, and the Journal is honored to present this issue in honor of the great Wiley A. Branton. Past symposium issues include:

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INTRODUCTION

My role in introducing this Symposium is a narrow one: to set the stage for our outstanding group of authors. The title of this Symposium is *Collateral Consequences: Who Really Pays the Price for Criminal “Justice?”*. To fully appreciate the articles to come, an understanding is required of just what the term “collateral consequences” means, what is its moral relevance, and how our panelists will add to understanding it.¹ That is my task here. In accomplishing this task, I plan to raise more questions and to suggest answers, but it is our authors in the pieces to come who ultimately will provide the defense of those answers. I plan to set the stage for their arguments by discussing, in Part I.A, the warfare analogy as a way better to understand the social harms inflicted by the collateral consequences of sentencing decisions. In Part I.B, I discuss the ways in which this analogy fails, shedding further light on the costs of collateral consequences. Part II elaborates on the moral implications of criminal justice system actors’ knowingly (or otherwise) inflicting the harms discussed in Part I. Part III sums up the preceding argument, cautioning that the failure to reduce unnecessary collateral consequences poses risks not just to individuals thereby wronged but to the heart of America’s political values. Part IV, striking a more hopeful note, summarizes each of the papers in this Symposium, viewing each as suggesting practical ways to reduce the very risks Part III identifies. The conclusion finally summarizes the reasons why this Symposium has laid out a practical roadmap for useful change and the social imperatives that demand heeding that call to action.

I. OF WAR AND PEACE

A. What Are “Collateral Consequences”: The Warfare Analogy

In war, the term “collateral damage” refers to the unintended damage done to innocent civilians’ life, health, and property. The damage is “unintended” in that the warriors wish that the damage would not occur. For example, they might bomb a building to kill warriors on the other side of a conflict. They also hope that their bomb will destroy their opponents’ weapons, thus sapping much of their ability to fight back. Yet innocent civilians might be nearby, losing legs, arms, or even their lives when caught in the blast. The bombers wanted to kill the soldiers but not the civilians. The harm to civilians is thus “collateral” to the harm intended to be done to enemy soldiers.

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2. One commentator summarized the definition:

Perhaps the most significant of all causalities in Iraq was that of the concepts and definitions of accidental killing, legitimate target, and war crime, all of which have been manipulated under the umbrella of collateral damage. Because accidental killings of civilians do not become war crimes, media campaigns could be manipulated to make the incident appear as though the intended attack was against a legitimate target. The killing then becomes collateral damage, an act that has the protection of immunity under both the Laws of Armed Conflict (“LOAC”) or Laws of War, and the Uniform Code of Military Justice (“UCMJ”).


3. Otherwise, the killings could not be “accidental” or unavoidable to achieve military goals. See id.

4. Professor Barber has concisely explained the two central underlying principles: the principle of distinction and the prohibition against indiscriminate attacks. Rebecca J. Barber, The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan, 15 J. CONFLICT & SECURITY L. 467, 473-75 (2010). She explains that:

It is a basic principle of international humanitarian law that military commanders must distinguish between military objectives and civilian persons or objects. This is known as the principle of distinction, and has been described by the International Court of Justice as one of the “intransgressible principles of international customary law” that “must be observed by all States whether or not they have ratified the conventions that contain them.” The principle is codified by Protocol I Article 48, which provides that parties to a conflict must distinguish between the civilian population and combatants and between civilian objects and military objectives, and must direct attacks only at military objectives. Military objectives are defined by Article 52(2) Protocol I as . . . those objects which by their name, nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Id. The principle of distinction alone accomplishes little. What makes it matter here is its pairing with a related prohibition. Indeed,

One of the most important rules which gives effect to the principle of distinction is the prohibition of indiscriminate attacks, including attacks which may be expected to cause disproportionate harm to civilians. This is the ‘proportionality rule’, and is encapsulated in Protocol I Article 51(4) prohibiting indiscriminate attacks, together with Article 51(5)(b) which provides that an attack may be considered indiscriminate if, inter alia, it . . . may be expected to cause incidental loss of civilian life, injury to civilians,
Of course, the bombers may have taken steps to avoid harming the civilians, such as scheduling the bombing for a time when civilians are unlikely to be in the vicinity. Yet warriors know from experience that their knowledge on the battlefield is imperfect. They also know that conditions can change suddenly and unexpectedly. For these reasons, warriors further know that collateral damage will occur—not that it may but rather that it inevitably will happen. They may not always know when or who will be injured, but they know that it is unavoidable. The only way to eliminate collateral damage entirely is not to wage war, to surrender. Because surrender is not considered a viable option, collateral damage is accepted but regretted.

In the American criminal justice system, the term “collateral consequences” is likewise used to describe the harms that a sentencing decision may cause to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage. The prohibition of attacks causing disproportionate harm to civilians is repeated in Article 57(2) regarding precautions in attack: military decision-makers must refrain from deciding to launch an attack which is expected to cause excessive loss of civilian life or damage to civilian objects, and shall cancel or suspend the attack if it becomes apparent that the attack may cause excessive loss or damage. The International Committee of the Red Cross (ICRC) has described the rule of proportionality (in addition to the general principle of distinction) as a rule of customary international law applying in both international and non-international armed conflicts.

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5. See Ghoshray, supra note 2, at 693 (“The principle of proportionality makes it mandatory for the military planners, under Article 57(2)(a)(ii) of Protocol I, ‘[t]o take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.’ ”).

6. Cf. Barber, supra note 4, at 477 (“At the outset, it is important to note that commanders are not to be judged on the basis of an ex post facto assessment of the actual loss of civilian life and/or damage to civilian property weighed against the actual military advantage gained, but are required only to make decisions based on the information available to them at the time of the attack. As such, the test to be applied is one that considers the expected loss of civilian life and/or damage to civilian property weighed against the anticipated military advantage.”).

7. This certainly was the position of former-President Bush’s then-Secretary of Defense, Donald Rumsfeld, who has said, “[A]ny time that the Department of Defense is engaged from the air or on the ground, we have to know that there are going to be people hurt. Overwhelmingly, they will be people who we intend to hurt. On occasion, there will be people hurt that one wished had not been. I don’t think there is any way in the world to avoid that and defend the United States from the kinds of terrorist attacks which we’ve experienced.” Donald H. Rumsfeld, Sec’y of Def., Department of Defense News Briefing - Secretary Rumsfeld and General Myers (Oct. 15, 2001), available at http://www.defense.gov/transcripts/transcript.aspx?transcript id=2108.

8. This inevitability is why the law of war speaks of avoiding intended, unnecessary, or disproportionate harm to civilians rather than no harm at all. See Ghoshray, supra note 2, at 690-95 (summarizing the principles of distinction, necessity, and proportionality).
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judge may not have intended to inflict on a criminal defendant.\textsuperscript{9} Nevertheless, the judge knows that certain such harms will happen.\textsuperscript{10} They are dictated by law\textsuperscript{11} or inflicted by social custom.\textsuperscript{12} But the judge feels no responsibility for these harms because she does not inflict them nor decide that the offender deserves them.\textsuperscript{13} Others, legis-

\textsuperscript{9} See People v. Catu, 825 N.E.2d 1081, 1082 (N.Y. 2005) ("Collateral consequences ‘are peculiar to the individual and generally result from the actions taken by agencies the court does not control.’") (citing People v. Ford, 86 N.Y.2d 397 (1995)).

\textsuperscript{10} Certainly, they should know. See Ron Spears, Foreseeing the “Four C’s” (Collateral Consequences of Criminal Convictions), 98 ILL. B.J. 432, 432 (2010) ("Criminal justice experts urge, and a recent supreme court decision demands, that lawyers and judges better understand and advise defendants of these consequences prior to their guilty plea."). It is hard to imagine, given their ubiquity, that competent judges today are not aware at a minimum that there will be collateral consequences, as well as being aware of what are at least some of those consequences. See Catherine A. Christian, Awareness of Collateral Consequences: The Role of the Prosecutor, 30 N.Y.U. REV. L. & SOC. CHANGE 621, 621 (2006) ("The 'collateral consequences' of a criminal conviction . . . have multiplied exponentially in the past decade. For an ever-expanding multitude of offenders . . . these consequences dwarf the severity of the criminal sanction itself.") (quoting then-New York County Bar Association President Norman Reimer). The recent Padilla decision may indeed require judges to inform defendants pleading guilty of all, or at least many, of the collateral consequences of conviction. See Margaret Love & Gabriel J. Chin, The “Major Upheaval” of Padilla v. Kentucky: Extending the Right to Counsel to the Collateral Consequences of Conviction, CRIM. JUST., Summer 2010, at 36, 37, available at http://adwww2.americanbar.org/sections/criminaljustice/CR109200/PublicDocuments/UpheavalPadillaKentucky.pdf. (“While Padilla’s implications for cases involving deportation are clear, it may also require lawyers to consider many other legal implications of a plea.").

\textsuperscript{11} For a compilation of collateral consequences imposed by law, see KELLY SALZMANN & MARGARET COLGATE LOVE, ABA, INTERNAL EXILE: COLLATERAL CONSEQUENCE OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (2009), available at http://www.abanet.org/cecs/inter-nalexile.pdf.

\textsuperscript{12} One example of social custom is the reluctance to hire ex-cons. One author noted a combination of legal bars from certain jobs and employer reticence to hire may make getting a job extremely difficult:

A guilty plea and the resulting conviction may completely bar employment or, at least, drastically limit available job opportunities for a defendant. Most job applications and interviews ask an applicant if he or she has ever been convicted of a crime, and many employers conduct criminal background checks for prospective employees. Any employer can choose not to hire a given individual on the basis of that applicant’s criminal record. Individuals with criminal records may also be denied opportunities to enlist in or maintain positions within the armed forces. Guilty pleas may also prohibit an individual from holding public office, or may result in revocation or suspension of a defendant’s business or professional license by administrative bodies. Charles F. Wilson et al., What the Courts May Not Be Telling Defendants, Bos. B.J., Jan./Feb. 2003 at 10, 12.

\textsuperscript{13} One author has denounced this state of affairs, recommending instead that: Collateral consequences should generally be imposed only if necessary, based on preventive and, to a lesser extent, retributive and denunciatory grounds. Sweeping, automatically imposed restrictions, which are reminiscent of mandatory sentences, should be abolished since they are unnecessarily punitive. Sentencing courts should announce all collateral consequences publicly and factor them into the overall sentence. Those collateral consequences that are retained should be based on guidelines constructed primarily on preventive grounds. New legislation imposing collateral consequences should include sunset provisions so as to force lawmakers to assess their efficacy. Norma V. Demleitner, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences, 11 STAN. L. & POL’Y REV. 153, 154 (1999).
lators and bureaucrats, are responsible for these unintended pains.\textsuperscript{14} These harms can include such things as mandatory deportation, eviction from public housing, flat prohibition against holding certain jobs, inability to get any job after release, and loss of contact with family, friends, and children.\textsuperscript{15} Because the harms are unintended by the judge as crime-warrior, the harms are viewed as “collateral.”

But the judge also knows that, as in war, third parties uninvolved in the conflict may suffer. Children grow up without fathers; wives raise those children alone, without the financial or emotional support of their spouses; entire families struggle in ways that can perpetuate a cycle of crime and poverty.\textsuperscript{16} The harms extend well beyond the defendant’s immediate loved ones: neighborhoods lose the stability stemming from too many men torn from those with whom they are close; entire societies suffer higher taxes and lost productivity as injuries to neighborhoods and third parties become criminogenic rather than rehabilitative; angry, distrustful residents become detached from law enforcement, unwilling to lend it aid in promoting neighborhood safety.\textsuperscript{17} In this sense the harms to third parties, groups, and entities are, as in war, “collateral.”

B. The Analogy’s Failure: How Real War and the War on Crime Are Different

1. Greater Certainty and Particularity of Harm

Yet there are differences too between the collateral damage inflicted by war and the collateral consequences inflicted by the criminal justice system. In war, the bomber does not know which innocents will die. In the war on crime, the judge certainly knows that this particular offender will suffer harms beyond those included in the offender’s sentence and surely knows at some level that his family and


\textsuperscript{15} See, e.g., Catherine A. Christian, \textit{Awareness of Collateral Consequences: The Role of the Prosecutor}, 30 N.Y.U. REV. L. & SOC. CHANGE 621, 621 (2006) (“Some examples of the collateral consequences of a criminal conviction are: (a) disenfranchisement; (b) employment; (c) public housing (Narcotics Eviction Programs); (d) driving privileges; (e) firearms possession; (f) immigration status; and, (g) civil forfeiture.”). After the recent \textit{Padilla} decision, the court may also be obligated to inform a defendant pleading guilty of all (or many of) the collateral consequences of conviction. See Love & Chin, supra note 10.


\textsuperscript{17} See id.
neighbors will suffer too.18 Furthermore, in war, when collateral damage occurs and how bad it will be are mere questions of probability.19 In the war on crime, collateral damage and its extent are knowable certainties.20 There is an argument to be made, to which I will return shortly, that this greater certainty and particularity of supposedly unintended harm carries with it more troubling moral implications than is the case with the collateral damage involved in real war.

2. The Offender, Unlike the War-Torn Villager, Is Not Truly “Innocent”

There is, of course, another side to the moral picture. Most of the civilians in physical wars are assumed to be truly innocent non-combatants. Perhaps they support the enemy soldiers in their hearts, but they do not participate in the struggle with their bodies.21 By contrast, the criminal offender is clearly viewed as a combatant, indeed as one of the central enemy combatants.22 Even though the sentencing judge did not decide that the offender deserved the so-called “collateral consequences” of his crime, there may be a sense that we should not care. After all, had he not done the crime in the first place, he would not be suffering these consequences.23 Furthermore, for many of the collateral consequences, someone, perhaps the legislature or the executive, has decided that anyone convicted of any crime, or perhaps of certain particular crimes, automatically deserves these extra punishments.24 So these punishments are, after all, intended ones and deserved ones, not truly collateral at all.

18. See supra text accompanying notes 2-4.
19. See supra note 4 and accompanying text (discussing “expectancy” of lost life and the need to balance it against military goals under the law of war).
20. Cf. MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA, 4-6, 104-10 (1996) (arguing that racial disparities in the war on drugs were foreseeable to, and probably actually foreseen by, the legislators and executives who declared it).
21. Indeed, this non-involvement in combat is what defines the distinction between civilians and combatants in international humanitarian law. See CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME II: PRACTICE PART I, at 100-07 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).
22. Thus the phrase the “war on crime.” See Mary Louise Frampton et al., Introduction, in AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION 1-12 (Mary Louise Frampton et al. eds., 2008) (defining the war on crime and explaining its progress, while imagining a post-war future).
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But this perspective has serious flaws. First, it once again treats the offender as a thing—a member of a class rather than a unique individual judged under unique circumstances. To treat someone as a member of a class rather than a uniquely valuable individual is to dehumanize him. That dehumanization has ill consequences for the offender, for his rehabilitation, and for the moral values that best bind us together as a people. This too is a point that I will elaborate on shortly.

3. Offender, But Not Villager, Autonomy

Second, unlike in physical war, in practice an offender makes a choice about what harmful fate he will suffer. Women and children living near a bomb site are not asked whether they want to be bombed or not. An offender, of course, does not ask to be prosecuted and convicted. And his choices are limited. But he has more choice than do the women and children near the bomb sites. Ninety percent of criminal convictions arise from guilty pleas. Guilty pleas must be knowing, intelligent, and voluntary, at least as the law defines those terms. The law requires judges to engage in guilty plea colloquies to ensure that offenders know and understand their rights, the facts to which they are admitting, the fate to which they are submitting. These colloquies can be long and detailed, informing the offender of every trial right, of the sentencing guidelines calculations facing him, and of a host of other matters. Judges also ask defense attorneys to verify on the record that they have explained all the lost rights and likely resulting harms to the offender by pleading.

25. See Andrew E. Taslitz, Myself Alone: Individualizing Justice Through Psychological Character Evidence, 52 Mo. L. Rev. 1, 3-4 (1991) (explaining the importance of treating people as unique individuals).
27. Cf. id. at 187 (discussing similar points in the context of de-individualization under the Fourth Amendment).
28. See infra text accompanying notes 40-57.
29. See Brady v. United States, 397 U.S. 742, 752 n.10; U.S. Dep’t of Justice, Sourcebook of Criminal Justice Statistics 528-29 tbl.5.36 (Timothy J. Flanagan & Kathleen Maguire eds., 1991).
31. See id. at 123-25; Fed. R. Evid. 410 advisory committee’s notes.
33. See id. at 183-91.

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Yet, for most of our recent history, these colloquies did not inform criminal defendants of any of the collateral consequences of conviction.34 Today, most defendants are still likely largely ignorant of the full panoply of collateral harms awaiting them.35 Such ignorance cannot be consistent with a knowing plea agreement with the prosecutor.36 Our system justifies plea deals as legitimate precisely because they embody at least a theoretical commitment to the suspect’s autonomy in a culture that glorifies individual choice via contract and civilized competition.37 The plea deal saves the state time, money, and the risk of acquittal but respects the offender by allowing him some significant degree of voice and autonomy in his fate. That justification collapses when the offender is ignorant of exactly just what fate he has signed on to.38

4. Exclusion of Third Parties from Equal Citizenship

Third, the purported moral justification for collateral consequences ignores most of the harms done to the truly innocent—the offender’s family, friends, and neighborhood.39 There may be an unstated justification for this indifference: the sense that anyone associated with the offender or anyone like him is somehow tainted.40 Those who would associate with him, we suspect, are themselves involved in criminal activity but not yet caught. Alternatively, they

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35. See Love & Chin, supra note 10, at 36 (urging improvement in defense counsel’s advising pleading defendants of the collateral consequences of conviction, thus implying that the current state of affairs leaves much to be desired).
36. See id. at 40-42.
40. Kenneth L. Karst, Belonging to America—Equal Citizenship and the Constitution 4 (1989) (“The most heartrending deprivation of all is the inequality of status that excludes people from full membership in the community, degrading them by labeling them as outsiders, denying them their very selves.”); Demleitner, supra note 39, at 153 (using Karst’s quote to encapsulate the attitude of our legal system’s participants toward convicts, their status in society, and the collateral consequences of their convictions).
must be low-lifes of some sort to be involved with him in the first place. Likewise, neighborhoods that can breed such as him must be blighted, undeserving areas in the first place. These are the undeserving poor, undeserving, that is, of a good life. But their laziness, moral torpor, and occasional evil make them quite deserving of any harms that befall them. Those who are truly deserving would not be in their position, or if temporarily brought low, will by dint of sheer hard work and moral rectitude eventually work their way out of their misfortune no matter what additional obstacles the state may throw in their way. We are each responsible for, almost solely responsible for, the good and bad that life brings us.

i. Society Bears Zero Responsibility for Individual Wrongs

This moral justification is extraordinarily dangerous. It frees government and society from any sense of responsibility for the ills that contribute to crimes occurring in the first place, a position hard to square with the findings of modern social science. That does not mean that individuals are not also partly responsible for what befalls them. But to ignore social forces’ contribution is to let ignorance worsen crime and its attendant harms rather than to cure them.

42. Cf. Owen Fiss et al., A Way Out: America’s Ghetto’s and the Legacy of Racism 5-6, 28-43 (2003) (arguing that certain geographic areas are so blighted by poverty and crime that they should just be abandoned, dispersing their residents throughout more desirable locations).
44. See id.
46. “Our choices often lead to heart disease, diabetes, underage drinking, drugs, violence, and abuse. Soaring health and public safety costs are sometimes unfairly passed on to others. But more importantly, by ignoring or accepting sellish choices that cause the abuse, children, families and entire communities are destroyed.” Governor Sarah Palin, Alaska State of the State Address (Jan. 15, 2008), available at http://www.stateline.org/live/details/speech?contentId =273357.
47. See Taslitz, The Rule of Criminal Law, supra note 23, at 45-46.
48. See id. at 46.
49. See id. at 44-49.
ii. The Poor Are Evil

Moreover, this justification also equates poverty with evil. In doing so, it marks entire groups of people as excluded from full participation, unworthy of what society has to offer. Additionally, the disproportionate poverty of minority racial groups, the media’s role in magnifying a sense of those groups’ contribution to crime and moral decay, and those groups’ disproportionate involvement in the justice system all mean that skin color or ethnicity become deeply associated with both poverty and crime. In this way, poor minority communities themselves become branded as evil, diseases infecting the social body and needing to be excluded from it. Surely such a gaping wound to equality-based values cannot be blindly accepted as consistent with a constitutional culture supposedly committed to equal respect for all.

iii. Indifferent Lawyers

Lawyers bear a heavy burden concerning this state of affairs. It is lawyers who can help to ensure that offenders’ decisions are more informed. It is lawyers who can most effectively agitate for change in substantive and procedural laws. It is lawyers who can fight best in
individual cases for minimizing collateral harms.\(^{60}\) And it is lawyers, particularly prosecutors—bound by the duty to do justice—and judges, bound by an even broader justice obligation—who bear obligation to society as a whole and not only to certain individuals.\(^{61}\)

5. What This Symposium Adds to the Debate

Much has been written about collateral consequences.\(^{62}\) But most of that writing focuses on the harm to the suspect, only incidentally the harm to society.\(^{63}\) Too little of the commentary on the social harms done focuses on the dangers of group-based exclusion in a thorough fashion or touches upon the moral evils done in the name of justice.\(^{64}\) Some of that writing focuses on autonomy concerns\(^ {65}\) but not enough—concerns that, our speakers will soon reveal, become especially salient in light of a recent United States Supreme Court decision, *Padilla v. Kentucky*.\(^ {66}\) Only a few pieces focus on the lawyer’s role in a way that recognizes the lawyer’s impact on the broader society and the full strength of her obligation in this area to her client. It is these gaps that this Symposium seeks to fill. Panel One thus focused on autonomy, Panel Two on exclusion, and Panel Three on lawyering.
To further set the stage for your fully appreciating the talks to come, I want briefly to return to two of the moral points I have made in just a tad more detail: the roles of certainty and particularity in moral responsibility. I also want to make a brief comment—inspired by one of our law journal students—Melissa Crespo,67 about society’s reciprocal obligation to right the wrongs it has done to third parties.

II. MORAL GAPS BRIEFLY ELABORATED

Let me elaborate briefly on some of the moral implications of collateral consequences that I have identified above, starting with the concept of certainty.

A. Certainty

In the criminal law, the offender’s relative certainty that his actions will harm another is considered an important indicator of his moral culpability.68 The lightest punishments are thus reserved for the negligent or strictly liable offenders, who are not consciously aware of any risk that they will cause harm.69 But ever-harsher punishments are respectively awarded to the reckless offender, who is aware of a substantial and unjustifiable risk of harm; the knowing offender, who is aware of a practical certainty that his actions will cause harm; and the purposeful offender, who wants the harm to occur and is convinced he will achieve it.70

Two further doctrines elaborate on the role of certainty in criminal culpability. Take the classic hypothetical in which a man is offered $50,000 by a shadowy stranger simply to fly down to a town just across the United States border in Mexico to drive a car there back up to Houston, Texas.71 The Mexican town is well-known as a drug-trafficking hub, and the man has heard the town’s reputation being discussed on the evening news. The man is convinced that the car contains ille-

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68. See Taslitz, Myself Alone, supra note 25, at 14-18 (discussing this point in the context of defining the core mental states of concern to the criminal law and the idea of deep versus shallow case logics).
69. See id. at 20-23.
70. See id.
71. This specific hypothetical is mine, but it is a variation of one routinely used in teaching first-year criminal law, as I can attest to from my twenty-two years of doing so, and reflective of much case law. See, e.g., United States v. Cisneros, No. 09-40703, 2011 WL 721534, at *4-5 (5th Cir. Mar. 1, 2011) (applying the willful blindness doctrine to a drug case); United States v. Rojo, 374 F. App’x. 285, 287-88 (3d Cir. 2010) (applying the willful blindness doctrine to a drug case).
gal drugs that he will be smuggling into the United States. But for this very reason, the man chooses never to look in the trunk or otherwise to inspect the car. He so chooses because, if stopped by border or other police, he wants legitimately to deny true knowledge of the drugs’ presence. He cannot “know” what he has not seen. But, under the doctrine of willful blindness, the law treats this effort to cheat the administration of justice by trying not to confirm one’s strong suspicions the same as if the offender actually knew that the car contained drugs.72 There are several reasons for this rule. First, any contrary rule encourages offenders to cheat the administration of justice by manipulating circumstances when their moral character is as severe as that involved with true knowledge.73 The offender would not change his behavior if he truly “knew” about the drugs and avoids confirmation of his suspicions only to protect his selfish needs from the eyes of the law. Second, even if he would have changed his behavior to conform with certain or “true” knowledge,74 he avoids that knowledge to salve his conscience falsely.75 This is a form of moral cowardice.76 It is also a form of self-deception, of misleading ourselves about our true motives, hiding full conscious awareness of the nature of things so that we can self-justify what we know at some level to be inappropriate, or even deeply morally wrong, actions.77

Psychologists would consider this form of self-deception one manifestation of “motivated reasoning”—reaching conscious conclusions that we can live with that are unconsciously or semi-consciously motivated by our self-interest.78 Permitting such self-deception coun-


73. See generally James Morton, Wilful Blindness Is Not a Criminal Defense, Nat’l Post (April 21, 2010, 9:00 AM) http://network.nationalpost.com/NP/blogs/fullcomment/archive/2010/04/21/james-morten-wilful-blindness-is-not-a-criminal-defence.aspx (“Legally, wilful blindness describes a situation where someone tries to avoid criminal liability by intentionally ignoring the obvious. For example, someone transporting packages containing illegal drugs might say he never asked what the contents of the packages were, and therefore lacked the requisite intent to break the law. Generally speaking, the defense does not work because wilful blindness amounts to knowledge. And knowledge of wrongdoing is a crucial element of an offence.”).

74. See Model Penal Code § 2.02(b) (defining knowledge).

75. See Andrew E. Taslitz, Willfully Blinded: On Date Rape and Self-Deception, 28 Harv. J.L. & Gender 381, 394-98 (2005).

76. See id. at 388.

77. See id. at 395-96.

tenances a kind of moral hypocrisy, in which we insist to ourselves and perhaps to others that our actions were not wrong, or at least not as reprehensible as others might make them out to be, when we know at some level they are indeed quite reprehensible. In other words, we say one thing but do, and at some level believe, another, and that is highly morally questionable. Self-deception also permits us to avoid the kind of moral struggle and critique we would wage internally, and perhaps with trusted others, if we were consciously honest with ourselves about our true awareness of the surrounding circumstances.

For judges, defense counsel, and prosecutors to ignore the collateral consequences of conviction, and to ignore the question whether a particular individual deserves them, is also a form of self-deception akin to the legal notion of willful blindness. Everyone in the courtroom is aware at some level that arrest, conviction, and sentencing will have grave consequences for the offender that are not formally part of his sentence. All can behave as if the sentence is, for example, simply five years on probation. Yet they are aware, even if not always at that moment consciously considering, that he is also being sentenced to eviction from public housing, exclusion from the job market, denial of educational loans, and a host of other ill effects. They are further aware that these “unsentenced” aspects of sentencing raise the likelihood of recidivism; that recidivism means a probation violation, which in turn means prison, but they turn a blind eye to consider whether they could avoid these consequences via another path. Alternatively, they deny the offender the dignity of free choice by keeping him ignorant of the full consequences for his life course of, for example, his pleading guilty. Even if they are hamstrung in individual cases, by avoiding full conscious awareness of the harm they inflict every day on offenders, they avoid the tugs of conscience that can compel them to pressure legislators and law enforcement to change

79. See Taslitz, Willfully Blinded, supra note 75, at 431-32.
80. See id. at 434 (discussing living with integrity).
81. See id. at 394-95.
82. See supra text accompanying notes 10-20.
83. See id.
85. See supra text accompanying notes 83-84.
course. They likewise put out of their minds their awareness of the suffering that families, friends, neighborhoods, local, state, and national communities may suffer as a result of their actions as well. But even semi-conscious awareness and the putting out of mind of troubling thoughts are, in the view of many philosophers and empiricists, troubling forms of self-deception. In short, these are ways to avoid moral struggle over the fate of the individual before him, those similarly situated, and the innocent families and neighborhoods whose lives the individual effects.

Perhaps more accurately, many in the criminal justice system are aware that some sort of ill effects other than the precise sentence imposed will occur, but they are so practiced at avoiding knowledge that they do not know what all those effects are or how they will impact a specific individual. They further believe that they can only guess at third party effects, that third parties are in fact ultimately morally responsible for their own fates, and that nothing can be done about the problem anyway because collateral harm is an inevitable concomitant of criminal punishment. Several responses to this line of reasoning are possible. Another analogy, that to the law of depraved heart murder, helps. Ordinary reckless killings are usually considered some form of manslaughter and are less severely punished than murder. But one kind of recklessness—called depraved heart at common law, given a more technical-sounding but nearly identical name under the Model Penal Code—is considered murder. Courts disagree about what raises ordinary recklessness to depraved heart murder. Yet one common approach is to look to the size of the risk

86. See Taslitz, Willfully Blinded, supra note 75, at 394-96 (noting that there are many types of self-deception, including avoiding consciously thinking about things known at some level in an effort to avoid moral responsibility for action).
87. See id. at 413-23 (discussing the forms of self deception); supra text accompanying notes 10-18 (discussing these types of collateral consequences).
88. See Taslitz, Willfully Blinded, supra note 75, at 388-96.
89. See supra text accompanying notes 16-17, 60-63.
90. Cf. Taslitz, Myself Alone, supra note 25, at 18-19 (discussing the morally numbing effects of assembly-line justice).
91. See supra text accompanying notes 41-48 (making similar points from which the current points follow).
93. See id. at 520-21, 546.
95. See Dressler, supra note 92, at 519; see also Alan C. Michaels, Acceptance: The Missing Mental State, 71 S. Cal. L. Rev. 953, 1007-13 (1998).
of harm. If the size of the risk of harm is high and the individual was consciously aware of some risk of the general type of harm involved—in homicide, of death or serious bodily injury that could result in death—that would constitute murder. Awareness of a risk, though short of knowing the precise details of the risk or the mechanisms by which it may be realized, creates deep moral responsibility for the resulting harm if the harm was sufficiently serious and its risk sufficiently grave. But ample research suggests that collateral consequences cause grave harms with a high degree of certainty. Nor is the argument that nothing could be done about it convincing. Some potential harms can be waived or minimized by the proper structuring of pleas or creative exercise of the prosecutor’s charging function. Other potential harms can be minimized, if not eliminated entirely, as our authors will explain.

Finally, some criminal justice system actors may claim simple negligence: total ignorance of collateral consequences flowing from a conviction. This ignorance seems incredible given the current attention to the topic. Yet, if true, does it not make sense to expect professionals to do better and to be morally responsible for curing their own ignorance? Granted, true ignorance may fail, under the legal and moral analogies to willful blindness and depraved heart murder discussed above, to bring total moral responsibility, for those doctrines require more than mere negligence. But that responsibility cannot be entirely avoided by the plea, “I did not know.” Freely-chosen incompetence by the professional upon which the system relies to administer “justice” is never a plea that should receive any welcome at all.

96. Id. at 1010; see John C. Duffy, Reality Check: How Practical Circumstances Affect the Interpretation of Depraved Indifference Murder, 57 DUKE L.J. 425, 435 (2007).
97. Id. at 430-31.
98. Id. at 438-39.
100. See Smyth, supra note 39, at 45; Taslitz, Judging Jena’s D.A., supra note 61, at 447-52 (discussing how the prosecutor generally can use the charging function to minimize social harm).
101. See Taslitz, Willfully Blinded, supra note 75, at 440 n.346 (“The whole point of a negligence standard is to impose liability for what an offender should have known or believed rather than what he in fact thought or believed in a particular case.”).
102. Cf. EDWARD J. KIONKA, TORTS IN A NUTSHELL 342 (5th ed. 2010) (“Professional negligence is the failure to exercise the degree of care and skill that is exercised by reasonably well-qualified professionals in that field.”).
B. Particularity

Individualized justice is often said to be a core moral principle of criminal justice. Each person is to be treated as a unique individual to be punished for what he has done and thought or felt while doing it. Careful consideration of the person before the court or jury, not reliance on stereotyping or raw generalizations, is the goal. Psychological research also reveals a concern with being respected for who we uniquely are as central to our sense of being treated justly. When our status as an individual is ignored, we are insulted. Correspondingly, however, harms directed at us as individuals rather than aimed at some amorphous mass are taken particularly personally.

A related but different principle of moral psychology concerns not the person harmed but rather the one doing the harm. In the infamous trolley problem, subjects face the prospect that a speeding trolley will kill five people in its wake but that pulling a switch will divert the trolley to another track, killing only one person. Most people will pull the switch on the theory that the good of the many outweighs the good of the one. But when faced with an alternative scenario in which a footbridge being trod by a very overweight man is above the tracks of the racing trolley and pushing the fat man off the bridge will kill him but save the other five persons, most people will not push him to his death. The subjects have trouble explaining why they treat the two situations differently. One fair explanation, however, is that it is harder to be so much more personal—to attribute his death not to the abstraction of a flipped switch but to the actor’s personal involvement, his face-to-face, hand-to-hand killing of another human being. Particularity matters.

Indeed, ample psychological research shows the greater moral difficulty we have inflicting harm on others whose faces we can see,

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103. See Taslitz, Myself Alone, supra note 25, at 4, 7; Taslitz, Individualized Suspicion, supra note 26, at 145-46 (2010).
104. See Taslitz, Myself Alone, supra note 25, at 14.
105. See id. at 18-19.
106. See Taslitz, Individualized Suspicion, supra note 103, at 183-84.
107. See id. at 184.
108. See Sherry F. Colb, Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms, 73 LAW & CONTEMP. PROBS. 69, 73 (2010).
110. Id. at 1395-96.
111. Id. at 1409.
112. Id.
113. Id. at 1400-01.
Destroying the Village to Save It

whose presence we can feel.114 If we know the person socially or otherwise, inflicting harm on him, absent reasons for a vendetta, can be all the harder.115 This observation is true the more we learn about them in ways that reflect their ordinary humanity.116 It is far harder to harm someone else whom you think of as a father, a son, a husband, or a church member than as a nameless individual.117

Though some moral theorists criticize the relevance of greater knowledge of the particularity of another and the closeness of a relationship with another,118 others see it as quite relevant.119 We are probably biologically programmed to feel the greatest affinity for those with whom we have personal—indeed visual, aural, and physical—contact.120 Our sense of empathy—of being to stand in that other’s shoes and see the world as she does—is strongest for such persons.121 But empathy and other cognitive and emotional states necessary to moral judgment improve with practice.122 If we cannot feel empathy for those nearest to us, we are even more likely not to feel it from afar.123

The point is that we probably feel, and a significant number of moral theorists argue we should feel, most morally responsible for harms we inflict on specific, real, flesh-and-blood individuals than on unseen masses from a distance.124 Furthermore, those we harm are likely to be more offended should we wreak undeserved moral harm on them in this personal fashion.125 Yet this is arguably just what hap-

114. Thomas E. Edgar, Mental Health and Moral Behavior, 42 INDIVIDUAL PSYCHOL. 92, 94 (1986) (“Once we have made a thorough-going identification of ourselves with others, then doing harm to others becomes unreasonable because others and ourselves become co-identities.” (emphasis added)).
115. Id.
117. See supra note 114.
118. See Frederick Schauer, Profiles, Probabilities and Stereotypes ix (2003) (“My aim in this book is to challenge the primacy of the particular. . . . I defend the morality of decisions by categories and generalizations, [and] . . . I look more sympathetically than is fashionable nowadays at profiles and stereotypes, which are little more than generalizations in street clothes.”).
121. See id. at 420.
122. See id. at 433.
123. See id.
124. See id. at 429-31.
pens at criminal sentencing. A real and specific individual stands before the judge, who imposes not only a formal sentence, but also all the invisible ones that we will discuss in this Symposium.\textsuperscript{126} Because no decision maker has gone through the process of deciding that this individual deserves these specific punishments for his specific crime given his unique actions and circumstances in this case, no one has truly decided that these collateral punishments are deserved.\textsuperscript{127} That violates principles of individualized justice and the moral sense of the importance of particularity.\textsuperscript{128}

When a bomb crashes in a distant village halfway across the planet from us, sent to its target by a President promising just such attacks, most of us feel little, if any, moral responsibility for what occurs.\textsuperscript{129} Yet if we killed the same villager personally, our feelings would be quite different.\textsuperscript{130} The analogy to collateral consequences may seem strained, both because imprisonment seems far less harmful than death and mutilation from a bomb and because, in fact, many villagers will die or be disabled. But note that this moral judgment turns on the nature of the harm inflicted and the numbers of persons hurt. It does not turn on the more personal versus the more distant nature of harm infliction. If we know that some governmental policy will result in higher child poverty rates, likely resulting in higher numbers of sick children and higher child mortality rates, we feel far less responsible than if we were asked to kill a single, particular child by our vote.\textsuperscript{131} Collateral consequences are, at least on the day of sentencing in the courtroom, aimed at a particular person not judged to deserve the harm. There is at least an argument that this aspect of imposing these consequences—ignoring differences in the degree of harm inflicted or the numbers hurt—is more reprehensible than the harm inflicted on unknown others as occurs in collateral damage in

\textsuperscript{126} See generally Invisible Punishment, supra note 99 (discussing the impact of collateral consequences on the individual and society, including disenfranchisement; ineligibility of ex-offenders for welfare benefits, public housing, and employment; gender imbalance in inner-city neighborhoods; and destruction of the family resulting from a generation of children with incarcerated parents); see supra text accompanying notes 16-17 (discussing the types of collateral consequences that stem from a conviction).

\textsuperscript{127} See supra text accompanying notes 15-17.

\textsuperscript{128} See supra text accompanying notes 25-27.


\textsuperscript{131} See supra text accompanying notes 109-13.
warfare. Of course, the harm done with invisible punishments, though inflicted one-by-one on each offender, in total affects many offenders, and there are far more third parties who suffer as well.\textsuperscript{132} The numbers harmed may therefore even be greater than in the village bombings. It is, therefore, only debates about the severity and avoidability of the harm done that can distinguish the two cases.

One related point: In a recent line of cases starting from \textit{Apprendi v. New Jersey}\textsuperscript{133} and \textit{United States v. Booker},\textsuperscript{134} the United States Supreme Court held that the jury, not the judge, must pass on the existence of facts that may raise a sentence beyond its statutory maximum.\textsuperscript{135} That is particularly the case under a system of mandatory sentencing guidelines, in which the sentence applicable based solely upon the jury verdict—that is, without additional facts found at sentencing—is considered the statutory maximum.\textsuperscript{136} Restated, the Court implicitly held that facts that reflect the moral gravity of the harm done, including facts that go to state of mind and related moral culpability of a particular offender, are so centrally linked to the purposes of an American criminal justice system that the voice of the community, as embodied in the jury, must pass on those facts in sentencing.\textsuperscript{137} But that principle, I have been arguing, applies equally to invisible punishments. Neither judge nor jury generally reflects on the morally and legally \textit{deserved} nature of automatically imposed criminal punishment.\textsuperscript{138} That failure is unacceptable. Importantly, the Court has also held that the jury-determination principle does not apply to advisory guidelines systems because in those systems what generalizations stated in guidelines might apply can be ignored if they are unjustified in the particular case.\textsuperscript{139} Advisory guidelines systems thus still retain a commitment to individualized punishment based upon a specific assessment of what the particular

\begin{footnotesize}
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\item \textsuperscript{132} See supra text accompanying notes 15-17 (discussing harms to families and communities).
\item \textsuperscript{133} 530 U.S. 466 (2000).
\item \textsuperscript{134} 543 U.S. 220 (2005).
\item \textsuperscript{136} See Darmer, supra note 135, at 535-36.
\item \textsuperscript{138} See supra text accompanying notes 13-17.
\item \textsuperscript{139} See \textit{Booker}, 543 U.S. at 246.
\end{enumerate}
\end{footnotesize}
individual before them deserves. Likewise, a system that would at least permit eliminating certain or all collateral punishments in individual cases would be far preferable to the mandatory, generally applicable one that governs us now.

C. Reciprocity

I want to add a brief word about the idea of reciprocity. I will not say much here, both because I have written about the idea more extensively elsewhere and because, as I noted earlier, a student of mine has explicitly applied reciprocity ideas to the problem of collateral consequences. Nevertheless, the point is worth making because it implicitly cuts across so much of the discussion thus far and the discussion to come in the Symposium papers.

Reciprocity turns on the idea of debt. If one person treats you in a positive way, reciprocity demands that you too do them a good turn. Correspondingly, if you treat them badly, they are entitled to return the favor. Reciprocity can occur among individuals, groups, and entire communities. Criminal punishment itself is a form of reciprocity in which the community pays back the criminal for the harm he has inflicted on society, or, restated, the criminal repays the debt he owes society from taking away part of its members’ sense of security. But if criminal punishment is excessive—if it inflicts more harm on the criminal than he deserves, then society has harmed him and owes him a debt. Collateral consequences imposed without a finding that the criminal deserves them accordingly fit into this category. That creates an obligation on society to right its wrong to the

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141. See Crespo, supra note 67 (applying the ideas discussed in my piece on reciprocity in corporate criminal punishment and other ideas to the context of collateral consequences).
144. See id. at 24, 70, 89-91, 111, 113, 142-44, 166.
145. See id. at 4-5, 12, 28, 70, 76-78, 81-82.
146. See Andrew E. Taslitz, Race and Two Concepts of the Emotions in Date Rape, 15 WIS. WOMEN’S L.J. 3, 76 (2000).
148. See supra text accompanying notes 91-99 (discussing lack of individualized findings that collateral consequences are deserved).
individual. But, still worse, where, as is argued here, collateral consequences are imposed on entire communities who have done no wrong as an entity, and most of whose members have likewise done no wrong,\(^\text{149}\) then society owes a debt to that community.

Society thus has an obligation to encourage imposition of collateral consequences that are no longer collateral in the sense that they are imposed after an individualized judgment that they are deserved.\(^\text{150}\) Correspondingly, society has a duty to minimize the wounds that collateral consequences inflict on communities and to heal them when they occur.\(^\text{151}\) The criminal justice system is the societal arm that strikes the undeserved blows against individuals and communities alike. It is thus that arm that must rise again with scalpel rather than sword, healing touch rather than fist.

### III. SUMMING UP

I want to close by returning to the physical warfare analogy. During the Vietnam War, American troops destroyed a Vietnamese village named Ben Tre, also known as My Lai.\(^\text{152}\) No one in the village resisted American troops when they entered the area.\(^\text{153}\) Searching troops captured only three weapons.\(^\text{154}\) An officer commanded his troops to take no prisoners but to destroy everything in the village.\(^\text{155}\) The troops complied, killing men, women, children, and babies.\(^\text{156}\) Over five hundred Vietnamese died that day.\(^\text{157}\) An American major later declared the logic behind this destruction. He said the following:

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\(^{149}\) See supra text accompanying notes 40-46 (making the argument that communities are so harmed).

\(^{150}\) See Crespo, supra note 67.

\(^{151}\) See id.


\(^{153}\) See Cookman, supra note 152, at 156; see also Lippman, supra note 152, at 301-14.

\(^{154}\) See Lipmann, supra note 152, at 309; see also Richard Hammer, The Court-Martial of Lt. Calley 5-21 (Coward et al., eds. 1971).

\(^{155}\) See Cookman, supra note 152, at 156; see also Lippman, supra note 152, at 304-05.


“It became necessary to destroy the village in order to save it.”\textsuperscript{158} By this he apparently meant that terrorizing civilians to deter them from supporting the North Vietnamese was necessary to winning the war, thus saving South Vietnamese society from the threat of communism.

My Lai did not involve collateral damage. It involved the intentional infliction of pain, fear, and death on seemingly innocent persons. I am not, therefore, arguing for a direct analogy. Nor am I convinced that all collateral consequences of convictions can or should be eliminated entirely. But our current approach to collateral consequences and our implicit rationales for it arguably mirror the major’s justification for the harm done at My Lai: wreak destruction as necessary to winning the war on crime. I am not convinced that the degree or nature of the destruction that we currently do in the war on crime is indeed necessary to winning the war. Indeed, it may help us to lose it and, in the process, to lose our political souls. If American society is the modern metaphorical village, destroying society to save it makes no sense at all.

IV. SAVING THE VILLAGE: WHAT OUR AUTHORS COUNSEL

The authors in this Symposium themselves suggest less destructive ways for society to save itself from the wrongs of collateral consequences. The authors recommend three primary remedies: (1) increasing informed choice; (2) more creative lawyering; and (3) fuller diagnosis of the problem.

A. Increasing Informed Choice

Professor Gabriel J. Chin, in \textit{Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Pleas},\textsuperscript{159} addresses complaints that making guilty pleas more informed decisions by advising clients more fully of the collateral consequences of the plea is unduly burdensome. Chin argues that more informed and open consideration of collateral consequences will change the very nature of the guilty plea process in a positive way. Specifically, a defendant aware of severe collateral consequences might be willing to exchange...

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\item \textsuperscript{158} Peter Arnett, \textit{Grim Decision for Military: It Became Necessary To Destroy Town To Save It,} \textit{The Danville Register,} Feb. 8, 1968, available at http://lh3.ggpht.com/_5XvBYfxU_dM/S25JztMq7xI/AAAAAAAABrA/pkhdW1H73ag/Ben%20Tre%20article%20-%20high highlighted-8x6.jpg?imgmax=800.3.
\item \textsuperscript{159} 54 How. L.J. 675 (2011).
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freedom from those consequences via a carefully structured plea for a longer sentence or similar concessions. This suggestion is not fanciful. For example, an offender who has spent almost his entire life in the United States might prefer one year extra time in prison to deportation to a country that, to him, is not his own. Guilty pleas might also be structured to avoid over-punishment that may impair effective re-entry into society, a goal shared by defense counsel and prosecutors alike. Individual research costs on defense counsel in identifying the many potential collateral consequences that may be relevant to a particular case will soon be low because the American Bar Association is compiling a list of such consequences in readily usable form. Chin also proposes using a standard Notice of Additional Legal Consequences to advise offenders of the most important and likely collateral consequences of their plea. A lawyer asking a series of standard questions should be able, in conjunction with the ABA materials, to identify additional relevant collateral consequences. Accordingly, Chin concludes, ensuring fully informed pleas are not an unreasonable burden to impose on counsel, and such pleas may increase client autonomy and reduce the number and severity of undeserved collateral consequences. I note as well that they restore an element of individualized assessment that a particular consequence is deserved in this case.

McGregor Smyth, in his piece, From “Collateral” to “Integral”: The Seismic Evolution of Padilla v. Kentucky and Its Impact Beyond Deportation, also explores the scope of the duty to promote client autonomy during guilty pleas. Smyth reads Padilla broadly to require informing the client of every collateral consequence that is an “integral part” of criminal punishment in counseling the client whether to plead guilty. Smyth argues that Padilla in fact implies a host of related defense counsel duties: the duties to inquire, investigate and research, advise on the consequences of the plea and its alternatives, and advise on the consequences of the likely sentence and its alternatives.

The duty to inquire means asking the right questions during the client interview to elicit facts that may be relevant to collateral consequences. The duty to investigate means using the results of the initial client interview to prompt further legal and factual research to determine what collateral consequences might follow from a conviction.

The duty to advise on the consequences of the plea and its alternatives means to explain fully to the client all sentencing and other consequences that may flow from a plea and from alternative potential pleas or trial alternatives. Such advice should address maximum and minimum possible penalties, not merely those that are most likely, and should be thorough. The lawyer should also advise the client on the sorts of alternative pleas that might be structured to reduce or eliminate collateral consequences and their impact. The duty to advise on sentencing extends not merely to the potential size of penalties but also to how to make the best case at the sentencing hearing to maximize the chances of minimizing the size of the penalties paid. Sentencing advice should further extend to all legal and social collateral consequences, including the impact of various sentencing options on the offender’s family.

But which collateral penalties are such an integral part of criminal punishment, so “enmeshed with criminal penalties,” as to trigger these various duties in a post-Padilla world? Smyth recommends considering the following factors. First, how severe is the collateral consequence? Severity must include the impact on both the client and his family. Furthermore, severity determination involves both an absolute and a relative inquiry. The absolute inquiry focuses on the degree of suffering inflicted on the client and his family. The relative inquiry focuses on the severity of the penalty relative to the offense and its traditional criminal penalties. Thus some collateral consequences might readily be perceived as more severe than the stigma and pain respectively resulting from a minor first offense usually punished by probation.

Second, how enmeshed is a collateral consequence into a criminal conviction? Statutes, regulations, and administrative policies must be explored in detail. The greater the degree to which a criminal conviction readily entails a collateral consequence, the greater that consequence may be described as deeply enmeshed in the criminal punishment such that the two are indistinguishable.

Third, how likely is it that the collateral penalty will flow from the criminal punishment? Certainly, automatic and irrevocable collateral penalties have a high likelihood of occurrence. But even many penalties having a discretionary element involved, for example, the ability of some defendants to seek discretionary relief from such a penalty, still may have a high likelihood of occurrence. The likelihood deter-
mination must be made in the context of determining the likelihood for this client, not some theoretical or average client.

Where there is a duty to advise and perform the other related duties noted above, how detailed must be the advice given? Smyth argues that advice must be clear, but that does not mean that complexity justifies oversimplified or no advice. It is the job of the lawyer to make even complex consequences and probabilities understandable to his client. Moreover, where there is reason to believe that the consequence is of particular importance to the individual client, the lawyer should provide that client with even more specific advice. Finally, mis-advice is never justifiable.

In sum, Smyth translates the concern for client autonomy into a series of very specific duties. These duties require certain types of investigation and planning by the lawyer, clear communication of the results to the client, and a continuing back-and-forth conversation with the client to assure truly informed decision making.

B. Creative Lawyering

Catherine Christian, of the Office of the Special Narcotics Prosecutor in New York City, addresses the value of creative lawyering in Collateral Consequences: Role of the Prosecutor.161 Christian argues that prosecutors have an ethical obligation to prevent unjust collateral consequences. Christian suggests three pre-conviction actions prosecutors should take. First, prosecutors must consider such consequences in negotiating guilty pleas or recommending sentences. Where those consequences would be too severe, prosecutors should act to reduce or eliminate them. For example, where a criminal conviction would lead to professional license revocation for a non-violent first offender, a more favorable plea should be considered to avoid the resulting unemployment. Second, where an immigrant poses no safety threat to the community, prosecutors should consider dispositions that avoid deportation. Third, prosecutors should support non-violent drug offenders being diverted into treatment programs. Post-conviction, argues Christian, prosecutors should support robust reentry programs that minimize the chances of unemployment, a collateral consequence that too often leads to recidivism. Christian, like Chin, thus argues for more individualized assessments of deserved collateral

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consequences, albeit imposing that duty primarily on the prosecutor rather than the judge or defense counsel.

Cyrus Vance, the elected prosecutor for New York County, New York (Manhattan), likewise sees prosecutors as having important duties to address collateral consequences. As he explains in his Keynote Address, this partly means helping to ensure that guilty pleas are informed ones. Thus Vance insists on his prosecutors placing on the record in open court at the time of any guilty plea colloquy a warning of the possible immigration consequences of conviction. But Vance goes further. He requires prosecutors to take those consequences into account in their charging decisions. Moreover, he recognizes that some crime stems from mental illness more than bad character or a bad situation. Punishing the non-violent mentally ill is often undeserved and ill-advised, treatment being the more just solution and likely the more effective preventative action. He is thus working on creating a mental health court in New York County to substitute treatment for incarceration in appropriate cases. He more broadly embraces problem-solving courts and flexible, rather than one-size-fits-all, sentences to minimize the collateral consequences imposed on individuals and communities alike. Similarly, he recognizes that improved reentry programs and job training can help to keep families intact and ex-cons who have paid their debt to society employed, further reducing ill collateral impacts. He also favors creative efforts to keep most convictions non-public to avoid probationers and parolees facing job discrimination. Vance thus favors prosecutors taking a holistic approach to the idea of prosecutors doing justice, an approach that recognizes prosecutors’ obligation and ability to aid in truly tailoring the punishment to the crime.

Margaret Colgate Love, in Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act, argues for statutory change to enable more creative lawyering by defense counsel. Specifically, Love argues for a mechanism to relieve an offender, post-conviction, of some or all the collateral consequences of his conviction. Love lays the groundwork for her argument by summarizing the deep, often undeserved cultural and legal roots of many collateral consequences, such things as unemployment, total loss of social status, exclusion from the circle of those

thought even capable of being worthy of forgiveness, and loss of licenses and voting rights. Love elaborates on this background via both an extended illustrative anecdote and a review of the rise and fall of what she calls the history of “forgiving and forgetting” in America. Love further demonstrates the inadequacy of such traditional remedies as expungements and pardons. She then explores the ABA Standards on Collateral Sanctions, which provided the framework for the Uniform Collateral Consequences of Conviction Act (the “Act”). It is that Act that Love, one of the reporters responsible for drafting the Act, defends.

The Act has two tiers, one “providing immediate relief from specific status-generated legal barriers that might impede an offender’s ability to live in the community.” Thus an individual who can show that relief would “materially assist” him in getting a job, housing, or other benefits for which he has a “substantial need” to live a law-abiding life may have particular collateral consequences removed. The second provision entitles an applicant to seek relief from certain consequences if he can persuade the relevant decision maker, on a case-by-case basis, that a denial of a particular benefit or opportunity lacks a substantial relationship to the conduct involved in the offense. The Act provides relevant discretionary decision makers with factors to guide their exercise of discretion. Thus a paramedic convicted of a crime might under the Act’s first section apply for relief from a provision automatically revoking professional licenses of all felons. But that same paramedic, having been freed from the flat bar on licensing, could then apply to the paramedic licensing board for a license. The Act’s second mechanism would permit him to try to prove that there is no substantial relationship between his crime and his fitness to be a paramedic. If the licensing board agrees, it could re-issue his license. Once again, the Act and Love’s proposals help to reintroduce an element of individualized assessment of desert into the collateral consequences process, even if that assessment is not expressly made by the judge or jury that decides criminal culpability or sentencing consequences in the first place.

Professor Jenny Roberts models creative lawyering in her piece, Proving Prejudice, Post-Padilla. Most of the discussion concerning Padilla v. Kentucky, where the Court held that the effective assistance of counsel often requires warning a pleading defendant of the immi-

\[164. 54 \textbf{How. L.J.} 693 (2011).\]
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gration law collateral consequences of his doing so, has centered on the extent of the duty to warn. What collateral consequences must a lawyer inform his client of before the client decides to plead guilty? How detailed must the warnings be? When is the duty to warn violated? These inquiries are indeed the subject of several of the articles in this Symposium. But proving the ineffective assistance of counsel contains a second prong beyond proving the lawyer’s failure. That failure must have prejudiced the client. Determining what prejudice means in a post-\textit{Padilla} world is Roberts’ task.

Robert’s primary contribution is to demonstrate, through painstaking dissection of \textit{Padilla} and a host of lower court precedent, the inadequacy of asking whether and how omitted information may have affected the case outcome had the case gone to trial. Most cases are resolved by guilty pleas, and \textit{Padilla} itself arose in the guilty plea process. The only sensible definition of prejudice, therefore, must look not to likely trial outcomes but rather to likely changes in guilty plea strategy and outcomes. A defendant aware of certain collateral consequences might choose a plea bargain different from the one he made without such awareness. His option once adequately informed is not necessarily to go to trial. Rather, he might prefer re-negotiation to address the feared collateral consequences, consequences he may so despise that he is willing to pay some other price, perhaps even a longer period of incarceration, to come up with a deal that avoids the ill consequences. Creative sentencing option availability, the possibility of renegotiating alternatives, the crafting of a package that incorporates the weighing of the cost of collateral consequences into the negotiation process are all things that, in a practical, realistic vision of plea-bargaining, would enter into the prejudice analysis in that context.

Roberts thus proposes the following test:

First, the court should ask whether it is reasonably probable that a rational person receiving effective assistance relating to the guilty plea decision-making process would have declined to plead guilty. Second, the court should ask whether, if the defendant had not taken the plea, there is a reasonable probability that there would have been a different outcome. This could be satisfied either in the traditional \textit{Strickland} and \textit{Hill} form of a reasonably probable successful trial outcome, or in two other forms: (1) reasonable probability of a second plea that is more favorable to the defendant; or (2) reasonable probability of a sentence that is more favorable with effective assistance than it was with ineffective assistance. The
second step of this inquiry is not independent of the first, as the likelihood of a different outcome is something a defendant would factor into his decision about whether to reject or accept a proposed plea.¹⁶⁵

Roberts proposes that at least three non-exclusive factors should guide application of this test. First, courts must inquire into the severity of the attorney’s error in the context of the individual case. In some cases, the collateral consequence may be so severe given the defendant’s goals that we can say with a high degree of confidence that he would have strenuously sought another outcome. That outcome might mean going to trial, but it also might mean re-negotiating for a feasible alternative sentence that would take into account his desire to minimize or eliminate the costs imposed by the collateral consequence. Roberts would draw on the insights of behavioral economics on risk-aversion to aid in this analysis. Thus the risk of seeking an alternative deal or going to trial may be minimal to an offender facing deportation if convicted if he has only been in the United States a short time and has family and friends in his home country. But the risk of alternatives may seem small next to the risk of deportation for an offender who has been in the United States twenty years and has his work, family, and friends here.

Second, the strength of the evidence against the offender or supporting a defense should play a subtle, case-specific role. For a minor charge but with grave collateral consequences like deportation, an offender might still prefer trial or an alternative plea deal to facing deportation no matter how strong the evidence against him. Moreover, given the minor nature of the offense, a prosecutor might be quite ready to re-negotiate rather than to expend resources on a trial. On the other hand, for a serious offense with relatively modest collateral consequences and strong evidence, an offender might be unlikely to go to trial or seek a different deal. Correspondingly, an offender with a strong defense might nevertheless plead guilty to avoid the lost time and psychological and family stress of a trial. Yet if he knows that he faces a dire collateral consequence upon conviction, he will very likely prefer a new deal or even trial to facing the dire consequence.

Third, Roberts would ask courts directly to inquire whether a different plea or sentence likely would have resulted from a more informed discussion. Roberts counsels focusing, whenever possible, on

¹⁶⁵. Id. at 732-33 (internal citations omitted).
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“objective” evidence that the prosecutor in the particular case would have been open to alternatives. For example, the history of plea negotiations may have revealed such a prosecutorial openness to other options, and the nature of the misinformation might suggest that the prosecutor would have gone for an alternative. Thus, a plea to 364 days in one case might avoid deportation, unlike the plea to one year of incarceration, which mandated subsequent incarceration. Where such objective evidence of the history of the relationship between the negotiating parties is missing, Roberts would rely, where it is the case, on the absence of evidence that the prosecutor cared about imposing the collateral consequence.

Roberts closes her article by crafting convincing responses to the objections to her argument, namely that judges are incompetent to make these sorts of judgments and that her prejudice standard will open the floodgates of litigation. The details of her responses need not be recounted here. What does matter is that Roberts has shown how creative lawyering can move current law toward a more sensible standard attuned to case-specific justice for each individual; more informed, autonomous client decision making about plea deals; and the express incorporation of collateral consequences into negotiations, recognizing collateral consequences as a form of punishment to be imposed only where deserved.

C. Better Diagnosing the Problem

Professor Dorothy Roberts addresses the disparate racial impact on privacy rights of the vast expansion in DNA testing in her piece, Collateral Consequences, Genetic Surveillance, and the New Biopolitics of Race.166 DNA databases have vastly expanded. Some jurisdictions mandate DNA testing of all arrestees, not simply of those convicted. DNA databases are used to make “hits” that link DNA at a crime scene to an individual, arguably thus identifying him as the wrongdoer. But these hits are sometimes in error. Moreover, in at least three states law enforcement pressures the families of offenders to give DNA samples so that these family members’ DNA can be tested or stored. Because the criminal justice system suffers from deep racial disparities, huge percentages of those exposed to a lifetime of bi-surveillance and to the risk of error in making “hits” mean compromised senses of security and privacy for racial minorities relative to

the white majority. Hits might also expose racial minority group members to disproportionate prosecution for minor crimes, but the accumulation of minor crimes can lead to harsh sentences of incarceration. Biopolitics, by magnifying already-existing racial disparities, further associates crime with race in the public mind. That in turn affects minority job and other opportunities. In short, biopolitics worsens the inequality in the distribution of collateral consequences. But this wound to equality values is itself a harm to the body politic as a whole. Roberts thus directs our attention to the way that widespread DNA-testing imposed collateral consequences on entire social groups, thus diagnosing a disease otherwise missed by those seeking to heal the body politic.

The issue of felon disenfranchisement has been discussed often.167 But it is often discussed with emphasis on the unfairness to individuals or to groups.168 Marc Mauer sees such disenfranchisement as fundamentally inconsistent with sound notions of American democracy. Others have discussed the impact of disenfranchisement laws on democracy, though primarily focusing on those impaired by continuing disenfranchisement after release from prisons.169 Mauer focuses more forcefully than most other thinkers on the continuing disenfranchisement of the 1.6 million Americans behind prison bars in his piece, Voting Behind Bars: An Argument for Voting by Prisoners.170

Mauer rejects the view that the incarcerated and their lives are so fundamentally different from that of the rest of us that they cannot handle, and do not deserve, the vote. Thus he argues that the characteristics of imprisoned felons and the nature of their crimes are often only marginally different from felons on probation. Mauer further rejects the idea that disenfranchisement is an aspect of punishment. First, the penalty is automatic, never imposed by a judge as a “deserved” part of the sentence. Second, we do not ordinarily sacrifice constitutional rights as an aspect of imprisonment. They may need to be adjusted to preserve safety and security, but they are not elimi-

169. See Manza & Uggen, supra note 167.
nated. For example, prisoners do not lose their First Amendment free speech rights, though there might be some monitoring of their mail to prevent smuggling or escape attempts. Nor is there any logical connection between being a prisoner, perhaps for stealing a car, and having the capacity to make sound voting decisions. To embrace such a philosophy is to accept discredited theories of needing an adequate “character” to vote that the Fifteenth Amendment rejected. Indeed, Mauer’s own experience with prisoners suggests that they have the same sound diversity of views on issues of political import as do the bulk of the American populace. That prisoners might themselves vote on incarceration policies, says Mauer, is itself a good thing, requiring candidates to engage prisoner views and learn from them. Two states, Utah and Massachusetts, had long allowed prisoners to vote, yet there is no indication that this has had any ill effect on those polities.

Mauer also points out that those in jails, though not legally disenfranchised, are de facto denied the vote for bureaucratic reasons, adding 700,000 souls to those denied this basic right of citizens. Moreover, racial disparities in felon incarceration exceed other racial disparities in the criminal justice system. Racially disparate disenfranchisement is a phenomenon inconsistent with any sound democratic principles. Moreover, by cutting so many African-Americans out of the political conversation and creating an appearance of racially biased exclusion, the data suggests that the free African-American population’s political activity is similarly depressed from where it would be were incarcerated felons allowed to vote. Discouraging the pro-social behavior involved in political discussion while incarcerated also ill prepares imprisoned felons for reentry as functioning citizens. Much of the rest of the world, argues Mauer, has recognized these and other dangers of felon disenfranchisement policies.

Mauer thus sees misdiagnosis in continuing denial of voting rights to imprisoned felons, despite progress in restoring voting rights after release. The misdiagnosis is in seeing the problem as one of deserved punishment. It involves no individual determination of desert and serves no valid punishment objective. Rather, it is a collateral consequence that diminishes the nature of American democracy for all. Proper diagnosis reveals the proper solution: restoration of voting rights, thus the complete end of at least this one sort of collateral consequence.

Professor Anthony Thompson’s article, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on*


*Destroying the Village to Save It*

Black Political Power,\textsuperscript{171} also focuses on the connection between collateral consequences and diminishing our democracy. Thompson looks to the continuing vast impact of felon disenfranchisement on the African-American community—effectively disenfranchising a significant percentage of Black voters—combined with the “usual residence rule.” That rule counts a citizen’s residence by the place where he usually lives and sleeps. The rule increases the effective population in the rural areas in which most prisoners reside, thus increasing the number of political representatives they are entitled to select, while denying the prisoners themselves voting rights. The result is amplified political power of groups who benefit from imprisonment while diminishing the power of those who suffer from it disproportionately.

Thompson begins by reviewing the history and current status of disenfranchisement laws. He crafts arguments that first, the Fifteenth Amendment invalidated Section 2 of the Fourteenth Amendment—which effectively authorizes disenfranchisement of the incarcerated—and thus can also no longer survive an Equal Protection challenge. Thompson also finds the usual residence rule, amplifying white voting power while silencing black voting power, as eerily reminiscent of the Three-Fifths Clause of the original Constitution. The political consequence of the usual residence rule, moreover, is to shift resources within a state away from the urban areas to which ex-convicts return, and thus where the money is needed for reentry programs, to the rural communities that benefit from housing the prisoners. Thompson finds little hope for change in current litigation relying on federal legal sources but greater hope for challenges to the rule and its consequences by relying on some state authorities. Thompson also argues that disenfranchisement works to exclude the “voice of difference” from political debates and psychologically isolates the disenfranchised from the broader population. The practice also increases ostracism upon return to the community.

In the penultimate part of his paper, Professor Thompson reviews the historical and political forces that have created this Three-Fifths Clause for modern times at great length. He ends his paper by celebrating a new New York State law that will start counting inmates as voters in their true homes rather than in prison and by defending a congressional bill aimed at restoring democracy to felons. But, more important than these details, is Thompson’s ability to shine a new light

\textsuperscript{171.} 54 How. L.J. 587 (2011).
on a collateral consequence that wounds not just the individuals involved but the very nature of the American polity itself. That wound is one that it is high time to close.

Finally, Professor Yolanda Vázquez, in her piece, *Perpetuating the Social Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, argues that using the criminal justice system to locate and remove Latino immigrants illegally and legally in this country is part of a broader historical pattern of Latino discrimination and exclusion rather than simply an effort to control American borders. Vázquez traces the history of efforts to exclude Latinos both physically and politically from full (or any) participation in American society. Thus Vázquez reviews efforts to deny Latinos citizenship, deny them entry into the United States even as legal immigrants, lynch them, repatriate them, and sweep them away in mass, indiscriminate roundups, even going so far as to deport Latino-American citizens. She next turns to legislative efforts over the last few decades to increase the number of criminal convictions resulting in removal from the United States, while decreasing the number of remedies available to them in immigration court to avoid deportation. Here is but a partial summary of those efforts:

[I]n 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (“IIRIRA”). As two of the most sweeping immigration acts in history, they further increased the number of crimes that became removable offenses and severely limited the relief available to noncitizens. The acts increased the number of noncitizens who could be classified as aggravaed felons, increased the number of crimes that made a person removable, severely restricted judicial review of administrative removal orders, limited remedies for relief from deportation, limited ability for admission into the United States by aggravated felons, and limited the discretionary relief from deportation available by the Attorney General. One specific example of AEDPA and IIRIRA’s effects was the repeal of INA § 212(c) relief from deportation. Prior to 1996, more than half of the applications under § 212(c) received relief from deportation in immigration court.\(^\text{173}\)

\(^{172}\) 54 HOW. L. J. 639 (2011).

\(^{173}\) Id. at 656-57.
Vázquez next reviews the efforts made by the executive branch to enhance efforts to exclude Latinos from American soil. She focuses in particular on the Department of Homeland Security’s 2007 implementation of the Agreement of Cooperation to Enhance Safety and Security (“ACCESS”). ACCESS includes a number of programs that encourage local and state police to deport supposedly dangerous criminal immigrants to protect community safety. But, Vázquez argues, these programs in practice reach persons involved in nonviolent crimes or simple immigration offenses. Yet they have resulted in massive numbers of deportations.

This mass deportation, argues Vázquez, harms families and communities as much as individuals. Many families of the deported are “mixed,” including citizen members. The resulting family separation imposes a severe economic and psychological toll on these families. Separation of citizen children from noncitizen parents can put the parents to a difficult choice whether to take their children with them versus leaving them behind to suffer severe educational, behavioral, and mental health consequences of separation. Yet these children are born in the United States, knowing no other home. Meanwhile, the broader Latino and Latino-American community faces community instability, develops a mistrust of law enforcement, and faces the destruction of family structures, the loss of communal and charitable services, and a constant fear of being “disappeared.” The combination of these factors isolates many members of the Latino and Latino-American community from the broader society, raises crime rates as disrespect for law and an unwillingness to aid in criminal prosecution rise, and places burdensome psychological and economic obstacles to individual and communal advancement. In short, as was true in earlier periods of American history, criminal and immigration law combine to exclude Latinos from equal membership in the broader entity we call the “American people,” including muffling the Latino political voice. The human and economic waste of current policy, Vázquez seems to imply, thus requires understanding the discriminatory political motivations and effects of unjustified “crimmigration” policy and seeking appropriate political solutions.

CONCLUSION

This Symposium seeks to highlight the ways in which the collateral consequences of conviction damage communities and the entire nation. But the Symposium also has a practical goal: to suggest ways
that lawyers can creatively combat the harms collateral consequences imposes and to move us back toward individualized judgments of what each offender deserves. Crime imposes grave harms on society, but unreasoning responses to crime can do equal damage. It takes a village to raise a healthy democracy, and the authors in this Symposium have sought to help the village thrive rather than allowing burning it clean as a way to save it. A better way to save villages is to care for them. Perhaps tough love is sometimes needed, but it is love, not unreasoning fear and disproportionate anger, that is needed just the same.
KEYNOTE ADDRESS

HON. CYRUS R. VANCE, JR.*

I want to thank Howard University School of Law and the Howard Law Journal for inviting me to speak at this year’s Wiley A. Branton/Howard Law Journal Symposium on the topic of collateral consequences in the criminal justice system. You could not have picked a more vital topic.

I would like to begin by acknowledging the relationship our office has with this great institution, because over the years, the Manhattan District Attorney’s Office has recruited many young men and women from this fine law school. And we hope some of you may choose to follow in the footsteps of other Howard alums, such as Cornett Lewers, who after serving in our office for six years went on to become a Senior Counsel at ITT; or Keith Harvest, who after serving six years went on to head the narcotics unit at the Essex County Prosecutor’s Office; or even Charles King, III who is into his twenty-second year as a career prosecutor in my office. There are many other examples; out of the thousands of applications we get each year for about fifty spots, on average, over the last twenty years we have been able to recruit one or more Howard Law graduates each year. We are very proud of our relationship with this great law school and hope it will continue far into the future. Permit me to acknowledge and thank you, and Howard, for providing a pipeline of terrific lawyers to serve the people of New York County, and to play important roles in our justice system.

When I became District Attorney at the beginning of this year, I made a promise. I said that I would, in all my decisions, be guided by two principles: “Is it fair?” and “Does it make us safer?” We are here today because too often, the criminal justice system can impose penal-

* District Attorney for New York County. District Attorney Vance was the Keynote Speaker at the Seventh Annual Wiley A. Branton/Howard Law Journal Symposium. He delivered these remarks at the Howard University School of Law on October 29, 2011.
ties that may, on the surface, seem sound, but which, when the defendant suffers the collateral effects of those sentences, turn out neither to be fair nor to make us safer.

In fact, scarcely had I taken office when I faced a particularly difficult decision raising precisely this issue in a case that had been prosecuted by the Manhattan District Attorney’s Office before I became District Attorney. In 1984, a boy, four-years old, came with his family from China to the United States. His parents were of modest means and worked long hours in their new country. Too often, the children were on their own, and eventually this boy fell in with a youth gang. When he was fifteen-years old, this young man and his companions committed a robbery. He was arrested and charged with the robbery; he made bail and was set free—and before he could be brought back into court, he had committed three more robberies.

I do not want to minimize the seriousness of those crimes. In one case, the young man displayed a knife and told the victim, “If you run, I’m going to stab you.” In another case, the defendant and a companion accosted a sixty-year-old man, punched him, and went through his pockets, all to steal a total of eight dollars. When the young man was arrested, the dollar bills were easily identified: they had blood on them.

The defendant’s cases were brought before Justice Michael Corrario, who ran a specialized youth court and who prided himself on never overlooking an opportunity to make a positive impact in the life of a young offender. But under the circumstances, even Justice Corrario saw no alternative but to sentence the defendant to a term of three to nine years. I have read the minutes of that case, and they are truly extraordinary. At one point, the judge asks the young man why, after he had been released pending trial for his first robbery, he had committed three more.

The minutes note that the defendant’s mother is crying as he gives his answer. “I was ignorant,” he says. “You are no longer ignorant?” the judge asks.

“‘I am trying to change,” he says.

The judge notes that the defendant is a gifted student, with math scores in the ninety-eighth percentile. He challenges the defendant, “Stick to reading, writing. That’s what you have to do . . . . [U]se [your] energy positively, not negatively. If you do that,” the judge promises, “I am here to stand behind you, make sure you get to do
Keynote Address

what I think that you can. That you are not prevented from getting a
good job, taking care of your family.”

The record shows that the young man fulfilled his promise to the
judge in every way. He proved to be a model inmate and earned his
high school equivalency degree while incarcerated. When he was re-
leased, he furthered his education in the computer field, obtained an
associates degree and a good job, filed his taxes every year, and even-
tually was engaged to be married.

And then, having achieved so much of the American dream, the
young man applied for United States citizenship. That application for
citizenship prompted the federal authorities to review his criminal his-
tory. When the immigration officials saw his convictions, they had no
alternative under the law but to arrest him and to seek his deporta-
tion. Remember that this man had not lived in China since he was
four-years old, and that his family now lived here in the United States.
Nothing awaited him in China. And yet, now the only hope the man
had to remain in the United States was for the Governor to grant him
a pardon.

The question I faced, so soon after I became District Attorney,
was what position I would take with respect to his application to the
Governor. After reviewing his case carefully, I wrote in support of his
application for pardon to the Governor, and perhaps, in part because
of our support and the support of many others, the Governor granted
the application. The young man was released from his immigration
hold and was not deported.

That is a dramatic example, but only one example, of how a crim-
inal conviction can have collateral consequences that go far beyond—
in fact sometimes can even dwarf—the impact of the original
sentence.

In my office, we now train prosecutors on the immigration conse-
quences of their charging decisions. This is by no means a simple pro-
position. Our nation’s immigration laws are as complex as anything
you are likely to study in law school, with so many intricacies that
sometimes it is hard for anyone but a specialist to predict with confi-
dence what will happen in a particular instance. And even aside from
legal complexities, the equities of these decisions are by no means
simple. I believe that in many instances deportation is an eminently
reasonable consequence for committing a serious crime. To be al-
lowed entrance into this or any nation implies a duty to obey the laws
that keep us all safe. But with the great power the law gives to prose-
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cutors to make decisions that affect the lives and liberty of so many people comes the responsibility to exercise that power wisely. It is incumbent on prosecutors to at least be aware when a charging decision we make today might lead to a conviction that would mandate deportation, leaving federal immigration authorities no discretion to exercise mercy.

We deal with this issue every day. You all no doubt know about the United States Supreme Court case Padilla v. Kentucky.¹ In Padilla, a non-citizen defendant, a lawful resident of the United States for forty years, pleaded guilty to a crime after advice from his lawyer that he need not worry about the immigration consequences of the guilty plea.² In fact, his guilty plea made him subject to virtually mandatory deportation. The United States Supreme Court held that bad immigration advice from a defendant’s criminal lawyer may constitute a violation of the constitutional right to effective assistance of counsel and could be grounds for vacating a conviction.³ In announcing the Court’s decision, Justice Stevens wrote, “The importance of accurate legal advice for non-citizens accused of crimes has never been more important. . . . [D]eportation 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.”⁴

It will not be hard for you to imagine what has occurred in the wake of this historic decision. My office—which handles 110,000 cases a year—has received many petitions from defendants who pleaded guilty, often years ago, but who now seek to have their convictions vacated because, they say, their criminal lawyer at the time of the guilty plea gave them bad immigration advice. My office is in the process of examining these claims and dealing with each one on its merits. But every day we continue to negotiate guilty pleas on our cases. What do we do now to prevent this problem from recurring as we go forward? How can I, as a District Attorney, without interfering with the attorney-client relationship, ensure that the defense attorney on the other side of the table is giving his or her client sound immigration advice?

Here is what we are doing: My office places on the record and in open court, a statement warning of possible broad immigration conse-

¹ 130 S. Ct. 1473 (2010).
² Id. at 1477-78.
³ See id.
⁴ Id. at 1480.
quences of his or her plea during the plea process. We have no right to offer the defendant our legal advice, but we certainly have the right—and I think the responsibility—to do our part to ensure the defendant is entering into the plea apprised of the rights he or she is waiving, and we can better assess for ourselves whether the defendant is truly making an informed decision in pleading guilty.

We have talked a lot about immigration cases. But in any case we handle, the consequences of conviction and sentencing can have devastating consequences for an offender, and even for innocent parties such as the defendant’s family. What impact will conviction have, years from now, on an ex-offender’s ability to find a job? What effect will years of state prison have on a person’s job skills, physical health, and mental health? And perhaps most tellingly of all, what impact does incarcerating many thousands of men have on the families they leave behind? Many of these consequences are, as a defendant stands before the court, invisible to us. Because you never know the impact of the decisions you make, exercise the power humbly. Other consequences are clear to see—but the question is whether we have the will and intelligence to deal with them. I recently visited Bedford Hills Correctional Facility for Women, in New York State. As I toured the facility, I asked the Commissioner of Corrections what I could do to help him meet the daunting tasks he faced. His reply was, “If you can do only one thing, find a way to treat non-violent mentally ill offenders in the community, rather than sending them to my prison.”

The Commissioner’s remark identifies one of the most urgent issues we face in the criminal justice system. A recent report from the U.S. Department of Justice reveals that, nationwide, over one-half of state and federal inmates exhibit symptoms of mental illness, including approximately one-third with symptoms of major depression or mania and approximately one-in-ten who report psychotic delusions. These nationwide statistics were borne out by what I have seen at Bedford Hills and other state penitentiaries—men and women with acute mental illness cycling in and out of prisons and city jails—punished for crimes they committed, but in many cases as a consequence of serious mental illness.

This is why I have proposed and hope to have operational by the end of this year a mental health court in New York County. Created in cooperation with New York’s Office of Court Administration, this planned initiative will divert non-violent mentally ill offenders from regular courtrooms to a special, designated court part. There, a
mental health professional will evaluate the defendant, and under the guidance of a specially trained judge and in collaboration with defense counsel, we will seek to formulate a course of treatment tailored for the needs of the individual defendant. If we are successful in providing treatment that addresses and, perhaps, cures the underlying illness that caused the crime to occur, it will reduce the chance of re-offending. This makes us safer, and it is a fairer approach than merely warehousing the mentally ill. The mental health court is part of a new perspective on criminal justice that uses “problem solving courts,” not just to adjudicate guilt and mete out sentences, but to address the constellation of problems that lie beneath the surface in so many kinds of criminal cases.

What we have learned is that a one-size-fits-all approach to sentencing just doesn’t work in these instances. For example, in a substance abuse part, or as it’s popularly called, “drug court,” we enter into a contract with a defendant promising that, if she completes a prescribed course of treatment successfully, her case will be reduced or dismissed outright. But we have learned that each defendant presents a special challenge. Many in the addicted population also have been diagnosed with a mental illness, and so we have to find a program that can treat the addiction while providing mental health services. Others are homeless. Still others have medical conditions that require active treatment. Some have children who must be cared for when the parent enters a residential facility. Some women are due to give birth during their course of treatment. It is, frankly, more art than science to find the program that best addresses the needs of the defendant before the court, and it requires the most dedicated professionals to create treatment plans that work.

But the rewards are enormous. Some of our courts have graduation ceremonies—which I gladly attend—in which the graduates receive diplomas, a valedictorian gives a speech, and public officials congratulate the graduates on their achievement. Men and women, who not long before seemed doomed to live out a downward spiral of addiction and criminal offending, are reunited with their families, and are, sometimes for the first time in their lives, optimistic.

Even in these success stories, there are collateral consequences to prosecution, but some are very positive ones: addictions overcome, families reunited, lives restored. Oftentimes, it takes an arrest and a criminal prosecution to bring a team of professionals to focus on a person’s addictions, illnesses, and needs. In a better world, no doubt
the criminal justice system affords us many such “teachable moments.” These, too, are resources we must not squander. But what of the defendant whose case is not diverted, whose indictment or complaint is not dismissed? What happens when that ex-offender is released from jail or prison and applies for a license or tries to find a job? A previous conviction can serve as a bar to future employment, and the offender enters that terrible cycle in which a conviction closes off possibilities for lawful employment, which in turn leads to reoffending.

I won’t pretend that this is an easy problem to solve. We face an economy in which many well-qualified applicants with faultless records justifiably complain they cannot find work. But there is an essential principle here that must not be overlooked. In New York, the law generally forbids discriminating against a job applicant on the basis of a previous criminal conviction, except where the conviction is specifically related to the duties and responsibilities of the job. But what good is this legal assurance if the potential employer has access to the very information they are mandated by law to ignore? Even employers acting in good faith may have difficulty making decisions free of this form of discrimination.

I would like to explore a system in which criminal convictions are sealed, except in those circumstances in which the law says they may or must be considered. For instance, if an ex-offender is re-arrested, both my office and the court should immediately have full access to his or her prior record. If the ex-offender applies to the bar for admission, or seeks to be bonded, or wants to run a child-care facility, certainly the convictions should be unsealed, and the full record of the applicant fairly considered. But where the law specifically says the conviction should be ignored—including in many employment situations—shouldn’t that record be invisible? In the age of the Internet, in which many jurisdictions post their court dockets online, it is a truly daunting challenge to ensure that information required by law to be confidential remains confidential. My colleagues in IT tell me that making this a reality will be no easy feat, but it is an idea that we
should explore if we are serious about reducing recidivism and bringing greater fairness to our justice system.

And everyone in the criminal justice system, especially prosecutors, must go further to consider the full range of re-entry services that ex-offenders need to become, once again, productive members of society. I believe we may be the only prosecutor’s office with an Executive Assistant for Crime Prevention Strategies, whom I have charged to devise, among many other things, a comprehensive set of re-entry proposals for my office to adopt. And beyond that, as Co-Chair of a new Permanent Sentencing Commission in New York, I hope to be an advocate for adoption of sentencing laws with a horizon beyond a prison door being shut. Surely, if we are sending someone to jail, then after they have served out their punishments in prison, we have to support their re-entry to their communities, to assure ex-offenders don’t become re-offenders.

But let me be honest: even if we divert every appropriate case into a treatment program rather than a jail or a prison; even if we help restore ex-offenders to their pre-conviction status; even if we go the extra mile to provide services needed by ex-offenders as they make their re-entry into our communities; still there are going to be a lot of people left going to jail and prison. Still there will be lives interrupted and families separated. These will continue to be the costs of protecting our communities from violence and crime. We still need to remove from among us those who prove unable or unwilling to live within the bounds of the law. Yet, if we leave this Symposium with a heightened sensitivity to the real costs of conviction and sentencing, then we will bring a new perspective to criminal justice. We will continue to examine our policies and continue to ask: “Are our decisions fair, and do our actions make our communities safer?”

Since I took office in January, I have tried to recast our approach to prosecution to a more community-based approach. I have divided up Manhattan into zones, assigned a named prosecutor to each zone, and charged that assistant district attorney with the responsibility of establishing direct relationships with the neighborhood leaders and police officers in each community. We have assigned analysts to keep us apprised of specific crime problems neighborhood-by-neighborhood and even block-by-block. And we have forged database connections with the Police Department that give my lawyers real-time information about what is happening on the streets. The focus, in short, is to try to utilize everything we know about “what works” in
law enforcement, so that we no longer see our role as just prosecuting crime, but as preventing crime. The measure of success should not be just on the number of convictions we achieve in the courtroom, but in our ability to affect long-term and sustained crime reduction by keeping ex-offenders out of the courtroom again. I hope to be judged on whether or not I succeed in this goal.

Because when we prevent crime, we don’t just make our streets safer, we start to empty out our jails and prisons as well. Much has been written about the dramatic drop in violent crime in New York in the last fifteen years. But what has perhaps been overlooked is that there has, in recent years, been an equally dramatic drop in our prison populations and our jail populations. Fewer people are incarcerated in New York today than at any time in the past twenty-four years. Together, these facts represent a turning point in the life of our communities. It is up to all of us to ensure that sound policies keep step with this trend.

One last thought: Today’s Symposium, as you know, is named in honor of a legal giant and a civil rights hero: Wiley A. Branton. Not long after his service in World War II, Wiley Branton joined the Pine Bluff, Arkansas, chapter of the NAACP, and worked in a voter registration drive. It did not take long before local authorities tried to stop him. He was arrested and convicted of violating an Arkansas ordinance that prohibited the printing or distribution of ballots for the purpose of instructing voters how to vote.

Imagine, for a moment, that his conviction had prevented Wiley Branton from attending the University of Arkansas School of Law. Imagine that his application to the bar had been rejected because he was an ex-offender. Imagine, that Wiley Branton had not been able to represent the high school students seeking to integrate Central High School in Little Rock. Imagine that the case of Cooper v. Aaron5 had never been brought and never appealed to the U.S. Supreme Court. Imagine, in short, that the nation had been denied the services of one of the most talented and courageous lawyers of his generation. This would have been not just a result of collateral consequences; it would have been a profound loss for the civil rights movement and for the progress of our nation.

In the spirit of Wiley Branton, then, let us join together in a common endeavor, by using the law, to bring fairness and safety to our communities.

Thank you.
Voting Behind Bars: An Argument for Voting by Prisoners

MARC MAUER*

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The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.1

In 1999, just five years after the end of the reign of the apartheid government of South Africa, the country’s constitutional court ad-

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dressed one of the most profound issues facing the new democracy. The case involved a challenge to the denial of voting rights for citizens incarcerated in South African prisons and raised the fundamental issue of the meaning of democracy, one that was particularly poignant in a society in which such questions had been restricted from public debate. In his written decision for the Constitutional Court of South Africa, Justice Albie Sachs declared, “Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.”

Few nations in recent years have considered issues of democracy with as much care as South Africa, so the public policy debates in that nation should be instructive to all. Yet in the United States, many would view the issue of voting rights for prisoners as an alien concept. Despite widespread reform campaigns on the issue of felony disenfranchisement in recent years, public and policymaker discussion on this topic has generally focused on the restoration of voting rights only after completing a felony sentence or in some instances for offenders currently on probation or parole supervision. Yet, as is true for criminal justice policy broadly speaking, disenfranchisement policies in the United States are very much out of line with world standards, and it behooves us to take a fresh look at the rationale and impact of policies that can only be described as aberrant by international norms.

This Essay makes the argument that felony disenfranchisement policies are inherently undemocratic no matter how applied, including for persons serving prison sentences. This Essay first presents an overview of the origins and impact of modern disenfranchisement practices. It then addresses the policy and philosophical concerns that are relevant in the particular case of prisoners’ voting rights.

A. Overview of Felony Disenfranchisement in the United States

Felony disenfranchisement policies can be traced back to the time of the founding of the nation, having been carried over from the Colonial period. Laws restricting the voting rights of persons with felony convictions were common practice in the new country, which in retrospect is hardly surprising. While the nation was founded as an experiment in democracy, it was in fact a very limited experiment. Essentially, wealthy white male property holders granted themselves

2. Id.
the right to vote. Estimates are that this group represented only about 6% of the population at the time. Excluded from the ballot box were women, African Americans, illiterates, poor people, and people with felony convictions. Over the course of some two hundred years all of those prohibitions save one have been eliminated, and we now look back on them with a great deal of national embarrassment. Thus, people with felony convictions remain the only category of citizens excluded as a group from electoral participation.

People convicted of felonies are largely excluded from the ballot box, and their numbers have been increasing substantially in recent decades. This is directly related to the unprecedented growth in the criminal justice system since the early 1970s. We can see this most dramatically among the incarcerated population, which rose from about 330,000 people in 1972 to 2.3 million today. As more people gain a felony conviction, not surprisingly the number of incarcerated persons rises as well.

Felony disenfranchisement laws are established by the states, each with its own determination of circumstances under which people with felony convictions lose their right to vote. As of 2010, incarcerated felons in forty-eight states (all but Maine and Vermont) and the District of Columbia are ineligible to vote; in thirty-five of these states, persons on probation and/or parole are also ineligible, and in twelve states even people who have completed their felony sentence may be ineligible to vote and are subject to lifetime disenfranchisement in four of those states. In the four most restrictive states—Iowa, Florida, Kentucky, and Virginia—all persons with a felony conviction permanently lose their voting rights, even if they never spend a day in prison. The only means by which their rights can be restored is through a pardon from the governor, a process which has generally been little known and cumbersome, and benefits only a relative handful of disenfranchised persons.

6. Id. at 3.
Today, an estimated 5.3 million persons are ineligible to vote as a result of a current or previous felony conviction.\textsuperscript{7} The scale of disenfranchisement is now so broad that it is likely to be influencing electoral outcomes. To take the most extreme example, the historic 2000 Presidential election was decided by a mere 537 votes in the state of Florida.\textsuperscript{8} At the time, Florida had one of the most restrictive disenfranchisement laws in the country, and on the day of the election an estimated six hundred thousand ex-felons were ineligible to vote.\textsuperscript{9} If the state’s policy had instead provided for restoration of voting rights after completion of a sentence, we can only surmise how many of the six hundred thousand would have voted and whom they would have voted for, but clearly the outcome of a significant national election may have turned on this policy.

Racial disparities in the criminal justice system translate into disparities in the disenfranchised population as well. An estimated 38% of the total disenfranchised population is African American,\textsuperscript{10} far greater than the black share of the national population, but in line with the black proportion of persons under correctional supervision. Overall, nearly two million African Americans are ineligible to vote.\textsuperscript{11} As will be seen, racial disparities in disenfranchisement in part reflect greater involvement in criminal behavior, but also reflect biased policy and practice decision-making.

B. The Modern-Day Movement for Disenfranchisement Reform

Since the late 1990s, a significant movement for felony disenfranchisement reform has emerged around the country. This was spurred in large part by two policy reports produced early in that period. First, a 1997 report by The Sentencing Project estimated that 4.2 million Americans were not eligible to vote as a result of felony disenfranchisement laws.\textsuperscript{12} That report received significant national attention and was followed the next year by a joint report of Human Rights Watch and The Sentencing Project, \textit{Losing the Vote}, which provided

\textsuperscript{7} Jeff Manza & Christopher Uggen, Locked Out: Felon Disenfranchisement and American Democracy 76 (2006).
\textsuperscript{9} Id.
\textsuperscript{10} Manza & Uggen, supra note 7, at 248-53.
\textsuperscript{11} Id.
the first state-based estimates of the impact of disenfranchisement.\textsuperscript{13} That analysis provided civil rights leaders and others at a state level with often striking data demonstrating the large-scale impact of these policies.

Legislative reform activity since that time has been remarkable, resulting in some cases in the elimination of entire categories of disenfranchisement and in others in scaling back the extent of prohibitions. Overall, twenty-three states have enacted such reforms, while only a small handful have adopted more regressive measures.\textsuperscript{14} Among the reforms have been the extension of voting rights to ex-felons in Iowa, Maryland, and New Mexico; the expansion of voting rights to persons on probation in Connecticut and probation and parole in Rhode Island; the elimination of post-sentence waiting periods in Nevada and Texas; and the streamlining of the rights restoration process in Alabama, Florida, Tennessee, and Virginia.\textsuperscript{15} A 2010 analysis by The Sentencing Project estimated that more than eight hundred thousand persons had gained the right to vote as a result of the enacted reforms.\textsuperscript{16}

Much of the concern regarding felony disenfranchisement policies has focused on the extreme racial effects of the policies. Many of the states with the most restrictive policies, those that impose bans on ex-felons as well as current felons, have been Southern states and often ones with documented histories of using disenfranchisement laws as a means of reducing black voter turnout. In the post-Reconstruction period, for example, states such as Alabama and South Carolina tailored their disenfranchisement policies with the specific intent of excluding the newly-eligible black male voters. They did so by imposing disenfranchisement for crimes believed to be committed by blacks, but not so for crimes perceived to be engaged in by whites. This set up the bizarre situation whereby a man convicted of beating


\textsuperscript{15} Id. at 2.

\textsuperscript{16} Id.
his wife would lose the right to vote, but not one convicted of killing his wife.\textsuperscript{17} Such was the racial logic of the time.

Not surprisingly, the bulk of the reforms to disenfranchisement law have taken place in states with the most restrictive policies, particularly those that bar persons from voting even after they have completed their felony sentence. Public opinion research has demonstrated strong support for restoration of rights to those who have “paid their debt to society.”\textsuperscript{18} There have also been persuasive arguments that engagement in the electoral process will facilitate successful reentry into the community from prison.

While the success of the reform movement in a relatively short period of time has been impressive, it nonetheless either directly or indirectly refrains from advocacy for a group of citizens that represents nearly a third of the disfranchised population, the more than 1.6 million Americans incarcerated in the nation’s state and federal prisons. In the following section, I will address and challenge the commonly expressed rationale for denying the right to vote to this group of people. In doing so, I hope to help stimulate new thinking about whether these policies serve any legitimate function in our democracy.

C. Challenging Prisoner Disenfranchisement: The Philosophical Debate

The disenfranchisement of prisoners generally is premised on assumptions about people in prison that portray them as qualitatively distinct from citizens in the outside world. From this perspective flows a view that disenfranchisement is a reasonable penalty to be imposed upon this class of people. A closer look at these perspectives reveals flawed logic and troubling conclusions.

1. Is Prison “Different?”

Given the momentum for reform and the changing political environment on felony disenfranchisement, we should explore why this movement has not generally evolved to advocating for voting rights for persons in prison. Political considerations play into this, of course, but perhaps the more fundamental problem is the prevailing senti-
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ment that somehow “prison is different,” and therefore, people in prison deserve to lose the right to vote. In this framing, prisoners are distinct from offenders who are not in prison, and further, disenfranchisement is seen as a reasonable aspect of the punishment that has been imposed on them. But does this rationale hold up to scrutiny?

In a broad sense, it seems clear that the imagery commonly ascribed to prisoners cannot help but stigmatize this group of people and lend a certain air of mystery to them. As many have noted, the walls of the prison are erected not only to keep prisoners locked in, but also to keep the outside world locked out. Few journalists venture into this massively funded public operation, and legislators largely take a “hands off” approach unless there is an eruption of violence. As a result, the image of the prisoner is one that is communicated largely through mass media marketing and Hollywood stories. Hannibal Lecter may be at the extreme edge of this portrayal, but cable TV series such as Oz and other depictions similarly communicate a picture of angry men (and sometimes women) capable of sudden and seemingly irrational acts of violence.

So we begin with a public mindset regarding prisoners that is largely based on overwrought stereotypes and therefore unlikely to be inclined to be supportive of anything perceived as “prisoners’ rights.” But in addition to this framing of the issue, there is also the problematic nature of how prison sentences are viewed as qualitatively distinct from other sanctions, a view that does not hold up to serious scrutiny. While it is true that the vast majority of persons convicted of serious violent crimes are sentenced to prison, in many cases of felony sentencings it is a close call between receiving a prison sentence or being placed on probation with conditions of supervision. Data from the Bureau of Justice Statistics, for example, demonstrate that of defendants convicted of a felony in the nation’s seventy-five largest counties in 2006 (most recent data), about a third each were sentenced to prison (35%), jail (36%), or probation or other non-incarcerative sanctions (30%).19 The differences in sentencing may reflect a variety of factors, including the relative severity of the crime, prior criminal history, availability of sentencing alternatives, and the sentencing judge; but many cases are essentially on the margins and could receive

either a prison term or a supervised sentence in the community. Therefore, the notion that “prison is different” does not really hold up in a substantial number of cases. Despite this, in twenty states persons in prison lose their right to vote while those on probation do not.

2. Disenfranchisement as an Aspect of Punishment

A key assumption that contributes to prisoner disenfranchisement is that it is generally assumed that disenfranchisement is merely a component of the punishment that is imposed upon conviction. But this assumption proves faulty on two grounds. First, unlike other aspects of punishment, disenfranchisement is neither imposed by a judge based on the individual characteristics of the offender and the offense, nor is it even acknowledged in the courtroom. Rather, it is imposed across the board depending on the type of sentence imposed in a given state, and most of the actors in the courtroom—including most notably, the defendant—are not even aware that this right of citizenship is being taken away.

A broader question lies in the nature of punishment itself. While imprisonment clearly represents a loss of liberty, we do not normally impose restrictions on the fundamental rights of citizenship for those who are incarcerated. If we conceive of voting as an aspect of free speech, the anomalous policy of restricting voting rights becomes clear. For example, someone in prison is free to subscribe to Newsweek magazine, but not to a magazine that describes how to make homemade bombs. The distinction here is between free speech and advancing public safety. People in prison are also free to communicate their thoughts to the outside world through letters, phone calls, and other forms of communication. Indeed, as some have done, they can submit op-ed articles to the New York Times or the Washington Post, and have their published words reach millions of readers. In almost all cases, such activity is far more influential than casting just one vote among millions in an election, yet there are relatively few restrictions placed on such communications.

3. Prisoners as “Untrustworthy”

There are those who contend that people who break the law are by definition untrustworthy and therefore should not be in a position to determine the laws that govern society. As commentator Roger Clegg reasons, “[p]eople who commit serious crimes have shown that they are not trustworthy. And, as to equity, if you’re not willing to
follow the rules yourself, you shouldn’t be able to make the rules for everyone else.”

Essentially, Clegg is suggesting that we establish a character test for voting qualification, one defined by a criminal conviction. In a previous era, such restrictions were only mildly disguised through literacy tests and poll taxes, but this modern day version is not much different. For a start, it suggests that “once a criminal, always a criminal” should govern access to the voting booth. It also rests on the dubious assumption that people who have been convicted of stealing a car, for example, cannot be trusted to participate in decision-making about which of two candidates has a more reasonable position on the war in Afghanistan, publicly-funded abortions, or health insurance policy. There is certainly no research that supports such a distinction. One might make an argument that persons convicted of electoral offenses might be barred from voting out of concern for not tainting the electoral process, but since more than 99% of persons in prison have not been convicted of such offenses this would hardly have any significant impact on the makeup of the electorate.

4. Impact on Democracy

As the nation has struggled to advance the concept of democracy over two centuries, the increasingly anomalous policy of disenfranchisement becomes a glaring gap on the ideal of full citizen participation, particularly as the criminal justice population has risen to record numbers. Even as a number of states have moved to extend voting rights to people on probation or parole, or to those who have completed their sentences, the prison population of 1.6 million people becomes increasingly isolated from the ballot box.

Nevertheless, many people contemplating the prospect of voting in prison initially conjure images of “criminal voting” that imagines “criminals” subverting the interests of law-abiding citizens. But how likely is this in practice? On an anecdotal basis, as one who has visited and corresponded with many prisoners over the years, it is not at all clear that people in prison have markedly different perspectives on

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key national concerns—economic issues, national defense, social policy—than the voting public in the free world. And on a practical basis, consider how political campaigns are waged and how issues are presented. While public safety issues are clearly of concern to voters, rarely are elections decided solely, or even significantly, on those policies. Candidates may portray themselves as “tough on crime,” of course, but it is difficult to imagine a candidate running on a “pro-criminal” platform gaining much traction in the electoral arena.

Further, to the extent that prisoners may in fact have strong views about incarceration and public safety issues, why should those views be denied access to the ballot box? Consider, for example, the voting rights of another notorious group: BP oil executives. In response to the Gulf oil spill, there have been varied calls for civil or criminal prosecution, payment of fines and damages, and other penalties, but no one has suggested that these executives should lose the right to vote. So, they are free to support candidates who they believe best represent their worldview, and if you or I disagree with them, then it is our job to develop support for our preferred alternatives.

In the area of incarceration policy specifically, with prisons in most states having been declared to be operating in an unconstitutional manner at various times, why would we not want to have the perspectives of the people who have experienced those conditions most directly incorporated into the electoral discussion? As law professor Debra Parkes argues, “[t]he reality that prisoners may have an impact on the outcome of elections is an argument in favour of allowing them to vote rather than against it.”22 Anecdotal evidence regarding prisoner input on the public debate suggests that enfranchisement may in fact encourage candidates to engage prisoners in dialogue. In a Canadian provincial election in Quebec in 1998 with prisoners eligible to vote, Parti Québécois candidate Raoul Duguay met with inmates at Cowansville Penitentiary, home to many long-term inmates.23 With ninety-two prisoners having registered to vote at the prison, Duguay considered these numbers sufficient enough to warrant a meeting with them.24

To bring a real world perspective into this analysis, there are in fact two states, Maine and Vermont, that have long permitted prison-

23. Id. at 100-01.
24. Id. at 101.
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ers to vote.\textsuperscript{25} In addition, Utah and Massachusetts had previously per-
mitted prisoner voting, but imposed a ban following referenda in 1998
and 2000, respectively.\textsuperscript{26} There is little data by which to assess what
this practice looks like, but available evidence suggests that a modest
number of prisoners do vote, and the process is relatively low-key.
Interested prisoners are able to use an absentee ballot to vote in their
home jurisdiction and there are no indications of practical problems
arising on election days. Looking at electoral outcomes, one would be
hard pressed to argue that these states have somehow become “pro-
criminal” in their orientation as a result of this practice.

D. Disenfranchisement of Prisoners Is Counterproductive for
Democracy and Public Safety

In addition to the philosophical challenges raised by disen-
franchising people in prison, such policies exacerbate many of the
problems associated with disenfranchisement in general. In particu-
lar, they create significant limitations on full democratic participation
by citizens, run counter to efforts to promote public safety, and exac-
erbate existing inequalities in the criminal justice system. These in-
clude limitations on the electorate, enhanced racial disparity, and
exacerbating challenges for reentry.

1. Limitations on the Electorate

Over the course of more than two hundred years the United
States has become a far more inclusive society than at the time of its
founding. The right to vote has been extended to women, African
Americans, and poor people, and earlier restrictions are now almost
uniformly looked back upon with regret. Therefore, the only major
restriction on the right to vote is for persons with current or previous
felony convictions. (Other ongoing voting rights issues remain, such
as the movement to secure Congressional representation for citizens
of the District of Columbia, though these citizens do have the right to
vote for other offices.) As noted above, felony disenfranchisement
affects a growing number of people as a result of the dramatic expan-
sion of the criminal justice system in recent decades, with the disen-
franchised population in state and federal prisons now numbering 1.6
million.

\textsuperscript{25} Mauer, \textit{Mass Imprisonment and the Disappearing Voter}, supra note 17, at 51.
\textsuperscript{26} \textit{Felony Disenfranchisement Laws}, supra note 5, at 2.
The legal exclusion of virtually all prisoners from the electoral arena contributes as well to the *de facto* disenfranchisement of most of the seven hundred thousand persons confined in local jails. The vast majority of this population is not legally disenfranchised since they are generally not serving a felony sentence or residing in one of the states that disenfranchises ex-felons. The majority (about 62%) of this population is awaiting trial, with the remainder generally serving a sentence of less than one year for misdemeanor convictions. In practice, however, few jail inmates are ever permitted to vote, primarily because of bureaucratic obstacles. Since inmates by definition cannot get to a voter registration office, and also have difficulty securing absentee ballots, the practical obstacles to their electoral participation in effect lead to widespread disenfranchisement. Notable exceptions include jails in Washington, D.C.; Philadelphia, PA; and Montgomery County, MD, where jail officials and voting rights groups have joined to make registration materials and absentee ballots widely available within the jail to interested inmates. If prisoners housed in state and federal prisons were permitted to vote, then it is likely that mechanisms to facilitate this would be in place in these institutions, and therefore could easily be adopted at the jail level as well.

2. Enhanced Racial Disparity

While disenfranchisement policies are theoretically race-neutral in their intent, in practice they produce a severely disproportionate racial effect. In large part, this results from disproportionate rates of felony arrests and convictions among African Americans and other minority groups. But, as a host of research has documented, disparities in imprisonment by race vary significantly in the extent to which they reflect criminal behavior. Criminologist Robert Crutchfield, for example, concludes that:

A growing literature shows empirically that racial differences in criminal involvement contribute substantially less to racial difference in criminal justice processing in some jurisdictions . . . . Unwarranted disparities in imprisonment and in criminal justice processing generally have been shown to correlate with social, demographic, and economic characteristics of jurisdictions. In other words, the

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extent to which racial differences in imprisonment can be accounted for by higher African American involvement in imprisonable offenses... is dependent on the social and economic climate of states and of particular localities.  

Nowhere is this more significant than in the area of drug law enforcement, the largest source of growth in incarceration since the 1980s. Looking at state and federal prisons, there has been an 1100% increase in the number of imprisoned drug offenders since 1980, far greater than the overall inmate population increase of about 350%. And this increase has particular resonance for disparity issues, with two-thirds of imprisoned drug offenders being African American or Hispanic. Much of this effect reflects disparate law enforcement practices regarding drug offenses, with African Americans being arrested for both drug possession and sale offenses at considerably higher rates than their proportion of drug use or sales. Therefore, while disenfranchisement policies generally affect people of color disproportionately, this is even more true in regard to disenfranchisement of incarcerated people since the racial/ethnic disparities in prison are the most extreme within the criminal justice system.

The racial effects of disenfranchisement extend well beyond the individual who is currently disenfranchised, though. While not all members of a given racial or ethnic group vote as a uniform bloc, there are nonetheless strong patterns of party affiliation or issue identification in such communities. Therefore, to the extent that felony disenfranchisement reduces the scale of the black electorate in particular, it also reduces the political impact of the larger black community, including those who have never been convicted of a felony themselves. Further, it is possible that large-scale disenfranchisement may reduce overall voter participation among eligible voters in some communities. Since voting is in large part a communal activity—we frequently discuss upcoming elections with family members and friends, or drive to the voting polls together—then any diminution of this activity may have a spillover effect. A study examining this issue found


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that states with more punitive disenfranchisement policies do in fact have lower electoral participation even among legally eligible voters.33

3. Exacerbating Challenges for Reentry

The widespread engagement with reentry policy and planning over the past decade has marked a renewed interest in producing effective outcomes for people transitioning from prison back into the community. While successful reentry is largely conditioned upon access to employment, housing, and other services, a key ingredient lies in developing positive connections to institutions in the community. By encouraging ex-offenders to become engaged in pro-social activities it is expected that they will then come to value the rewards of these connections more so than by engaging in anti-social behavior. In this regard, participation in the electoral process is clearly a strong means of connecting with the larger community and affirming one’s commitment to that larger community. By so doing, it appears that there are positive public safety benefits for the community as well. An assessment of this issue by Christopher Uggen and Jeff Manza finds that among people with prior felony convictions, there are “consistent differences between voters and non-voters in rates of subsequent arrest, incarceration, and self-reported criminal behavior,”34 and that “[v]oting appears to be part of a package of pro-social behavior that is linked to desistance from crime.”35

But the reentry rationale is equally true in regard to voting in prison. As corrections officials around the country now recognize, reentry planning needs to begin not on the day of release to the community, but ideally on the day of admission to prison. Therefore, we can imagine the potential energizing effect of hundreds of thousands of people in prison casting their (often first-time) votes for President and other offices. Given the extreme isolation of prisons from outside society, what better way of bridging that gap than participating in one of the few areas of public life that bring all Americans together?

Disenfranchisement can also be viewed as one element of the growing scope of the collateral consequences of a criminal conviction

35. Id. at 214.
that make it increasingly difficult for persons coming out of prison to rejoin the community in a productive manner. In addition to the loss of voting rights, various state and federal policies now impose restrictions on access to welfare and food stamp benefits, residence in public housing, financial aid for higher education, and access to employment. The collective impact of such policies, along with the longstanding stigma attached to a person with a prison record, creates a set of hurdles to successful reentry that are truly daunting.

E. International Perspective

As is true with criminal justice policies broadly speaking, so is it also the case that felony disenfranchisement policy in the United States is far more extreme than in other nations. The United States leads the world in its use of imprisonment, is one of the only industrialized nations to still employ the death penalty, is virtually unique in sentencing juveniles to life without parole, and also maintains restrictions on voting rights greater than in any other democratic nation.36

The extreme nature of U.S. disenfranchisement policies can be seen in the fact that to the extent there is debate about this issue elsewhere, the only significant distinction is whether any restrictions at all should be placed on people with felony convictions and if so, only to prohibit those persons in prison from voting. So, it is virtually unheard of in the rest of the Western world for an offender on probation or parole to lose the right to vote and certainly not for someone who has completed serving a sentence. The only exceptions to this are relatively trivial ones, such as the German provision of permitting a maximum five-year post-sentence loss of voting rights for offenses connected to voting fraud or misuse of the ballot box.37 In 2003, only two persons in Germany were disenfranchised under these provisions.38


38. Id.
A survey published by Laleh Ispahani in 2009 examined the disenfranchisement practices of European nations. She found that seventeen nations imposed no ban on prisoner voting, twelve (mostly former Eastern bloc nations) barred prisoner voting, and eleven employed a limited ban, generally applying to those convicted of serious crimes or serving long sentences.

Further, in those nations where data were available, prisoners generally displayed an active interest in electoral participation. For example, in Belgium, Lithuania, and Romania, more than 60% of inmates vote, while in Italy and the Netherlands between 20-60% do so.

Recently, the right of prisoners to vote has been strongly affirmed by constitutional court decisions in a number of nations. In two rulings in 1993 and 2002, the Supreme Court of Canada upheld the importance of prisoner voting rights, arguing that “[d]enial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter.” In South Africa, shortly after the dismantling of the apartheid government, the Constitutional Court also upheld the right of prisoners to vote in two separate cases. And in Israel, the issue of prisoner voting rights arose in the case of Yigal Amir, the assassin of Prime Minister Yitzak Rabin, and clearly one of the most despised citizens in the country. Yet the court upheld his right to vote as well, along with other incarcerated persons, in the case of Alrai v. Minister of the Interior, declaring that we must separate “contempt for this act” from “respect for his right.”

A case brought before the European Court of Human Rights (“ECHR”) challenged the blanket denial of voting rights to all sentenced prisoners in the United Kingdom. The case was brought by John Hirst, who was serving a life sentence and had been barred from voting in any parliamentary or local elections. While the court did not unambiguously uphold the right of all prisoners to vote, it de-

40. Id. at 25, 27.
42. Ispahani, supra note 39, at 48.
43. Id. at 49.
44. HCJ 2757/06 Alrai v. Minister of the Interior 50(2) PD 18 [1996] (Isr.).
45. Ispahani, supra note 39, at 45.
46. Id. at 41-45.
clared in 2005 that a blanket denial such as that practiced in the UK was in violation of protocols of the ECHR.47 The court left open the possibility that a member state could prohibit certain categories of prisoners from voting, such as those whose crimes involve abuse of a public position, but only after deliberation by a legislative body to develop a rationale for a compelling public interest in doing so.48

Finally, courts in Australia and Kenya have also affirmed the right of some or all prisoners to participate in the electoral process. A 2007 ruling by the Australian High Court rejected a blanket ban on voting by prisoners and reinstated the previous policy of permitting voting by anyone serving a prison term of less than three years.49 And in 2010, a Kenyan court affirmed the right of fifty thousand prisoners to vote in an upcoming national referendum.50 While the ruling only applied to the initial vote, it was expected that its impact might extend to future elections as well.51 Thus, in all these cases, and even in regard to petitioners hardly viewed as sympathetic in the public eye, constitutional courts have strongly affirmed the rights of citizenship, even for those behind bars.

F. Moving Toward Prisoner Enfranchisement

To make the argument that prisoners should be able to vote does not necessarily suggest that such an outcome is on the near horizon in the United States. Most states have banned this practice for many years and in fact go well beyond it by barring people on probation, parole, and ex-felons in many states. Currently, only thirteen states limit their disenfranchisement policy to those who are incarcerated, with two others not imposing any limits on voting.52 Nonetheless, if we are to attempt to move toward universal enfranchisement we would do well to consider the strategies and messages that can help to create the support for such a movement. Among other considerations is the need to consider whether language or arguments that may be perceived as strategic in the short run can be counterproductive later. A prime example in regard to advocacy of

47. Id.
48. Id.
51. Id.
52. Felony Disenfranchisement Laws, supra note 5, at 3.
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voting rights for ex-felons is the concept that voting rights should be restored “once you have paid your debt to society.” But while such an argument may be effective in gaining public support for reform, it also reinforces the notion that losing the right to vote is a part of that “debt” to society, and therefore, a legitimate aspect of the punishment that is imposed. If this is the case, then not only have people in prison not finished paying their debt, but neither have people on probation or parole, since they are still under supervision and could be returned to prison for violations. Thus, advocates for reform should carefully consider how to achieve short-term change while also laying the groundwork for a philosophical shift in our thinking about punishment that can produce fundamental long-term change.

While it is unlikely that many states would consider extending voting rights to people in prison in the short run, one can be cautiously optimistic about the prospects for doing so in the not too distant future. As noted, twenty-three states have enacted some type of reform to their felony disenfranchisement practices since 1997—a remarkable pace of activity in a relatively short time frame. In addition, in an increasingly interdependent global world, public policy discussions within the United States are moving at least modestly to take into account practices in other nations for the insight they may lend to our national perspective. In recent years, United States Supreme Court decisions involving the death penalty and life without parole for juveniles, for example, have made note of the practice of other nations as a point of reference for consideration.

Finally, just as advocates in all social movements maintain a vision for long-term change while striving for short-term victories, so too should the movement for disenfranchisement reform engage the public in thinking about the full meaning of democratic participation in regard to felony disenfranchisement. Such discussions need to be strategic in relation to time and place, and if consciously incorporated into a reform strategy, we may yet see progress toward this goal before long.

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53. See supra note 14 and accompanying text.
INTRODUCTION

This Article considers state and federal government expansion of genetic surveillance as a collateral consequence of a criminal record in the context of a new biopolitics of race in America. As I discuss more fully in my book Fatal Invention: How Science, Politics, and Big Business Re-create Race in the Twenty-First Century, the emerging biopolitics of race has three main components. First, some scientists are resuscitating biological theories of race by modernizing old racial typologies that were based on observations of physical differences with cutting-edge genomic research. These scientists are redefining race as a biological category written in our genes. Second, the biotechnol-
ogy and pharmaceutical industries are converting the new racial science into products that are developed and marketed according to race and that incorporate assumptions of racial difference at the genetic level.\(^4\) Finally, government policies that appear to be colorblind are stripping poor minority communities of basic services, social programs, and economic resources in favor of corporate interests, while simultaneously imposing on these communities harsh forms of punitive regulation.\(^5\) Mass incarceration and its collateral consequences are the chief examples of the punitive regulation of African American communities. This Article contends that these dehumanizing policies of surveillance and control are obscured by the emerging genetic understanding of race, which focuses attention on molecular differences while ignoring the impact of racism in our society.\(^6\)

Only a decade ago, the biological concept of race seemed to have finally met its end.\(^7\) The Human Genome Project, which mapped the entire human genetic code, proved that race could not be identified in our genes.\(^8\) Yet, there has been an explosion of race-based science and biotechnologies. For example in 2005, the United States Food and Drug Administration (“FDA”) approved the first race-specific drug, BiDil, to treat heart failure in black patients.\(^9\) In addition, fertility clinics solicit egg donations based on race and use race in genetic tests to determine which embryos to implant and which to discard.\(^10\) Consumers can send cheek swabs to dozens of online companies to find out not only their genetic ancestry, but also their racial identity.\(^11\)

\(^4\) Id. at 149-201, 226-57.
\(^5\) Id. at 300-08.
\(^7\) Id. at 262.
\(^9\) Jonathan Kahn, How a Drug Becomes “Ethnic”: Law, Commerce, and the Production of Racial Categories in Medicine, 4 YALE J. HEALTH POL’Y L. & ETHICS 1, 1 (2004); see also Ian Whitmarsh & David S. Jones, Governance and the Uses of Race, in WHAT’S THE USE OF RACE?, supra note 6, at 7.
\(^11\) Obasogie, supra note 8, at 25; Charmaine D. Royal et al., Inferring Genetic Ancestry: Opportunities, Challenges, and Implications, 86 AM. J. HUM. GENETICS 661, 661 (2010).
Furthermore, one of these companies used the same forensic tools to help law enforcement agencies identify the race of suspects.\textsuperscript{12}

Most relevant to the subject of this Symposium, in the last decade, federal and state governments have been rapidly expanding the collection of genetic information for law-enforcement purposes.\textsuperscript{13} With eight million offender samples, the U.S. federal government has stockpiled the largest database of DNA seized from its citizens of any country in the world.\textsuperscript{14} Because of rampant racial bias in arrests and convictions, the government’s DNA databases, which are being amassed nationwide, effectively constitute a race-based biotechnology emerging from genetic science.\textsuperscript{15} Unlike voluntary genetic testing technologies that claim to help people cure their diseases, improve the genetic composition of their children, and find their identities, forensic DNA repositories are gathered by the state without consent and maintained for the purpose of implicating people in crimes.\textsuperscript{16} These repositories signal the potential use of genetic technologies to reinforce the racial order not only by incorporating a biological definition of race, but also by imposing genetic regulation on the basis of race.

Part I of this Article reviews the expansion of DNA data banking by states and the federal government, extending the collateral impact of a criminal record—in the form of becoming a permanent suspect—to growing categories of people. Part II argues that the benefits of this genetic surveillance in terms of crime detection, exonerations of innocent inmates, and public safety do not outweigh the unmerited collateral penalty of state invasion of individuals’ privacy and the larger harms to democracy. These harms are exacerbated by the disproportionate collection of DNA from African Americans as a result of deep racial biases in law enforcement. Part III explains why DNA databases reflect and help to perpetuate a Jim Crow system of crimi-
nal justice. Finally, Part IV elaborates the racial harms that are caused by genetic surveillance that targets large numbers of African Americans, putting into practice deep-seated stereotypes about blacks’ inherent criminality. Far from correcting racial bias in law enforcement, the state’s use of DNA to designate millions of permanent suspects reinforces the roots of racial injustice.

I. EXPANDING COLLECTIONS

Genetic testing was first introduced as a type of supplemental evidence to help convict criminal suspects by comparing their DNA to crime scene samples. Data banking extended the purpose of DNA from confirming the guilt or innocence of particular suspects to detecting unknown suspects from crime-scene evidence. The theory was that law enforcement offenders could catch repeat offenders by running genetic information gleaned from semen, blood, saliva, or hair left by the perpetrator through a database containing genetic profiles of prior lawbreakers. The DNA profiles function as “genetic fingerprints” that can help match the crime scene sample with one in the DNA database. A match—called a “cold hit”—might save police months of investigation or help them catch a criminal who would have otherwise eluded detection. Initially, DNA was collected only from violent felons and sex offenders on the theory that they were the most likely to commit crimes again and to leave genetic evidence at the scene. Taking and storing genetic information from these felons constituted a collateral penalty resulting from conviction of a narrow set of crimes. The heinous nature of their crimes justified the state’s interference in their privacy.

The reach of this collateral penalty has extended drastically in the last two decades. Not only have the categories of people subject to DNA seizure increased, but the government’s use of the banked DNA has also broadened. Throughout the 1990s, Congress dramatically en-

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18. See id. at 561.
19. See id. at 560-61.
20. Id. at 563.
22. Schaefer, supra note 17, at 560.
23. See United States v. Romero-Vilca, 850 F.2d 177, 179 (3d Cir. 1988) (defining a collateral consequence as “one that is not related to the length or nature of the sentence imposed on the basis of the plea”); see also supra text accompanying note 22.
hanced the federal government’s authority to collect, analyze, and permanently store DNA samples.\textsuperscript{24} The DNA Identification Act of 1994 provided funding for law enforcement agencies to amass DNA into a giant federal repository, the Federal Bureau of Investigation’s (“FBI”) Combined DNA Index Systems (“CODIS”).\textsuperscript{25} Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 and the Crime Identification Technology Act of 1998, which allocated federal funds for developing and upgrading DNA collection procedures.\textsuperscript{26} The federal DNA databank contains not only samples gathered by federal agents but also genetic profiles submitted to the FBI by state law enforcement agencies. All states, in turn, have access to CODIS computerized data. By linking federal and state databases, law enforcement officers around the country can conduct interstate investigations, matching DNA evidence to suspects at the local, state, and national levels.

In the last decade, Congress passed a series of laws that gradually cast the federal DNA net even wider. The Patriot Act, passed in 2001 in the wake of the 9/11 attacks, extended the scope of federal DNA collection to terrorism-related crimes.\textsuperscript{27} The Justice for All Act of 2004 further widened the reach to all federal felonies and to additional crimes of violence or sexual abuse.\textsuperscript{28} On January 5, 2006, President George W. Bush signed into law, apparently without anyone noticing, the DNA Fingerprint Act of 2005—a stunning extension of government power.\textsuperscript{29} Buried in the pages of the popular Violence Against Women Act reauthorization bill, the DNA Fingerprint Act authorizes U.S. agents to take and store DNA from anyone they arrest or detain and permits CODIS to retain profiles from arrestees that were submitted by the states that collected their DNA.\textsuperscript{30} Citizens who have not been convicted or charged with any crime and immigrants de-

\textsuperscript{24} See infra text accompanying notes 25-26.
\textsuperscript{29} Krimsky & Simoncelli, supra note 14, at 34.
\textsuperscript{30} Id. at 34-35.
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tained on suspicion of Immigration and Naturalization Service violations may also have their profiles retained.31

A similar escalation is taking place at the state level. All fifty states now extract DNA from at least some classes of offenders and send it to CODIS.32 Forty-seven states take a sample from anyone convicted of a felony, and some states include misdemeanor offenders.33 In eighteen states, people who are only arrested are forced to submit DNA, even if they are never convicted of a crime.34 Thirty-five states have extended their genetic collection law to children.35 Most states retain the actual DNA samples and not just the genetic profiles derived from the samples, allowing investigators to mine them for additional genetic information in the future.36 Half of states allow the stored DNA samples to be used for purposes other than law enforcement, such as biomedical research.37

The State of California, which has amassed the third-largest DNA database in the world, behind only the U.S. and British governments, illustrates the cutting edge of state expansion.38 In 1998, the California legislature passed the DNA and Forensic Identification Database and Databank Act to permit police to retrieve DNA from anyone, including children, convicted of a felony, sex offense, or arson.39 By 2004, the California database had grown to 220,000 offender profiles.40 However, law enforcement clamored for a wider net to stockpile even more DNA samples for the database.41 Also in 2004, Proposition 69, the DNA Fingerprint, Unsolved Crime, and Innocence Protection Act, was placed on the ballot.42 The ballot initiative took a giant leap beyond the current law; it broadened the scope of individu-

33. Id. at 38 (stating that only Idaho, Nebraska, and New Hampshire do not authorize DNA collection from all felons).
34. Id. at 39 tbl.2.2, 41.
35. Id. at 38.
36. Id. at 237-38.
37. Id. at 238.
39. Tania Simoncelli & Barry Steinhardt, California’s Proposition 69: A Dangerous Precedent for Criminal DNA Databases, 33 J.L. MED. & ETHICS 199, 202 (2005). The felony of arson was added after 2002 in an expansion of the Act’s list of qualifying offenders whom police were permitted to retrieve DNA. Id.
40. Id. at 200.
41. Id. at 203.
42. Id. at 199.
als in the state who are subject to warrantless DNA seizures to anyone, even children, arrested on suspicion of committing any felony.\(^{43}\) The measure also applies retroactively to authorize collection of DNA from all five hundred thousand Californians who are in prison, or on probation or parole with a felony record.\(^{44}\) Consequently, the state’s DNA database is expected to mushroom to more than two million samples over the next five years.\(^{45}\)

There was strong opposition to the law. A range of advocacy groups, including the California American Civil Liberties Union (“ACLU”), the League of Women Voters, the Privacy Rights Clearinghouse, the Children’s Defense Fund, and the American Conservative Union, objected to the initiative’s inclusion of arrestees for undermining the principle of presumptive innocence, branding children with lifetime suspicion, and wasting taxpayer money on the monumental costs of DNA processing.\(^{46}\) According to the California Department of Justice, of the approximately 332,000 people arrested for felonies in California in 2007, more than 101,000 were not convicted of any crime.\(^{47}\) That means that roughly 30% of arrestees are subject to DNA seizure without a determination of guilt.\(^{48}\)

In 2009, the ACLU of Northern California filed a class-action lawsuit arguing that Proposition 69 is unconstitutional because it subjects innocent Californians to “a lifetime of genetic surveillance” that constitutes an unreasonable search under the Fourth Amendment.\(^{49}\) The named plaintiff, Lily Haskell, was arrested at a peace rally in San Francisco and forced to provide a DNA sample, even though she was quickly released without being charged with a crime.\(^{50}\) “When your DNA is taken after an arrest at a political demonstration, it can have a silencing effect on political action,” Haskell later said.\(^{51}\) "Now my ge-
genic information is stored indefinitely in a government database, simply because I was exercising my right to speak out.” But the ACLU lost its case. A California federal judge ruled that the ACLU failed to show that individual privacy rights outweigh the government’s compelling interest in DNA profiling that works to “swiftly and accurately” solve past and present crimes.

In California, Colorado, and New York, the scope of genetic surveillance extends to another category of people who have never been suspected of a crime. In what is known as “familial searching,” investigators question relatives of people whose DNA is stored in the government databank and pressure them to submit genetic samples to avoid being implicated in a crime. Under this scheme, people become candidates for inclusion based merely on their relationship to someone previously profiled. Familial searching is used when a crime scene sample fails to produce a perfect cold hit, but does provide a partial match to a DNA profile stored in the database. The police track down close relatives, such as siblings, parents, or children, of the partial matches and ask them to provide a DNA sample through a cheek swab to compare with the crime scene evidence. Although submitting a sample is voluntary, refusing to submit one looks suspicious. Gathering samples from family members extends state surveillance to yet another category of innocent citizens. These innocent citizens are trapped by a new form of suspicion based on familial association.

II. THE COST OF SURVEILLANCE

Government DNA data banking began as a targeted procedure to assist law enforcement in identifying perpetrators of a narrow set of crimes. It has expanded into a form of state surveillance that ensnares innocent people or petty offenders who have done little or

52. Id.
55. See KRIMSKY & SIMONCELLI, supra note 14, at 88.
56. Id.
58. See generally KRIMSKY & SIMONCELLI, supra note 14, at 64–88 (discussing the process of familial DNA searches and the policy issues surrounding the practice).
59. Id. at 28.
nothing to warrant the collateral intrusion into their private lives. Databanks no longer detect suspects—they create suspects from an ever-growing list of categories. Even so, the public shows little alarm about the massive retention of genetic information because the balance between protecting individual privacy and keeping the streets safe seems to fall in favor of more law enforcement. DNA profiling is a far more precise and objective method of identifying suspects compared to less sophisticated law enforcement techniques, such as eyewitness identification or smudge fingerprints found at a crime scene.60 Far from feeling threatened by this gigantic storehouse of genetic data, many Americans see it as a surefire way of catching criminals and ensuring that only guilty people are convicted of crimes.61 Storing an innocent person’s DNA seems a small price for such a great public good.

The countless cases where DNA data banking either yielded no benefit or produced erroneous identifications received little attention from the media. Moreover, the public does not hear from the thousands of innocent people whose DNA was seized and stored against their will. Although DNA testing has shed light on the injustice of false convictions, it cannot solve the underlying problems that lead innocent people to be convicted in the first place. Most wrongful convictions result from deep biases in the criminal justice system that make poor, minority defendants vulnerable to police abuse, misidentification, and inadequate representation.62 False confessions coerced by the police are one of the main causes of wrongful convictions.63 According to the Innocence Project, “In about [twenty-five] percent of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty.”64

62. See Teressa E. Ravenell, Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims, 81 Temp. L. Rev. 689, 692 (2008) (“[W]rongful convictions do not result from a single flaw or mistake; many factors can be at the root of a wrongful conviction. Such factors may include biased police lineups, mistaken eyewitness identification, faulty forensic science, coerced false confessions, and unreliable informants.” (internal citations omitted)).
false confessions were a factor in fifteen of thirty-three exoneration
won by the Center on Wrongful Convictions. It makes no sense to
correct a problem created by law enforcement’s abuse of power by
handing over even more authority to law enforcement in the form of
DNA collection. The way to reduce wrongful convictions is to remove
the biases based on race and class that corrupt our criminal justice
system. Extending the reach of state surveillance does just the oppo-
site. Besides, contrary to the public’s belief that DNA evidence is in-
fallible, there have been numerous cases of errors in the handling and
analysis of DNA that have led to false accusations and convictions of
innocent people.

These weaknesses in the state’s use of DNA data banking as a
tool for reducing crime make it harder to justify the resulting breach
of individual privacy. Society recognizes that the government violates
its civil liberties if it taps our telephones or secretly searches our
homes without court permission. Collecting and storing our DNA is
also a serious intrusion into our private lives because DNA is a part of
the body; taking it without consent violates our bodily integrity. In
addition to this material aspect, DNA contains sensitive personal in-
formation that can be used to identify our family members and us, can
be matched with other private records, including medical files.

Society tolerates the state forcibly extracting highly personal data
from people convicted of serious crimes because these offenders have
a diminished right to privacy as a result of their antisocial conduct. But
as the categories of people who are compelled to submit DNA
broaden, it becomes less clear why the state should have so much
power over them. Once compelled DNA collection goes beyond mur-
derers, rapists, and armed robbers, law enforcement’s need for a sus-

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northwestern.edu/wrongfulconvictions/aboutus (last visited Feb. 4, 2011).
66. KRIMSKY & SIMONCELLI, supra note 14, at 140-41.
67. See generally U.S. CONST. amend. IV (guarding against unreasonable searches and
seizures when the searched party has a “reasonable expectation of privacy”); Electronic Com-
clude transmissions of electronic data by computers); Omnibus Crime Control and Safe Streets
States).
68. See generally George J. Annas, Protecting Privacy and the Public—Limits on Police Use
of Bioidentifiers in Europe, 361 N. ENG. J. MED. 196, 196-201 (2009) (explaining that bioiden-
tifiers implicate privacy even more than answers on tax returns since they directly identify
individuals).
69. FED. BUREAU OF INVESTIGATION, SUMMARY OF THE UNIFORM CRIME REPORTING
ucrmain.pdf.
pect’s DNA lessens and the right to retain control over their private information strengthens. Although people convicted of heinous crimes may forfeit their claim to privacy, there is no such justification for seizing genetic samples from someone who has, say, forged a check. State agents should be required to obtain informed consent to take or test DNA from anyone who has not been convicted of a serious crime.

Although U.S. courts have been slow to recognize this threat to civil liberties, in 2008, the European Court of Human Rights unanimously held that the United Kingdom’s storage of DNA for purposes of criminal investigation infringed privacy rights protected by Article 8 of the European Convention. The European Court was especially troubled by the indefinite retention of genetic information taken from children and adults who were never convicted of a crime, stigmatizing them as if they were convicted criminals. This equation of the innocent and the guilty disregards the presumption of innocence accorded to citizens in a democracy. Massive government collection of DNA transforms the relationship between citizens and their government in ways that contradict basic democratic principles. Government becomes the watchdog of citizens instead of the other way around. Although they are guilty of no wrongdoing, huge segments of the population are perpetually under suspicion. Citizens can no longer rely on the state to safeguard their privacy by forgetting their past behavior because evidence about them is stored forever. The state has the authority to take citizens’ private property—in this case, their genetic information—without due process. Those are features of a totalitarian state, not a liberal democracy.

III. JIM CROW DATABASES

These privacy violations are exacerbated by the racial inequities that plague every part of the U.S. criminal justice system. The most stunning aspect of this injustice is the mass incarceration of African

71. Annas, supra note 68, at 198.
73. Id.
74. See Berson, supra note 70.
75. See generally Jack M. Balkin, The Constitution in the National Surveillance State, 93 MINN. L. REV. 1, 13 (2008) (arguing that “the rise of the National Surveillance State portends the death of amnesia”).
76. See Berson, supra note 70.
American men.™ Radical changes in crime control, drug, and sentencing policies over the last thirty years produced an explosion in the U.S. prison population from three hundred thousand to two million inmates.™ Additionally, the United States has the highest rate of incarceration in the world at a magnitude unprecedented in the history of Western democracies.™ The gap between black and white incarceration rates has increased along with rising inmate numbers.® Black men are eight times as likely as white men to be behind bars.® One in nine black men aged twenty to thirty-four is in prison or in jail.® In fact, most people sentenced to prison today are black.® In her 2010 book, The New Jim Crow, legal scholar Michelle Alexander demonstrates that black incarceration functions like a modern-day Jim Crow caste system because it “permanently locks a huge percentage of the African American community out of the mainstream society and economy,” replicating the subjugated status of blacks that prevailed before the civil rights revolution.®

The targeted imprisonment of black men is translated into the disproportionate storage of their genetic profiles in state and federal databases. We can look to the United Kingdom to gauge the likely racial impact of our own federal database now that it has surpassed theirs in size. Their database reveals that 40% of all black men and 77% of black men aged fifteen to thirty-five, compared with only 6% of white men, were estimated to have genetic profiles in the UK national DNA database in 2006.® Also in 2006, Stanford bioethicist Hank Greely estimated that at least 40% of the genetic profiles in the U.S. federal database were from African Americans, although they

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78. See, e.g., Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 6 (2010); Marc Mauer, Race to Incarcerate 1-2 (2006); Lo¨ıc Wacquant, Class, Race & Hyperincarceration in Revanchist America, Daedalus, Summer 2010, at 74.
79. See Roberts, supra note 77, at 1272.
80. Id.
81. Id. at 1274.
83. See Roberts, supra note 77, at 1272.
84. Alexander, supra note 78, at 13.
make up only 13% of the national population. Sheldon Krimsky and Tania Simoncelli arrive at a similar estimate in which 41% to 49% of CODIS profiles are from African Americans.

The extension of DNA collection by the federal government and a number of states to people who are only arrested—as opposed to charged or convicted—brings many more whites into the system, but it is also on its way to creating a nearly universal database for urban black men. These men are arrested so routinely that upwards of 90% would be included in databases if the collection policy is strictly enforced. In April 2010, Arizona Governor Jan Brewer signed a controversial law giving police broad authority to detain anyone suspected of being in the country illegally. This law is held up as a model for immigration enforcement policy in other states. When combined with congressional authorization of DNA sampling from all federal detainees, these immigration laws will cause the number of Latino profiles in CODIS and state databases to skyrocket.

Police routinely consider race in their decision to stop and detain an individual. A New York Times/CBS News Poll conducted in July 2008 asked: “Have you ever felt you were stopped by the police just because of your race or ethnic background?” Sixty-six percent of black men said yes, compared to only 9% of white men. The United States Supreme Court has authorized police to use race in determining whether there is reasonable cause to suspect someone is involved in crime. Michelle Alexander calls the Court’s license to discriminate the “dirty little secret of policing.” In recent decades, a conservative Supreme Court has eroded the Warren Court’s protections
against police abuse in ways that promote the arrest of blacks and Latinos—relaxing, for example, the standard for reasonable suspicion—and has blocked legal channels for challenging racial bias on the part of law enforcement.98

There is overwhelming evidence that police officers stop motorists on the basis of race for minor traffic violations, such as failure to signal a lane change, often as a pretext to search the vehicle for drugs.99 One of the first confirmations of this was a 1992 Orlando Sentinel study of police videotapes that discovered that, while blacks and Latinos represented only 5% of drivers on the Florida interstate highway, they comprised nearly 70% of drivers pulled over by police and more than 80% of those drivers whose cars were searched.100 A study of police stops on the New Jersey Turnpike similarly found that, although only 15% of all motorists were minorities, 42% of all stops and 73% of all arrests were of black drivers.101 In Maryland, only 21% of drivers along a stretch of I-95 outside of Baltimore were African Americans, Asians, or Latinos, but these groups made up nearly 80% of those who were stopped and searched.102 Likewise, an Illinois state police drug interdiction program, known as Operation Valkyrie, targeted a disproportionate number of Latinos, who comprised less than 8% of the Illinois population but 30% of the drivers stopped by drug interdiction officers for petty traffic offenses.103

Police officers also make drug arrests in a racially biased manner. Although whites use drugs in greater numbers than blacks, blacks are far more likely to be arrested for drug offenses—and, therefore, far more likely to end up in genetic databases.104 The latest National Survey on Drug Use and Health, released in February 2010, confirms that young blacks aged eighteen to twenty-five years old are less likely to

98. See Jose Felipe Anderson, Accountability Solutions in the Consent Search and Seizure Wasteland, 79 Neb. L. Rev. 711, 712-18 (2000); see also Brignoni-Ponce, 422 U.S. at 884-87 (approving race as a factor to determine whether probable cause exists).


102. Harris, supra note 99, at 80.


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use illegal drugs than the national average. Yet, black men are twelve times more likely than white men to be sent to prison on drug charges. This staggering racial disparity results in part from the deliberate decision of police departments to target their drug enforcement efforts on urban and inner-city neighborhoods where people of color live. Indeed, the increase in both the prison population and its racial disparity in recent decades are largely attributable to aggressive street-level enforcement of the drug laws and harsh sentencing of drug offenders.

A crusade of marijuana arrests in New York City in the last decade provides a shocking illustration. Since 1997, the New York Police Department (“NYPD”) has arrested 430,000 people for possessing tiny amounts of marijuana, usually carried in their pockets. In 2008 alone, the NYPD arrested and jailed 40,300 people for the infraction. Even more alarming is the extreme racial bias shown in whom the police target for arrest. Although U.S. government studies consistently show that young whites smoke marijuana at the highest rates, white New Yorkers are the least likely of any group to be arrested. In 2008, whites made up over 35% of the city’s population but less than 10% of the people arrested for marijuana possession. Instead, the NYPD has concentrated arrests on young blacks and Latinos. Police arrested blacks and Latinos for marijuana possession at seven and four times the rate of whites, respectively.

The racist marijuana policing strategy is based on the routine police practice of stopping, frisking, and intimidating young blacks and Latinos. According to Harry Levine, the City University of New York

107. Id. at 16.
110. Id.
111. Id.
112. Id.
113. Id.
sociologist who exposed the arrest campaign, “In 2008, the NYPD made more than half a million recorded stop and frisks and an unknown number of unrecorded stops, disproportionately in black, Latino and low-income neighborhoods.”

Although New York City is the “marijuana arrest capital of the world,” other cities like Atlanta, Baltimore, Denver, Houston, Los Angeles, Philadelphia, and Phoenix are also arresting and jailing huge numbers of blacks and Latinos for marijuana possession.

The widespread arrests of young blacks and Latinos for marijuana possession and other petty offenses, such as truancy, skateboarding, and playing loud music, have devastating consequences. A first-time offender who pleads guilty to felony marijuana possession has a permanent criminal record that can block him or her from getting a student loan, a job, a professional license, food stamps, welfare benefits, or public housing. Even if they avoid prison on a first offense, those who are arrested a second time risk a harsh sentence for being a repeat offender. In addition to harsh sentencing, a lifetime of genetic surveillance can now be added to the long list of collateral consequences created by discriminatory arrests.

IV. RACIAL HARMS

Racial disparities in DNA databanks make communities of color the most vulnerable to state surveillance and suspicion. The disproportionate odds faced by blacks and Latinos of having their DNA extracted and stored will, in turn, intensify the racial disparities that already exist in the criminal justice system. People whose DNA is in criminal databases have a greater chance of being matched to crime scene evidence. While a guilty person may have no right to complain, that is no excuse for unfairly placing certain racial groups at greater risk of detection. Blacks and Latinos have greater odds of being ge-
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netically profiled largely because of discriminatory police practices. Moreover, people whose profiles are entered in DNA databases become subject to a host of errors that can lead to being falsely accused of a crime. As the federal government and a growing number of states extend the scope of DNA collection to innocent people, they are imposing this unmerited risk primarily on minorities.

The problem is not only that all of these harms are placed disproportionately on people of color, but also that the dangers of state databanks are multiplied when applied to blacks and Latinos because these groups are already at a disadvantage when they encounter the criminal justice system. Blacks and Latinos have fewer resources than whites to challenge abuses and mistakes by law enforcement officers and forensic analysts. They are stereotyped as criminals before any DNA evidence is produced, making them more vulnerable to the myth of DNA infallibility. “The experience of being mistaken for a criminal is almost a rite of passage for African-American men,” writes journalist Brent Staples. One of the main tests applied by a disturbing number of Americans to distinguish law-abiding from lawless people is their race.

Many, if not most, Americans believe that black people are prone to violence and make race-based assessments of the danger posed by strangers they encounter. One of the most telling reflections of the presumption of black criminality is biased reporting of crime by white victims and eyewitnesses. Psychological studies show a substantially greater rate of error in cross-racial identifications when the witness is white and the suspect is black. White witnesses disproportionately misidentify blacks because they expect to see black criminals. According to Cornell legal scholar Sheri Lynn Johnson, “This expectation is so strong that whites may observe an interracial

121. Cole, supra note 119.
124. Id.
125. Id. at 949.
126. Id.
scene in which a white person is the aggressor, yet remember the black person as the aggressor.”

In numerous carefully staged experiments, social psychologists have documented how people’s quick judgments about the criminal acts of others are influenced by implicit bias—positive or negative preferences for a social category, such as race or gender, based on unconscious stereotypes and attitudes that people do not even realize they hold. Whites who are trying to figure out a blurred object on a computer screen can identify it as a weapon faster after they are exposed to a black face. Exposure to a white face has the opposite effect. Research participants playing a video game that simulates encounters with armed and unarmed targets react faster and are more likely to shoot when the target is black. The implicit association between blacks and crime is so powerful that it supersedes reality; it predisposes whites to see black people as criminals. Most wrongful convictions occurred after witnesses misidentified the defendant. Databanks filled with DNA extracted from guilty and innocent black men alike will enforce and magnify the very stereotypes of black criminality that lead to so many wrongful convictions in the first place.

Collecting DNA from huge numbers of African Americans who are merely arrested, with no proof of wrongdoing, embeds the sordid myth of black criminality into state policy. As databanks swell with DNA from black people who are arrested or convicted on petty offenses and as their relatives also come under suspicion in states with familial searching, the government effectively treats every black person in many communities as a criminal suspect. It seemingly also legitimizes the myth that blacks have a genetic propensity to commit crime.

In 2010, Florida State University criminologist Kevin Beaver published a widely reported study claiming to show that young men with the low-activity form of the monoamine oxidase A ("MAOA") gene—dubbed by the press as the "warrior gene"—were more likely...
to join gangs than those who had the high-activity version of the MAOA gene.\textsuperscript{133} He concluded that “male carriers of low MAOA activity alleles are at risk for becoming a gang member and, once a gang member, are at risk for using weapons in a fight.”\textsuperscript{134} The public, who already implicitly associates blacks with violence, may link research claiming that genes cause gangbanging and aggression to the disproportionate incarceration of African Americans along with the disproportionate banking of African Americans’ genetic profiles, to reach the false conclusion that blacks are more likely to possess these crime-producing traits—or even that most blacks actually possess them. Americans will become even more indifferent to racial injustice in law enforcement if they are convinced that black people belong behind bars because of their genetic predilection to crime.

CONCLUSION

Despite the racial harms of DNA data banking, civil rights advocacy groups have done little to challenge the threat posed by government genetic surveillance. Their silence stems from a tension surrounding DNA testing. Although it is serving an unjust criminal justice system, DNA technology is also responsible for one of the biggest successes in criminal justice reform. As of 2010, more than half (151 out of 254) post-conviction DNA exonerations involved African Americans.\textsuperscript{135} There could not be a better public-relations campaign for DNA than the compelling stories of falsely imprisoned people released after DNA testing. As criminologist Simon Cole notes, “At first glance, post-conviction DNA exonerations appear to be a powerful example of the use of technoscience to offset social inequality.”\textsuperscript{136} Civil rights organizations that may have ordinarily opposed the expansion of DNA databanks because of their intrusion into communities of color instead embrace DNA technology as a result of its ability to exonerate victims of the system. However, while it appears DNA databanks would decrease mass incarceration, this Article has argued that DNA databanks are actually more likely to intensify it and its collateral consequences.

\textsuperscript{133} Kevin M. Beaver et al., Monoamine Oxidase A Genotype Is Associated with Gang Membership and Weapon Use, 51 COMPREHENSIVE PSYCHIATRY 130, 132 (2010).
\textsuperscript{134} Id.
\textsuperscript{136} Cole, supra note 119, at 99.
Champions for racial justice who support expanded DNA databanks or are silent about them should not make the mistake of embracing DNA technology without analyzing its full role in the criminal justice system. Although DNA testing can correct injustices when used narrowly to confirm a suspect’s guilt or innocence, the massive genetic surveillance we are witnessing threatens to reinforce the racial roots of the very injustices that need to be corrected. Wrongful convictions are a symptom of our Jim Crow system of criminal justice, which is systematically biased against blacks and Latinos. Creating a Jim Crow database filled with their genetic profiles only intensifies this travesty of justice, adding yet another collateral consequence of criminal injustice and fortifying a dangerous biopolitics of race.

137. See, e.g., Joel Stonington, State All-Crimes Databank Proposed, WALL ST. J., June 2, 2010, at A25, available at http://online.wsj.com/article/SB10001424052748703961204575280732811781468.html (illustrating elected officials, such as Governor David Paterson and President Barack Obama, who support expanded DNA collection).

Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power

ANTHONY C. THOMPSON*

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INTRODUCTION

The United States criminal justice system operates almost reflexively as a system of racial control. Beginning in the 1980s, “crime management” and “crime control” became the two-pronged rally cry of criminal justice policy makers bent on convincing a crime-weary public that tough on crime policies would increase their safety and security. The retributive “culture of control” that ultimately emerged relied on a few favored tools for control: quick arrest, determinate sentencing, and massive incarceration. What made these tools so effective was their focused application. These tools were utilized in, and directed toward particular offenders and particular communities. As a direct result of these targeted practices, individuals and communities of color have suffered considerable consequences—both intended and unintended.

These criminal justice tools continue to be used almost without question. For the past three decades, criminal justice policy—both in substance and in application—has singled out individuals and communities of color and has left significant devastation in its path. Policy makers have been quick to defend their actions and to assert that the policies they have promoted and launched have been colorblind. They have claimed that, even if such policies could be shown to have had a disproportionate impact on individuals and communities of color, this impact was felt only because individuals of color in those communities were engaging in much of the criminal conduct. However, a closer examination of these and other such denials of racialized motivations are self-deluding at best and deceitful at worst. Criminal
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justice authorities have similarly sought to justify this targeting by asserting that limited resources have dictated that they look for the most symbolic, most visible, and most potent ways to enforce the law. Still, whatever the purported justification, years of such targeting have devastated communities of color, disabled families, and disrupted most prospects of healthy economic activity.

All of this has been well documented. But perhaps what has received less attention as a consequence of mass incarceration is the political cost that communities of color have suffered as a result of being the preferred site for law enforcement activity. One aspect of the political effect that has received at least some attention is felon disenfranchisement. An estimated 5,300,000 Americans, or about one in every forty-one adults, cannot vote because they have previously been convicted of a felony. Nearly four million (74%) of the 5,300,000 disqualified voters are not currently in prison. Rather, they are living in communities on probation or on parole or are ex-offenders. Approximately two million of those who have been stripped of the right to vote are individuals who have completed their entire sentence, including probation and parole, yet remain disenfranchised. Nationwide, 13% of African-American men have lost the right to vote—a rate that

gress, “Section 941(b)(1)(A)(iii) provides for a ten-year minimum sentence for those persons found possessing 50 grams or more of cocaine base. A similar ten-year minimum is imposed for those possessing over 5,000 grams of powder cocaine. The Sentencing Commission adopted the 100 to 1 ratio in U.S.S.G. § 2D1.1.” United States v. Clary, 34 F.3d 709, 710 n.1 (8th Cir. 1994) (upholding the disparity as constitutional since it was not passed with race-based animus), rev’d, United States v. Clary, 846 F. Supp. 768, 783-84 (E.D. Mo. 1994) (“Legislators used these media accounts as informational support for the enactment of the crack statute. The Congressional Record, prior to enactment of the statute, is replete with news articles submitted by members for their colleagues’ consideration which labeled crack dealers as black youths and gangs. Members of Congress also introduced into the record media reports containing language that was either overtly or subtly racist, and which exacerbated white fears that the ‘crack problem’ would spill out of the ghettos.” (internal citations omitted)).


8. Erika Wood, Brennan Ctr. for Justice, Restoring the Right to Vote 7 (2008), available at http://brennan.3cdn.net/5c8532e8134b233182_z5m6ihv1n.pdf; see also U.S. Census Information, Brennan Center for Just., http://www.brennancenter.org/content/section/category/us_census_and_the_incarcerated_people (last visited Mar. 25, 2011).


10. Id.
is seven times the national average—and 8% of African-Americans generally have been disenfranchised.\footnote{Id.} One of the fundamental battles for the Civil Rights Movement involved the fight for the right to vote, yet that right is eliminated or rendered irrelevant when countless numbers of people within communities of color have effectively lost the franchise. Even as states somewhat belatedly begin to loosen some of the more restrictive provisions of their disenfranchisement laws, communities of color will continue to feel the devastating effects of the diminution of their political voices and power.

Another tool that is rapidly emerging as an unseen but potent means of political disempowerment for communities of color that remains largely ignored—the “usual residence” rule of the U.S. Census Bureau.\footnote{Residence Rules: Facts About Census 2000 Residence Rules, U.S. Census Bureau, http://www.census.gov/population/www/censusdata/resid_rules.html (last modified Apr. 25, 2003).} If one were to ask the average citizen whether he or she could define the usual residence rule, the citizen most likely would indicate that he or she had never heard the term. But the lack of familiarity with both the phrase and its operation makes the practice all the more troubling. The usual residence rule instructs states to count individuals where they “live\[ \] and sleep\[ \] most of the time.”\footnote{Id.} While this sounds innocuous enough on the surface, this provision has literally facilitated an unfair redistribution of political power away from urban communities of color to rural communities.\footnote{See generally Anthony Thompson, Democracy Behind Bars, N.Y. Times, Aug. 6, 2009, at A29, available at http://www.nytimes.com/2009/08/06/opinion/06thompson.html (describing how state funds are diverted from urban to rural areas because most state prisons are located in rural jurisdictions).} Prison populations have the ability to artificially inflate the population figures of otherwise sparsely populated rural areas through the inclusion of non-voting prison inmates in their sums. This method of counting simultaneously decreases the population numbers within the communities from which these inmates have come and to which they will return for services and support.\footnote{Id.} While the full impact of this practice is yet to be determined, the political redistribution facilitated by this rule will likely have an enduring impact on apportionment decisions and the resulting political resources that communities of color will have at their disposal.

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When we combine the impact of state felon disenfranchisement laws with the impact of the usual residence rule, communities of color can expect to experience a devastating one-two punch that threatens to gut the political power of African-American communities. The redistribution of population numbers under the usual residence rule amplifies the political power of rural communities. It also reduces the power of communities of color in order to accumulate resources at a local level and exercise political power at the national level.¹⁶ The unobserved but unmistakable relationship between felon disenfranchisement and the usual residence rule is that both serve to disenfranchise large portions of African-American communities and together drain and dilute the political power that those communities could wield.

This Article examines the comprehensive and devastating blow of felon disenfranchisement and the usual residence rule to the political power of communities of color. Part I examines felon disenfranchisement and its contemporary expansions, revealing the effectiveness of this tool in controlling and limiting black political power at the state level. Part I also examines voter redistricting based on the Census and the method by which prison-based gerrymandering moves electoral power away from the communities from which inmates come—and to which they will be released—to rural prison jurisdictions in which they are housed. It then explores the interaction of these actions and their cumulative impact on black political power. Part II surveys the policies and choices that precipitated the political disempowerment of communities of color. It then examines the historical and contemporary reasons why this political disempowerment has occurred. Part III suggests ways to redress the harms caused by political disenfranchisement and to reallocate political power and resources at both the local and national level.

I. WEAKENING THE POLITICAL EXPRESSION OF INDIVIDUALS AND COMMUNITIES OF COLOR

Political disenfranchisement of African-American communities has deep roots in the history of the United States. From the Reconstruction era to current times, African-American communities have suffered the consequences of efforts to quash and to exercise control

¹⁶. Id.
over growing political power in their communities. Some of these efforts have been overt in their objectives to respond to and limit black political power. Other efforts have muted the black political voice in ways that perhaps were not intended but have had that effect. Felon disenfranchisement has perhaps more clearly fallen into the former category over time, and the usual residence rule seems to belong to the latter category. But whether explicit or implicit, the impact of both on the political power of communities of color has been—and will likely continue to be—quite potent.

A. Felon Disenfranchisement: The First Punch

The loss of voting rights following conviction of a crime is not a new phenomenon. The Ancient Greeks and Romans prevented the “infamous” from voting. These principles were carried through Europe, Colonial America, and ultimately to the United States. Prior to 1840, four states (Connecticut, Delaware, Ohio, and Virginia) had broad felon disenfranchisement laws. More states followed after 1840 when many states eliminated property restrictions on the right to vote. The history of felon disenfranchisement reveals that denying suffrage to felons has had a direct impact on black voter participation in the political process since the period immediately following the Civil War when state laws were enacted in order to disenfranchise blacks. Contemporary uses of state felon disenfranchisement laws may, at first blush, seem neutral with regard to race. However, the racialized consequences of the War on Crime, War on Drugs, and

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19. Id. at 55-57.
21. The following Northern states enacted broad felon disenfranchisement laws in the nineteenth century: Connecticut (1818); Delaware (1831); Rhode Island (1841); New Jersey (1844); New York (1847); Wisconsin (1848); Maryland (1851); Minnesota (1857); and Pennsylvania (1860). Manza & Uggen, supra note 20, at 50. The more “progressive” Western states of California (1849) and Oregon (1859) also enacted such laws. New Hampshire (1967) and Massachusetts (2000) were the last Northern states to enact legislation denying felons the right to vote. Id. at 55-58 (discussing the types of crimes added).
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mass incarceration—which has become a signature of the culture of control and has dominated criminal justice policy-making for the past three decades—illustrate that these laws are far from race-neutral in effect.

The United States has the highest incarceration rate in the world. From the 1920s to the early 1970s, U.S. incarceration rates remained relatively static, hovering around 110 prisoners per one hundred thousand people. Today, those numbers have exploded. There are approximately 714 persons per one hundred thousand residents imprisoned. Significantly, men of color constitute a disproportionate percentage of inmates in U.S. prisons. If current incarceration rates remain stable, close to one-third of the next generation of African-American men will lose their right to vote at some point in their lives. Today, 13% of black men (or 1.4 million), are disenfranchised under state laws, and 440,000 of these men have completed their sentences and ostensibly have paid their full debt to society. While other countries such as the United Kingdom and Russia deny prison inmates the right to vote, the United States stands alone in restricting the rights of non-incarcerated felons, who comprise approximately three-quarters of the population of disenfranchised persons.

An ex-offenders residence determines whether he or she will lose the right to vote. A survey of states reveals wide disparities in the terms and application of laws that states have enacted to disenfranchise individuals who are convicted felons. Two states, Kentucky and Virginia, maintain the most restrictive disenfranchisement provisions—they permanently disenfranchise individuals for all felonies. Eight states permanently disenfranchise individuals for some felony convictions. Thirty-five states prohibit convicted offenders from voting while on parole. Thirty states apply this rule further to prohibit

27. Id.; Uggen & Manza, supra note 23, at 778.
28. See Uggen & Manza, supra note 23, at 782 n.5.
29. Id.
individuals on probation from voting.\textsuperscript{30} Delaware is the only northern state to disenfranchise individuals with felony convictions who have completed their parole or probation.\textsuperscript{31} Forty-eight states do not allow inmates to vote while they are in custody.\textsuperscript{32} The result of this voting rubric is that inmate presence in the prison community can be used to increase the political power and Congressional representation there as opposed to the community where the inmate will return home.\textsuperscript{33}

Recognizing the gravity of the decision to deprive an individual of the franchise, some states have opted in recent years to restore the right to vote under certain circumstances. Twenty states restore voting rights upon completion of the inmate’s sentence, which includes probation or parole.\textsuperscript{34} Five states restore voting rights automatically after release from prison and discharge from parole and allow probationers to vote.\textsuperscript{35} Thirteen states and the District of Columbia restore the right to vote automatically after release from prison.\textsuperscript{36} Two states, Maine and Vermont, have no disenfranchisement statutes on the books and permit inmates to vote.\textsuperscript{37} Many felons, depending on their offense, who wish to regain their voting rights must submit to a psychological examination.\textsuperscript{38}

While expansions of felon disenfranchisement laws historically have served as implements of reversing black political gains,\textsuperscript{39} the origins of felon disenfranchisement do not reveal a decision to enact laws

\textsuperscript{30} Id.
\textsuperscript{31} In 2000, Delaware amended its constitution to allow ex-felons to vote five years after serving their sentences. However, individuals convicted of homicide, manslaughter, a sexual offense, bribery or improper influence of a public official, and abuse of office may not have their voting rights restored. See Del. Const. art. 5, § 2; Felony Disenfranchisement Laws, supra note 26.
\textsuperscript{32} Felony Disenfranchisement Laws, supra note 26, at 3.
\textsuperscript{33} See generally Peter Wagner, Importing Constituents: Prisoners and Political Clout in New York, Prison Pol’y Initiative (Apr. 22, 2002), http://www.prisonpolicy.org/importing/importing_body.pdf (discussing the “impact of mass incarceration on individuals, communities, and the national welfare” and encouraging the public to participate in creating better criminal justice policy); see also Felony Disenfranchisement Laws, supra note 26.
\textsuperscript{34} These states include: Arkansas, Arizona, Georgia, Idaho, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Washington, West Virginia, and Wisconsin. See Felony Disenfranchisement Laws, supra note 26, at 3.
\textsuperscript{35} These five states include: California, Colorado, Connecticut, New York, and South Dakota. Id.
\textsuperscript{36} These states include: Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah. Id.
\textsuperscript{37} Id.
\textsuperscript{38} Manza & Uggen, supra note 20, at 86.
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in order to produce a racial impact. In fact, prior to the Civil War, state felon disenfranchisement laws did not have an extensive effect, in part, because states did not incarcerate many people during that period. Additionally, prior to the Civil War, blacks could only vote in six states, and property restrictions prohibited many African-Americans from voting at all. But today, many African-Americans who would otherwise be eligible to vote are prohibited from exercising this right due to the impact of criminal justice policy choices.

Litigants have challenged felony disenfranchisement laws alleging that they violate the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court considered the question in Richardson v. Ramirez and explicitly upheld felon disenfranchisement. In that case, three individuals who had previously been convicted of felonies attempted to register to vote, but the State of California denied their application. The Court noted that Section 2 of the Fourteenth Amendment to the United States Constitution allows for the disenfranchisement of ex-felons. Specifically, Section 2 permits the denial of voting rights “for ‘participation in rebellion, or other crime.’ ” The Court further found that “those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in Section 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by Section 2 of the Amendment.”

Notwithstanding other decisions in which the Court rejected some types of state limitations on voting rights under the Equal Protection Clause, in Richardson, the Court determined that “the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of [Section] 2 and in the historical and judicial interpretation of the Amendment’s applicability to state laws disenfranchising felons” was controlling. The Court distinguished disenfranchisement from other state restrictions on the franchise “which have been held invalid under the Equal Protection

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40. MANZA & UGGEN, supra note 20, at 54.
41. Id. at 42, 54.
43. Richardson, 418 U.S. at 24.
44. Id. at 26.
45. Id. at 54.
46. Id. at 25.
47. Id. at 43.
48. Id. at 54.
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Clause by this Court.” 49 The Court did not address the racial nature of both the origins of many disenfranchisement laws 50 nor their continuing racialized impact. 51

Critics have attacked the Richardson decision, arguing that Section 2 should not be given such interpretive weight. In his dissent, Justice Marshall made a spirited attack, arguing that Section 2 “was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment.” 52 Justice Marshall rejected the majority’s reasoning that Section 2 provides a limitation on Section 1, asserting that Section 2 merely “provides a special remedy—reduced representation—to cure a particular form of electoral abuse—the disenfranchisement of Negroes” and the fact that “Congress chose to exempt one form of electoral discrimination from the reduction-of-representation remedy provided by [Section] 2 does not necessarily imply congressional approval of this disenfranchisement.” 53 Marshall’s dissent argued that to hold otherwise would, in essence, “freeze the meaning of other clauses of the Fourteenth Amendment to the conception of voting rights prevalent at the time of the adoption of the Amendment.” 54 Another state limitation on voting explicitly authorized at the time of the adoption of the Amendment—one-year durational residence requirements—had already been declared unconstitutional by the Court in Dunn v. Blumstein. 55

Scholars present a related but broader attack on the meaning of Section 2. Many consider Section 2 an obsolete provision that was neither exercised nor enforced. 56 They contend that it is a relic of the Reconstruction era without lasting significance or practical impact. 57 Some have taken the argument even further, asserting that the Fifteenth Amendment effectively repealed Section 2 of the Fourteenth

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51. See Wagner, Importing Constituents, supra note 33.

52. Richardson, 418 U.S. at 74.

53. Id. at 74-75.

54. Id. at 76.


57. Id.
Scholars, such as Professor Gabriel Chin, posit that “Section 2 was a dead letter before it became law.” Before the Fourteenth Amendment was passed, work on the Fifteenth Amendment had already begun. Chin further argues that a fundamental inconsistency exists between the two: “Section 2 recognized state power to disenfranchise African-Americans, while the Fifteenth Amendment removed that power,” and the “Fifteenth Amendment simply eliminated the power that Section 2 attempted to regulate.”

If, as Chin suggests, Section 2 was effectively repealed by the Fifteenth Amendment, then the justification for Chief Justice Rehnquist’s reliance on Section 2 in the majority opinion of Richardson is substantially weakened. If Section 2 is no longer an active provision, then relying on it is no longer a text-based argument; rather, it simply provides evidence of types of voting limitations that were in existence at the time and that were considered appropriate by the framers of the Fourteenth Amendment. However, other types of limitations that were also accepted at the time of the writing of the Fourteenth Amendment, such as residency requirements, have been subjected to scrutiny under the Equal Protection Clause.

There is yet another ground for a more limited reading of Section 2. For example, Professor David Shapiro suggests that a close reading of the text suggests a distinction between those for whom the right to vote may be denied—those who are not male citizens over twenty-one years of age—and those for whom the right to vote may be abridged—those who have engaged in rebellion or other crime. This reading would suggest that Section 2 did not contemplate or explicitly allow a permanent denial of the right to vote to an ex-felon who has completed his sentence and, thereby, paid his debt to society.

There is also some basis to limit today’s expansive definition of felony. Using the same sources Justice Rehnquist uses in Richardson,
there already exists a limited reading of the concept of crime present. In *Richardson*, he argues that at the time the Fourteenth Amendment was ratified, twenty-nine states had provisions that withheld the franchise from “persons convicted of felonies or infamous crimes.”66 At the time, the concept of “felony” was limited to crimes at common law, which when compared to modern criminal codes, is a much more limited list of offenses. Similarly, the Military Reconstruction Act, also cited by Rehnquist, required the franchise to all males over the age of twenty-one “except such as may be disfranchised for participation in the rebellion or for felony at common law.”67 Finally, the enabling legislation that admitted states to representation in Congress also specified that disenfranchisement was permitted “as a punishment for such crimes as are now felonies at common law.”68 Justice Rehnquist indicates that the understanding of “other crime[s]” was limited to those crimes that were felonies at common law—a sharply restricted list compared to a modern understanding of what constitutes a felony.

There is ample support for this interpretation. Between 1776 and 1821, “eleven state constitutions disqualified criminals from voting,” and “by 1868 eighteen more states excluded serious offenders from the franchise.”69 Although these laws differed, the most common offenses that led to disenfranchisement were infamous crimes and penitentiary offenses.70 A review of the historical evidence suggests that “early U.S. disenfranchisement law[s] . . . target[ed] those crimes manifesting a particularly immoral character.”71 While theoretically the moral turpitude label could have been interpreted more broadly, its use as a basis for limiting the franchise is tied to common law felonies.

There is some evidence to suggest that the term “other crimes” was intended to refer to crimes that were felonies at common law.72 This interpretation would require a relatively sweeping change to the nation’s disenfranchisement laws. States that disenfranchise for *all felonies*, as well as those that use crimes such as drug sales and drug

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67. *Id.* at 49 (emphasis added).
68. *Id.* at 52.
70. *Ewald*, supra note 56, at 1064.
71. *Id.*
72. *See, e.g.*, Harvey v. Brewer, 605 F.3d 1067, 1070-71 (9th Cir. 2010); see also Chin, *supra* note 58, at 315.
possession, would be required to reevaluate and greatly restrict the number of current felons who could be subjected to disenfranchisement.

This argument was presented to the U.S. Court of Appeals for the Ninth Circuit in *Harvey v. Brewer.* In *Harvey,* the plaintiffs argued that the Equal Protection Clause only allows for felon disenfranchisement for crimes designated as felonies at common law. The Ninth Circuit justices rejected this as a prerequisite for felon disenfranchisement. First, Justice O'Connor, who wrote for the panel, noted that in *Richardson v. Ramirez,* one of the plaintiffs had been convicted of a crime that was clearly not a felony at common law. The panel held that the Fourteenth Amendment’s term “other crime” was not restricted only to common law felonies. It stated that not only did historical dictionaries not define crime as common law crime but also that the best way to determine the seriousness of a crime is to see how modern legislatures designate the offense. The panel also referred to the Supreme Court’s decision in *Blanton v. City of North Las Vegas,* in which the Court held that the Sixth Amendment’s guarantee to a jury trial could not be based solely on common law offenses. In *Blanton,* the Supreme Court recognized that “[o]ur adherence to a common-law approach has been undermined by the substantial number of statutory offenses lacking common-law antecedents.”

Despite the Supreme Court’s rejection of equal protection challenges to state felon disenfranchisement laws, the Equal Protection Clause may still offer a glimmer of hope to litigants. In *Hunter v. Underwood,* the Court made clear that it did not read Section 2 as being “designed to permit the purposeful racial discrimination attending the enactment and operation of [the disenfranchisement law in question] which otherwise violates [Section] 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* . . . suggests the contrary.” In this case, the Court held that provisions of a state felon disenfranchisement law that denied the right to vote to persons convicted of crimes involving moral turpitude violated the

73. *Harvey,* 605 F.3d at 1067.
74. Id. at 1072.
76. *Harvey,* 605 F.3d at 1074 (noting that the crime was heroin possession).
77. Id. at 1074-75.
78. Id. at 1075; see also *Blanton v. City of N. Las Vegas,* 489 U.S. 538, 541-43 (1989).
79. *Blanton,* 489 U.S. at 541 n.5.
Equal Protection Clause, noting that the provision was originally motivated by racial discrimination against blacks.\textsuperscript{81} Thus, if litigants can establish intentional discrimination or demonstrate a pattern of unequal or selective enforcement, they may prevail.\textsuperscript{82} But such challenges would likely prove difficult. Ultimately, communities of color will need to advocate for legislative change in order to reverse the impact of felony disenfranchisement.

B. The Usual Residence Rule and Voter Redistricting: The Second Punch

In similar fashion, the usual residence rule threatens to gut the political power of African-American communities. Counting inmates as residents, an act permitted under the Census Bureau’s usual residence rule, skews political power, clout, and resources. The usual residence rule is an important dimension of the national Census that instructs states to count individuals where they “live[] and sleep[] most of the time.”\textsuperscript{83} It is this practice that permits states and counties to count prison inmates as residents of the jurisdiction in which the prison is located.\textsuperscript{84} While most prisoners typically come from low-income urban communities and ultimately return to those same communities upon release, they are not counted as part of the population in those communities for the purpose of the Census.\textsuperscript{85} Instead, sparsely populated rural areas can legally inflate their population numbers by including prison inmates who do not have the power to vote in those rural areas in their count.

The dramatic impact on political power and resources that occurs because of the implementation of the usual residence rule was most likely unintended when the rule was first created. The Census emerged as the principal centralized mechanism employed by the federal government to count the entire population in order to apportion

\textsuperscript{81} Id. at 232-33.


\textsuperscript{84} Id.

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congressional representation to each state rationally and fairly.86 Because the federal government’s principal concern in taking the Census is to capture the total number of residents within a state for apportionment purposes, the question of where in the state prisoners should be counted—either in their home district or in the district in which the prison is located—makes no difference to Census officials. Consequently, since the government instituted the Census in 1790, prisoners generally have been counted as residents of the correctional facility in which they are being held and, therefore, as part of that jurisdiction’s local population.87 This redistribution of numbers simultaneously amplifies the political power of rural communities and dilutes the potential political power of the communities of color from which these inmates come and to which they will return upon release from prison for services and support.

Several states have imposed laws asserting that incarceration does not modify one’s residence.88 Accordingly, the practice employed by many states of counting prisoners as residents of the prison in which they are incarcerated runs counter to state residency law. Legal residence tends to be “defined as the place that people choose to be and do not intend to leave.”89 In most instances, prisoners cannot choose where they are incarcerated, and they fully intend to leave as soon as possible. Under this view, a prison appears to be the antithesis of a residence, and the inclusion of prisoners in the population of the district in which the prison is located appears to be in direct conflict with state law.

The Supreme Court has decided many cases related to voting practices that unfairly dilute the vote or interfere with fundamental democratic principles. The Court has addressed issues such as stuffing ballot boxes and racially based gerrymandering,90 declaring such prac-

88. See e.g., CAL. ELEC. CODE § 2025 (West 2010) (“A person does not gain or lose a domicile solely by reason of his or her presence or absence from a place . . . while kept in an almshouse, asylum or prison.”); CONN. GEN. STAT. ANN. § 9-40(a) (West 2010) (“No person shall be deemed to have lost such residence in any municipality by reason of his absence therefrom because of imprisonment on conviction of crime.”).
89. Kajstura & Wagner, supra note 86 (emphasis added).
Practices unconstitutional.\textsuperscript{91} Prison-based gerrymandering may be paralleled to the Three-Fifths Clause, which was originally contained in the U.S. Constitution and under which slaves counted as three-fifths of a person for purposes of apportionment despite their inability to vote.\textsuperscript{92} Today, prisoners are being counted for purposes of representation as full residents of an area where they did not choose to reside, in which they generally cannot vote, and where they typically do not intend to stay once released from incarceration. The operation of the usual residence appears to undercut the principle of one man, one vote.\textsuperscript{93}

When one adds the racial component—where people of color are inflating the population numbers of largely rural areas and shifting resources to those areas and away from the urban areas where those people of color are likely to return—the analogy to the Three Fifths clause is all the more compelling. The districts in which prisons are located are generally rural and have an overwhelmingly white population.\textsuperscript{94} Those being held in the prisons, however, are disproportionately African-American. In Georgia, for instance, African-Americans make up roughly 30\% of the general population but over 60\% of the prison population.\textsuperscript{95} Additionally, most prisoners are incarcerated in areas other than where they previously resided. An extreme example of this is Illinois where 60\% of the state’s prisoners are from Cook County, but 99\% of these prisoners are counted as residents of other counties.\textsuperscript{96} These patterns can be found to a lesser degree in many other states. Removing African-Americans from urban districts and counting them in rural or suburban areas tend to decrease voting power in their home districts.\textsuperscript{97} Representatives, who would likely not receive the votes of those who are incarcerated were the prisoners

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\textsuperscript{91.} See generally \textit{Ex parte} Siebold, 100 U.S. 371 (1879) (discussing Congress’ constitutional right to punish election crimes such as placing extra ballots in a ballot box).
\textsuperscript{94.} See Peter Wagner, \textit{Prisoner of the Census Analysis: Counting Urban Prisoners as Rural Residents Counts Out Democracy in New York Senate}, REAL REFORM NY (Dec. 1 2003), http://www.realreformny.org/wagner120203.html (“Officially, the district is overwhelmingly white (94.2\% White, 2.13\% Black), but even that little diversity is from the prisoners. The 8,951 prisoners are 77\% Black or Latino. Without the prisoners, the district would be 96.5\% White and 0.64\% Black.”).
\textsuperscript{96.} See McGhee & Wagner, \textit{supra} note 92.
\textsuperscript{97.} Id.
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allowed to participate in elections, are nevertheless put in office specifically because of the presence of the prisoners in their district.

Anamosa, Iowa, offers a stark example of the power-shifting effect of counting prisoners as residents of their prisons. The local government in Anamosa has divided the city into four wards, each with roughly identical populations.\textsuperscript{98} Despite appearing equal on paper, each vote cast in Ward 2 of Anamosa carries almost twenty-five times more weight than votes cast in the other Wards.\textsuperscript{99} This imbalance is due to the fact that all but fifty-eight of the people in Ward 2 are prisoners.\textsuperscript{100} The situation in Anamosa is so disproportionate that a city councilman of Ward 2 was elected with just two write-in votes, one from his wife and the other from his neighbor.\textsuperscript{101} While certainly the most extreme example, Anamosa is not the only place where prisoners make up a large percentage of a district’s population.

There are a range of examples of prisoners accounting for significant portions of the population. Indeed, where the usual residence rule presents perhaps the most significant problem on the national level is where its operation creates political districts that would not otherwise exist.

For example, the district of State Senator Elizabeth O’C. Little, a Republican in upstate New York, has [thirteen] prisons, adding approximately 13,500 incarcerated “residents.” Without the inmate population, Ms. Little would face an uncertain future. Her district would probably have to be redrawn because it wouldn’t have enough residents to justify a Senate seat.\textsuperscript{102}

Other examples include Lake County, TN, where prisoners account for 88% of a county commissioner district\textsuperscript{103} and La Villa, TX, where the prison population accounts for up to 69% of the city’s population.\textsuperscript{104} More typically, prisoners will account for anywhere from

\begin{itemize}
  \item \textsuperscript{99} \textit{Id}.
  \item \textsuperscript{100} \textit{Id}.
  \item \textsuperscript{101} \textit{Id}.
  \item \textsuperscript{102} Thompson, \textit{supra} note 14.
  \item \textsuperscript{103} See Roberts, \textit{supra} note 98.
\end{itemize}
5% to 15% of the population in the area in which they reside. While these and other similarly situated districts benefit from a system that includes prisoners in the population count, those areas most adversely affected by this system are the communities from which the prisoners have come—often the areas with the highest crime rates.

The usual residence rule, therefore, raises two fundamental issues. First, inmates in nearly all states are not allowed to vote, yet their presence affects electoral representation in places where they do not live permanently. Second, resources shift unfairly from inner city urban areas to rural jurisdictions. When this occurs, the effects are plain to see for anyone who cares to take note. Cities lose out on funds that could be used to enhance those communities and to assist returning inmates in reentering those communities, and rural areas unfairly enjoy the benefits of inflated numbers without having to do anything other than bear the burden of maintaining a prison.

Perhaps as the impact of the usual residence rule begins to come to light, litigation on the subject will increase. Thus far, challenges have been largely unsuccessful. For example, in Borough of Bethel Park v. Stans, plaintiffs brought suit against the National Census Bureau and the Commonwealth of Pennsylvania for applying the usual residence rule to count college students, members of the Armed Forces stationed in the U.S., and inmates of institutions in the places where they were located at the time of the Census as opposed to the places of their legal residences for all other purposes. Plaintiffs argued that the method of enumeration permitted by the usual residence rule resulted in an underestimation of these groups’ respective political subdivisions. They also alleged that such enumeration would lead to an improper allocation of federal and state funds and a dilution of the vote for these groups. But the Third Circuit rejected their claim that the rule violated the Fifth and Fourteenth Amendments and held that there was a rational basis for the usual residence rule.

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106. See McGhee & Wagner, supra note 92.
108. Id. at 577.
109. Id. at 580-83.
110. Id. at 582-83.
To the extent that litigants can tie their claims to state constitutions, they may have a better chance of success. For example, litigants in Massachusetts might raise a challenge based on the Massachusetts Constitution. The State Supreme Court has raised a question as to whether the application of the usual residence rule violates the Commonwealth of Massachusetts’ interpretation of “inhabitant.”\footnote{See Op. of the Justices to the House of Representatives, 312 N.E.2d 208, 209-10 (Mass. 1974).} While the usual residence rule counts an individual on the basis of where he or she lives and sleeps most of the time, the Commonwealth’s constitution defines a person as an inhabitant of his or her domicile.\footnote{See id. at 209; Eric Lotke & Peter Wagner, Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From, 24 PACE L. REV. 587, 600 (2004).} It remains to be seen whether challenges under the Voting Rights Act may also prove helpful to raise issues about the dilution of the vote for communities of color.

C. The Cumulative Impact of Felon Disenfranchisement and the Usual Residence Rule on Black Political Power: The One-Two Punch

At a time when national political attention is drawn to pressing issues around the national and global economy, we have failed to appreciate the full extent of political disenfranchisement. Political disenfranchisement has occurred and continues to occur in communities of color across the country because of the staying power of state felon disenfranchisement laws and the Census’ usual residence rule.

Felon disenfranchisement carries with it a range of consequences for the individuals and the communities that the rule disproportionately affects. When large numbers of African-American voters face exclusion from the polls, many critical perspectives are left out of the electorate and out of the mainstream of political debate. Indeed, the exclusion of felons poses a threat to fundamental notions of democracy.\footnote{See Uggen & Manza, supra note 23, at 777-78.} The impact can be felt on both an individual level and on a community level.

For the individual, the practice of barring an ex-offender from the political process reinforces his or her separation from the community and society as a whole.\footnote{THOMPSON, supra note 3, at 124-28.} When one focuses on the large numbers of African-Americans that endure permanent disenfranchisement, one
sees parallels to other institutions that have too often sought to bar African-American perspectives. If we examine juries in the United States, for example, and efforts in some states to move away from unanimous voting, we see another method of diluting the voices of people of color. Typically, jurors of color make up a minority percentage of juries, but their views and voices often represent a critical voice of difference that would otherwise be lost if not for a requirement of unanimity.\textsuperscript{115} Kim Taylor-Thompson in her important work on race, gender and juries, suggests that people of color on juries serve to “decode” situations that may be in question in the context of a criminal trial.\textsuperscript{116} Their ability to bring insights and experiences to the deliberation enhances the jurors’ fact-finding role. Similarly, Professor Peggy Davis has also focused on the role of individuals of color “going meta” in their ability to step outside of a situation and analyze its nuances in ways that others who are not subordinated may be unable.\textsuperscript{117} In the context of a jury, going meta “may permit the juror of color to observe the degree to which race affects and infects the jury deliberation process, and then to re-engage and contribute insights.”\textsuperscript{118} Voters of color would likely bring the same outsider perspective to questions that mainstream voters might otherwise miss.

Withholding the franchise from ex-felons, who disproportionately tend to be of color, serves to exclude and reduce the impact of the voice of difference that ex-felons would likely bring to the political debate. African-Americans interact with and experience society in ways that are not shared by non-African-Americans.\textsuperscript{119} This is not to suggest that African-American community views are monolithic; rather, notwithstanding class differences, there are still issues where which race makes a difference in perception. And that perception informs political views and attitudes. When we add the component of experience with the justice system and imprisonment, there are a host of experiences that may affect political judgment and decision-making which should be a part of the debate and discussion. But these perspectives are simply lost due to the operation of disenfranchisement laws.

\textsuperscript{116} \textit{Id.} at 1287.
\textsuperscript{118} Taylor-Thompson, \textit{supra} note 115, at 1288.
\textsuperscript{119} Thompson, \textit{supra} note 3, at 135.
Another impact of disenfranchisement is the ostracism of the person from the community into which he or she will return. The process of political participation can serve as a critical means of reconnecting individuals to their respective communities.\textsuperscript{120} The creation of peer associations and genuine community connections through participation in political forums and political activity can build social capital for the individual and for the community. These activities can build community support for the individual returning to the community from a period of incarceration. The support of others and a socially active lifestyle may have some of the same benefits as mentoring and similar programs that help reconnect individuals who have spent time in-custody. Returning offenders involved in democratic activity who work on issues that affect others in their situation may garner the support of community members and groups and therefore increase their likelihood of successful reintegration.

Communities of color suffer from the effects of felon disenfranchisement. Some argue that the impact of felon disenfranchisement may not be severe given that black communities tend to have low voter participation generally.\textsuperscript{121} But evidence suggests a link of low voter participation to felon disenfranchisement. In states with more restrictive criminal disenfranchisement laws, the overall voter turnout is lower than in states with less restrictive criminal disenfranchisement laws.\textsuperscript{122} Moreover, in states with restrictive criminal disenfranchisement laws, the probability of voting declines for African-Americans, even if they do not possess a criminal record.\textsuperscript{123} The fact that so many are barred from voting in particular communities makes exercising the franchise less a part of the fabric of the community, precipitating a negative ripple effect.

Concentrating large numbers of non-voting citizens in communities results in neighborhoods that have little or no political voice.\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Courtney Artzner,Notes & Comments, Check Marks the Spot: Evaluating the Fundamental Right to Vote and Felon Disenfranchisement in the United States and Canada, 13 Sw. J.L. & Trade Asm. 423, 427-28 (2007).
\item \textsuperscript{123} Id. at 80.
\item \textsuperscript{124} See Anthony C. Thompson, Navigating the Hidden Obstacles to Ex-Offender Reentry, 45 B.C. L. Rev. 255, 282-83 (2004) (“The loss of voting power has ramifications not only for the individual ex-offender, but also for the communities to which ex-offenders return, which will then include growing numbers of residents without a recognized political voice.”).
\end{itemize}
Individual disempowerment and the loss of a single perspective in our democracy should raise alarm, particularly when that disempowerment is occasioned by the state. But when individual impact is multiplied and the cumulative impact of silencing large segments of neighborhoods and communities is examined, the integrity of our democratic system is brought into question. Moreover, since African-Americans overwhelmingly vote Democratic, felon disenfranchisement reduces the Democratic voting base by decreasing the number of eligible voters.125 Absent the voice of such a large number of African-American voters, the political process in the United States disproportionately favors the center and the right of the political spectrum.

Unlocking democracy and engaging voices that have been left out of the political discourse would alter the political playing field. Racial identification remains “highly correlated with political affiliation.”126 This fact raises some profound questions about the political leadership and discourse in this country. Although many states allow for the re-acquisition of voting rights, the means and methods are often expensive, labor-intensive, and unrealistic for unrepresented, indigent defendants.127

When we add the usual residence rule to this mix, the results are all the more disturbing. The U.S. Census count is used to apportion voting representation and to create political boundaries.128 With a disproportionate number of people of color imprisoned in the United States, many of the communities losing their political power are communities of color.129 The usual residence rule not only serves to dilute political power, but also to divest urban communities of much-needed federal funding for social services and reentry.130 While prison communities are given jobs in the correctional field, communities where

125. See Uggen & Manza, supra note 23, at 780.
129. Brisman, supra note 83, at 356.
130. Id. at 301-02 (citing Ryan S. King & Marc Mauer, The Sentencing Project, The Vanishing Black Electorate: Felony Disenfranchisement in Atlanta, Georgia 1
individuals return are often devoid of genuine occupational opportunities.\footnote{See id.}

The usual residence rule permits the manufacture of legislative districts that would not exist but for the prison.\footnote{See Taren Stinebrickner-Kauffman, Counting Matters: Prison Inmates, Population Bases, and “One Person, One Vote,” 11 VA. J. SOC. POL’Y & L. 229, 230 (2004) (“Legislative districts with prisons gain constituents by virtue of the presence of the prisons, so the residents of these districts are over-represented as compared to those who live in districts without prisons.”).} Without the presence of inmates, there would be an insufficient number of citizens to create a political district organically in many instances. Some suggest that this situation can be changed by election, but this argument fails to acknowledge that individuals who are being used to enhance the political power of rural communities and being counted for redistricting purposes cannot vote.\footnote{See supra notes 14-15 and accompanying text.} Moreover, too often the artificially bolstered rural districts maintain a strong political hold on state legislatures.\footnote{See MANZA & UGGEN, supra note 20, at 202.}

The usual residence rule often creates incentives for representatives in rural communities to reap the benefits of its operation. The prison industry has been a booming business for many rural communities.\footnote{See Nathaniel Persily, The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them, 32 CARDOZO L. REV. 755 (2011); TRACY L. HULING, U.S. COMM’N ON CIV. RIGHTS, PRISON AS A GROWTH INDUSTRY IN RURAL AMERICA: AN EXPLORATORY DISCUSSION OF THE EFFECTS ON YOUNG AFRICAN AMERICAN MEN IN THE INNER CITIES (1999), available at http://www.prisonpolicy.org/scans/prisons_as_rural_growth.shtml.} The choice to build a prison means additional correctional jobs in communities that might otherwise have no real industry to sustain them.\footnote{HULING, supra note 135.} Countless communities have become the equivalent of company towns in which generations of families plan for careers as correctional officers. The economic viability of the community and the residents depends upon the prison’s sustained existence. So it is perhaps not surprising that maintaining those prisons becomes a priority for legislators from those jurisdictions. And when we see state legislatures opposing reductions in mandatory minimum drug sentences, the rhetoric may be crime control, but the often unspoken agenda is to avoid (at all costs) anything that might threaten the economic viability of these prison communities. Felon disenfranchisement and the usual residence rule should not be used as tools to sustain the economic
viability of rural communities when the resultant effect is the disempowerment African-American communities.

II. THE PATH TO POLITICAL DISEMPOWERMENT: HOW DID WE ARRIVE AT THIS POINT?

The combination of post-Reconstruction legislation and the War on Drugs from the 1960s to the present has led to an explosion of collateral consequences for criminal convictions. No set of collateral consequences has been as devastating for the political life of African-American communities as the one-two punch of felon disenfranchisement and the usual residence rule. The disproportional racial impact of these strategies raises questions as to whether they were intended to operate together as a method of disempowerment or whether the combined effect was unintended. This Part will examine the history of these actions, exploring the policy choices and political context in which they occurred as well as the historic and contemporary reasons why this political disempowerment exists and persists.

A. Is This Disempowerment a Legacy of Slavery?

Felon disenfranchisement is not a new phenomenon; however, it has enjoyed periods of expansion that have coincided with gains in black political power. In one of the most significant works on disenfranchisement, Professors Jeff Manza and Christopher Uggen assert that there were two initial waves of felon disenfranchisement. The first wave occurred between 1840 and 1865 during which time all sixteen states that passed laws disenfranchising felons “did so after establishing full white male suffrage by eliminating property tests.” These measures were not specifically related to race. Of course, they did not need to be, “most states did not permit African Americans to vote at all.”

The second major wave of felon disenfranchisement occurred between 1865 and 1900. During this time, nineteen states “adopted or amended laws restricting the voting rights of criminal offenders.” Before 1880, disenfranchisement laws applied to individuals convicted of common law offenses, such as murder, rape, assault, and bur-

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137. MANZA & UGGEN, supra note 20, at 53-54.
138. Id.
139. Id. at 54.
140. Id. at 55.
Indeed very few states had developed or enacted a legal distinction between those offenses considered crimes at common law and any other felonies. Indeed, the enabling acts and the Reconstruction Act support the view that the term “other crimes” was intended to be limited to those crimes that were then felonies at common law. Comments by representatives indicate that they were concerned that the “other crimes” exception could be used to discriminate against black men, so they limited the provision to crimes that were then “felonies under the common law.” But between 1865 and 1900, when states expanded the coverage of disenfranchisement laws to include a broader list of felonies, they seemed focused on diluting the voting power of African-Americans as a group.

1. The Impact of Jim Crow

Felon disenfranchisement became a potent weapon in, as well as a legacy from, the Jim Crow era. Jim Crow laws were state and local statutes enacted and enforced beginning around 1876 and ending in the mid-1960s that mandated racial segregation in all public facilities. During the Reconstruction period after the Civil War, the federal government expanded and enacted into law civil rights protections for blacks who had been freed as a result of the Civil War. Blacks were elected to office, owned property, started businesses, and attended school in record numbers. This dramatic change in the political landscape was intended by Republicans (the party of Abraham Lincoln) to demonstrate that they had won the Civil War. But as a consequence, southern Democrats rededicated their efforts to finding new methods to regain control over the black population that had been freed.

141. Id. at 55, 307 n.40.
142. Id. at 55.
143. John R. Cosgrove, Four New Arguments Against the Constitutionality of Felony Disenfranchisement, 26 T. JEFFERSON L. REV. 157, 175-81 (2004) (analyzing whether the other crime exception was limited to offenses that were felonious at common law).
144. Id. at 177. Cosgrove makes three other arguments in support of a limited reading of Section 2. Two of the arguments are based on the language limiting the provision to male citizens (suggesting either that it does not apply to female felons or that it is in conflict with the Nineteenth Amendment). Id. at 188-92. The other argument focuses on disenfranchisement that is inflicted on individuals for out of state convictions (violating either the Due Process Clause or the Full Faith and Credit Clause). Id. at 181-87; see Sumi Cho, Post-Racialism, 94 IOWA L. REV. 1589, 1606 (2009).
146. Id.
147. Id.
The election of large numbers of blacks to state and federal offices was perhaps one of the most visible blows to Southern Democratic power. Indeed, these political accomplishments were met with significant backlash from whites, especially poor southern whites, who viewed the gains being made by blacks as a direct threat to white social and economic power and position. The change in status of blacks from slaves to elected officials did not sit well with Southern whites, and, as resentment fomented, southern whites looked for new ways to fight “the egalitarian policies adopted by” the newly established governments.

Blacks were aware that this moment in history presented an opportunity. So they made use of the franchise to elect unprecedented numbers of freedmen to office. Between 1869 and 1901, twenty-two blacks were elected to Congress. The social and political impact was immediate. Whites felt threatened by the presence of black office-holders. One commentator reflected the feelings of whites, writing in 1881 that the enfranchisement of the black population caused the “debasement of the elective franchise.” He added that the impending “negro domination” ultimately would result in “incompetence, profligacy, and pillage, the like of which has never disgraced the annals of any English-speaking people.”

With fears of a new racial hierarchy, white Southerners banded together in an effort to subvert federal voting laws. Democrats, “guardians of white suffrage,” easily made “the Negro [voter] a whipping boy, a scapegoat” for all of the problems facing the post-war South. The conflict between Republican and Democratic platforms debating the power of federal rather than state sovereignty emerged as a contentious issue that spurred both legislative and judicial attempts at black disenfranchisement. Once the Union regained control of the Confederacy, a number of bills were enacted as federal law, including the Enforcement Act of 1870 and the “Ku Klux Klan” Act.

152. Id. at 242.
153. Id.
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of 1871.154 The federal government soon became the national “arbiter of citizen’s rights.”155 While a national debate raged about states versus federal rights, the Supreme Court was reluctant to limit state powers.156

Some observers viewed black empowerment as “further punishment of white southerners by radical Republicans.”157 These feelings spurred increasingly violent acts, such as lynchings and rapes, against blacks individually. At the same time that these more obvious forms of racial intimidation and hatred were becoming the norm, more institutionalized forms of legal discrimination began to emerge on the American landscape. In 1877, a “national compromise” secured southern votes in the national presidential election and sold out newly freed blacks in the enforcement of civil rights. This compromise resulted in the withdrawal of federal troops from the south and virtually guaranteed the unencumbered enforcement of Jim Crow laws without federal interference.

The United States Supreme Court became a willing collaborator. In Plessy v Ferguson,158 the Court facilitated the institutionalization of Jim Crow in 1896 by officially sanctioning legalized segregation. The Court found that separate but equal facilities were constitutional and that any sense of inferiority that separate but equal facilities produced was solely a product of Black perception. The Court also stated that prejudice could not be undone by forcing the commingling of races. While the enforcement of Jim Crow was already well underway, the language of “separate but equal” from Plessy gave Southern lawmakers the rhetorical underpinning and legal justification for brutal systems of segregation.159

The Jim Crow era went further. It forbade blacks to sit on juries and prevented them from holding positions of authority in the justice system, such as sheriffs, police officers, prosecutors, and judges. Moreover, a general social atmosphere of violence and repression resulted in what was effectively a dual criminal justice system: one for

156. See Barnes & Connolly, supra note 154, at 335.
158. 163 U.S. 537 (1896).
159. See Tyson, supra note 24, at 350-51.
blacks and one for whites. Under Jim Crow, whites could expect to escape prosecution or, if prosecuted, to escape conviction for even the most violent crimes against blacks.

The late 1800s represented the beginning of a massive retrenchment of rights for newly freed blacks. Disenfranchisement grew from a limited vehicle focused on common law felonies into a more powerful device that was used to limit the political power of blacks primarily but not solely in the South. In addition, the prison as an institution played an important role in the retrenchment of newly found black rights. Prison leasing became a method of reinforcing the white landholder’s grip on economic power in the South. There have been numerous histories of the convict lease, some taking the perspective of the culture that fostered the lease,160 some focusing on the economic foundations of the lease,161 while others focus on elaborating the precise forms it took.162 In all of these instances the lease is treated as something peculiar to the South—as an anomaly in a history of American punishment focused on the creation and development of systems of imprisonment.

Robert Perkinson argues, however, that rather than viewing Southern punishment as anomalous, we can only truly understand contemporary forms of American punishment by understanding Southern punishment.163 He argues that there are two strains of punishment in the United States. One originated in the North and embraced the rehabilitative ideology, assuming that people can change and reintegrate into society. The other, coming largely out of the South, focused on “the development of labor control, racial division, and corporal debasement.”164 Both strands are present in the U.S. criminal justice system, but only by focusing on Southern punishment and the latter strand can we better understand the retributive forms that punishment has taken in the late twentieth century.

160. See generally Edward L. Ayers, Vengeance and Justice: Crime and Punishment in the 19th-Century American South (1984) (exploring the major elements of southern crime and punishment at a time that saw the formation of the fundamental patterns of class and race).
164. Id.
Rather than focusing solely on the convict lease as a distinct component of a larger history of punishment, the South’s increasing reliance on the convict lease until the end of the nineteenth century may be viewed as one part of a move toward the complete disenfranchisement of blacks in the South. It was one of many techniques that was used to deny the recently freed slaves political participation. As Douglas Blackmon argues:

By 1900, the South’s judicial system had been wholly reconfigured to make one of its primary purposes the coercion of African Americans to comply with the social customs and labor demands of whites. It was not coincidental that 1901 also marked the final full disenfranchisement of nearly all blacks throughout the South.¹⁶⁵

Alex Lichtenstein makes a similar argument while emphasizing the unique function of convict lease within the development of the Southern economy: “Convict labor accommodated the labor needs of industrial and extractive enterprises while keeping in check the threatening social transformations associated with modernization. What anti-enticement laws, crop-liens, and vagrancy statutes were to the planters, the convict lease was to an emerging class of industrial entrepreneurs, in Georgia and elsewhere.”¹⁶⁶

Although prior to the Civil War numerous states in the South had begun to construct penitentiaries on the Northern model, these were reserved almost exclusively for white convicts. In all Southern states where penitentiaries were constructed, however, construction was preceded by extensive debates about the role of penitentiaries in republican society. According to Ayers, the positions of the debate could be described as follows:

Some . . . Southerners believed freedom could grow best under the protection of an enlightened state government that made laws more effective by making them less brutal and offered the possibility of restoring the ex-criminal to society. Others believed, just as strongly, that such an innovation threatened the liberty of citizens and even of convicted criminals. Both sides used the same rhetoric, but with visions of a different republic in mind.¹⁶⁷

Ayers alleges that to understand this debate it is important to understand the centrality of the concept of honor to Southerners because:

¹⁶⁵ Blackmon, supra note 162, at 7.
¹⁶⁶ Lichtenstein, supra note 161, at 72.
¹⁶⁷ Ayers, supra note 160, at 42.
In this way, a class divide between those who supported the penitentiary (and had the most invested in property as a means of social order) and those who were suspicious of it (and were more likely to be inmates in the new institution) emerged.\footnote{168}

Although couched in terms of the meaning of Republicanism, the debate over the penitentiary was also focused on what it meant to be modern.\footnote{170} The supporters of the penitentiary tended to be representative of the most cosmopolitan elements of their society. They shared many of the values and concerns of the outside world, and they were aware that the rest of the Anglo-American world increasingly looked upon their slave South as a throwback to a part of a common past best forgotten. This may help account for the frequency with which the dualism of “barbarism” and “civilization” recurs in Southern pleas for the penitentiary.\footnote{171}

The foundations of the penitentiaries in the South were very shallow. Ayers argues that, in the North, “an emerging capitalist ideology fused with republicanism to make the institution seem less obtrusive than it did to many people in the South. Republicanism and capitalism reinforced each other’s emphasis on internalized values, the transforming power of labor, and the necessity of order and regularity.”\footnote{172} These ideologies did not permeate the South, where the penitentiary appeared to be a centralized source of power unconnected to other values.

Once they were created, the penitentiaries in the South were composed largely of “[p]oor and alien white men.”\footnote{173} Blacks were emphatically not inmates during the antebellum period because “peni-
tentiaries in a republican society simply were not for slaves. Slaves had no rights to respect, no civic virtue or character to restore, no freedom to abridge.” 174 Although they always constituted a minority, the existence of free blacks posed significant problems to Southern penitentiaries. According to prison officials, the presence of blacks would destroy any reformatory effect the prisons might exert because “it destroyed white men’s feelings of pride while dangerously inflating that of the blacks.” 175 The solution was to “lease free blacks to work outside the prison walls on canals, roads, and bridges.” 176

The one exception to the overwhelmingly white prison populations in the South was found in Texas where although there were no black prisoners, it did have among its imprisoned population “a disproportionate number with Mexican roots.” 177 Instead of subjecting slaves to the penitentiary, slaves were largely subjected to the discipline of their owners and as such were largely outside the reach of the criminal justice system. This version of subjugation although different from slavery, has its roots in fundamental disempowerment of certain communities. Political disempowerment in this way served to subordinate communities of color.

B. Is This Disempowerment a Political Conspiracy?

As one examines the policy choices that have led to the political disenfranchisement of African-Americans, it is perhaps worth exploring whether there is reason to suspect a political conspiracy. Authors have attempted to link the War on Drugs and other criminal justice efforts to anti-civil rights efforts in the early 1970s. This analysis necessarily starts with an exploration of Jim Crow and post-Jim crow politics and policies.

After the Jim Crow laws took hold in the South and began to creep into the North, the Civil Rights Movement in the 1960s began to attack the racism inherent in “separate but equal” practices and laws. 178 The 1960s represented a time of heightened political unrest

174. Id.
175. Id. at 62.
176. Id.
177. PERKINSON, supra note 163, at 76.
and activism, marked by the anti-Vietnam War Movement. But coinciding with Americans’ attacks on the war came increasingly potent expressions of black political power. Black political activism found two principal avenues for expression: the Black Power Movement and the Civil Rights Movement. While employing often vastly divergent tactics, the objectives of both movements were to empower blacks, attack racist practices and laws, and demonstrate that black people would not allow racist practices to go unnoticed or unanswered.

Largely due to the choice to employ non-violence as a signature for the movement, the Civil Rights Movement gained tremendous attention and popular momentum. What is perhaps remembered most clearly is that the Civil Rights Movement mobilized a nation to change. What is remembered less clearly is that in an effort to discredit the movement, Southern governors and law enforcement officials mobilized white opposition by changing the discourse from equality and civil rights to a demand for “law and order.” Southern officials attempted to redefine civil rights protest activities as criminal rather than political in nature in order to gain traction and support for their efforts to thwart black political activism. These political leaders, tapping into Southern white anger at losing their political control over blacks, successfully tied the emergence of the Civil Rights Movement to what they would proclaim was a “breakdown of law and order” necessary to protect the social fabric of the country.

“Crime rhetoric thus reemerged in political discourse as southern officials called for a crackdown on the ‘hoodlums,’ ‘agitators,’ ‘street mobs,’ and ‘lawbreakers’ who challenged segregation and black disenfranchisement.” However, this rhetoric was not limited to the South. It also entered the national discourse on the Civil Rights

183. Id. at 30.
184. Id.
185. Id.
Movement as evidenced by former Vice President Richard Nixon’s argument that “the deterioration [of respect for the rule of law] can be traced directly to the spread of the corrosive doctrine that every citizen possesses an inherent right to decide for himself which laws to obey and when to disobey them.”186 Katherine Beckett argues that “racial subtext” of the arguments for the need for increased law and order:

was not lost on the public: those most opposed to social and racial reform were also most receptive to calls for law and order. Ironically, it was the success of the civil rights movement in discrediting more explicit expressions of racist sentiment that led politicians to attempt to appeal to the public with such “subliminally” racist messages.187

When the Republican candidate for President, Barry Goldwater, based his 1964 campaign on a law and order platform, the public’s fear of crime was quite low.188 Despite the lack of public concern, Goldwater raised the specter of lawlessness and loss of social control as central issues in his campaign.189 Couching opposition to expanding civil rights legislation in calls for law and order had found a national stage at the same time this approach was gaining traction on a state and local level among the most ardent opponents of civil rights and desegregation.190

But it was not until the election of 1968 that this call for increased law and order resulted in Richard Nixon’s call for increased convictions.191 Richard Nixon’s presidential platform was built largely on “Tough on Crime” rhetoric that focused a great deal on the gains made by the black community.192 Nixon’s Chief of Staff, H.R. Haldeman, described in detail the strategy imposed by the President in addressing his strategy: “[President Nixon] emphasized that you have to face the fact that the whole problem is really the Blacks. The key is to devise a system that recognizes this while not appearing to.”193 Despite the centrality of crime in Nixon’s campaign, once in office he had to confront the fact that crime was largely a local issue. As a result,

186. Id. at 31 (internal quotation marks omitted).
187. Id. at 32.
188. Id. at 25.
190. Id. at 431.
191. Tyson, supra note 24, at 368.
192. Id.
193. Id. at 368-69.
“[i]nsiders concluded that ‘the only thing we could do was to exercise vigorous symbolic leadership’ and therefore waged war on crime by adopting ‘tough sounding rhetoric’ and pressing for largely ineffectual but highly symbolic legislation.”194 Still, the Tough on Crime policies that were devised and implemented by the Nixon Administration were continued in subsequent Republican administrations under the label of the “War on Drugs.” The War on Drugs was fought on the streets of African-American communities and targeted young African-American men195—perhaps, the largest contributor to the high number of disenfranchised blacks.

It seems clear that support for increasingly punitive crime control policies was linked to views on race. For instance,

Beginning in the early 1970s, researchers found that those expressing the highest degree of concern about crime also tended to oppose racial reform. . . . Others also found that racial attitudes were an important predictor of support for law and order rhetoric: “those who support a hard line on law and order issues tend to be more racist and sexist, tend not to support equal rights for unpopular minorities . . . and they have a more negative view of welfare recipients.”196

At the same time, views with regard to race became the determinate of party affiliation: “As the traditional working-class coalition that buttressed the Democratic party was ruptured along racial lines, race eclipsed class as the organizing principle of American politics. By 1972, attitudes on racial issues rather than socioeconomic status were the primary determinant of voters’ political self-identification.”197 Katherine Beckett argues that this is why crime control rhetoric was so useful to the Republican party, maintaining that “[t]he rise of racial attitudes as the primary determinant of partisan loyalty and the association between racial attitudes and beliefs about crime and punishment help to explain the utility of crime-related issues to the Republican party.”198 This was viewed by political strategists as one type of “coded antiblack campaign rhetoric.”199 This campaign strategy also explains Reagan’s creation of the War on Drugs.

194. BECKETT, supra note 182, at 39.
195. THOMPSON, supra note 3, at 49.
196. BECKETT, supra note 182, at 84.
197. Id. at 42.
198. Id. at 86.
199. Id. at 41.
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The conventional wisdom among the Republicans was that the way to attract working-class men and their families was on the basis of what Reagan called the social issues—especially law and order. Consistent with this analysis, the Republican party platform of 1980 advocated “firm and speedy application of criminal penalties,” increased use of the death penalty, and the “firm punishment of drug pushers and drug smugglers with mandatory sentences.”

While considering the use of crime control rhetoric by political elites, it is important to evaluate the impact of this rhetoric on public attitudes. One argument is that the political initiative with regard to increasingly punitive crime control policies was a response to public concern about increasing crime rates. Public opinion regarding crime was not shaped in response to experience with increasing crime or drug use, rather “levels of public concern are largely unrelated to the reported incidence of crime and drug use but are strongly associated with the extent to which elites highlight these issues in political discourse.”

Her findings show that from 1964 to 1974, levels of political initiative on and media coverage of crime were significantly associated with subsequent levels of public concern, but the reported incidence of crime was not. From 1985 to 1992, political initiative on the drug issue—but not the reported incidence of drug use or abuse—was strongly associated with subsequent public concern about drugs.

Moreover, “while the reported rates of crime and drug use shifted slowly and gradually, public concern about these problems fluctuated quickly and dramatically.” This further suggests that the shift was related to political initiative rather than to actual reported rates of crime or drug use.

1. War on Drugs: Jim Crow Updated

With any reference to a historical phenomenon such as the Holocaust, Slavery, or Jim Crow comes certain metaphorical challenges. Some believe that a contemporary comparison in some way diminishes the significance and impact of the historical event. In analogizing the War on Drugs to Jim Crow, I am fully aware of the limitations of the analogy; however, in light of the War on Drugs’ and Jim Crow’s focus on race, it seems appropriate.

200. Id. at 48.
201. Id. at 15.
202. Id. at 23.
203. Id. at 16.
The War on Drugs grew out of the Tough on Crime politics. The strong Tough on Crime rhetoric served as a basic staple of conservative electoral politics. Indeed, during the height of the crack epidemic in black communities, the Senate finalized a version of the 1986 Anti-Drug Abuse Act that contained a trigger quantity—the issuance of crack cocaine at fifty grams triggered a ten year mandatory minimum sentence. The quantity for cocaine was set at five kilograms. The legislation also imposed twenty-nine new mandatory minimum sentences, resulting in a one hundred to one ratio between the triggering quantities necessary for powder cocaine and crack cocaine sentencing. “In 2002, 81% of the offenders sentenced for crack trafficking were Black.” Statistics reveal that “[t]he average sentence was 119 months for crack defendants and [seventy-eight] months for powder cocaine defendants.”

The collateral consequences of mass incarceration are codified in a range of laws. Some of these controversial government measures include denying public assistance to persons convicted of drug crimes . . . [and] evicting entire families from public housing if one member is convicted of a drug charge . . . .” The crack cocaine epidemic of the 1980s and 1990s provided the media and social impetus to increase penalties associated with drugs. Images of young men of color on the nightly news with automatic weapons and gold necklaces blanketed the airwaves. In the legal arena, potential legal challenges to the new crack cocaine laws were summarily defeated. Racial challenges seeking to prove a racial animus or discriminatory intent on the part of Congress were found to be lacking.

One exception to the legal rulings on crack was the decision by Judge Cahill in United States v. Clary. Judge Cahill concluded that the crack/powder sentencing disparities are a racist holdover from a Jim Crow Era criminal justice system. Cahill reviewed factors that the

204. Tyson, supra note 24, at 378.
205. Id.
207. Tyson, supra note 24, at 379.
208. Id.
209. Id. at 381.
210. Id.
211. Id. at 375.
212. Id. at 383.
213. United States v. Clary, 97 F.3d 1457 (8th Cir. 1996); see THOMPSON, supra note 206, at 18.
Supreme Court has recognized for determining whether a law was motivated by racial discrimination, including legislative history, overall historical context, and presence of a racially disparate impact. Judge Cahill acknowledged that legislation will not contain overtly racist referrals and lawmakers will go to considerable lengths to eliminate any allusion to racial factors. He also acknowledged that “unconscious racism” plays a role in power dynamics and in the perception of crime in society, finding it in “Congress’s attempt to rationalize the sentencing disparity between crack and powder cocaine.”

Judge Cahill revealed “not only that little thought was given to the construction of the Anti Drug Abuse Act of 1986, but also that the racialization of crack cocaine abuse through mass media and popular perception greatly influenced Congress’ thinking.” In addition, “[h]e present[ed] compelling statistics from official and reputable sources about the impact of mandatory minimums on the Black male population . . . .” Furthermore, he “quoted a Federal Bureau of Prisons report finding a direct relation between the 90% increase in the prison population . . . and the mandatory minimum drug sentences and the sentencing guidelines.”

The Eighth Circuit overruled Judge Cahill, acknowledging the presence of a racial consciousness based on the testimony of Eric E. Sterling, Counsel to the Subcommittee of Criminal Justice in the House of Representatives, at the time the sentencing disparity was passed. However, while the Eighth Circuit acknowledged the presence of a racial consciousness, they did not find this was indicative of the presence of racial animus. During the Jim Crow Era, blacks were prohibited from voting through the use of poll taxes and grandfather laws and also the fear of violent retaliation, including lynching. Today, racialized mass incarceration is used to disenfranchise black voters.

While the disenfranchisement that occurred following the Civil War was the result of changes in laws that actively sought to disenfranchise particular types of felons, the increasing amount of disen-

214. See Thompson, supra note 206, at 18; Tyson, supra note 24, at 386.
215. See Tyson, supra note 24, at 386; see also Thompson, supra note 206, at 18.
216. Tyson, supra note 24, at 387.
217. Id.
218. Id. at 388.
219. Id.
220. See Thompson, supra note 206, at 18; Tyson, supra note 24, at 391.
221. Tyson, supra note 24, at 391.
franchisement that we see today seems to be a result of an increasing number of both crimes that are classified as felonies and felony convictions than a result of changes in felon disenfranchisement laws. This suggests that while, in the post Civil War period, the racialized nature of both voting laws and criminal laws led to the use of criminal disenfranchisement as a means to disenfranchise blacks, in the contemporary period, the laws are facially neutral with regard to race. However, the war on crime and mass incarceration effect a disproportionate racial impact.

Jeff Manza and Christopher Uggen argue that states have attempted to decrease felon disenfranchisement. They argue that this trend began in the early 1960s, reached its high tide mark in the 1970s, and continues to the present:

During this period, a large number of states ([twenty-three] in all) amended or did away with laws barring some or all of the ex-felon population from access to the ballot box. To be sure, even in the midst of this general period of liberalization, two states (Michigan and New Hampshire) became more restrictive, but the clear direction of change was toward liberalization. Some states reduced the scope of their laws by allowing probationers to vote and by automatically restoring voting rights upon completion of sentence. During the peak of this liberalization phase, voting was increasingly extended not only to ex-felons but also to those nonincarcerated felons on probation and, in some cases, parole. Five states changed their laws to automatically restore voting rights upon completion of sentence and five more to disenfranchise only inmates between 1970 and 1975. Since the mid-1970s, the pattern of change has slowed, but of those states changing their laws far more have liberalized . . . . These liberalizing measures have also affected far more individuals than the restrictive measures.222

This seems to suggest that the continued existence of felon disenfranchisement is more the result of incomplete gains during the Civil Rights Movement rather than a reaction to the gains made.223 It is also arguable that the reason disenfranchisement seems so much greater now than in the 1970s is not because the laws have become harsher with regard to actual disenfranchisement, but simply that more people are being sent to prison and, therefore, are subject to

222. MANZA & UGGEN, supra note 20, at 59.
223. Although the increased number of felony convictions seems to be a reaction to the civil rights movement, see the discussion of Katherine Beckett's work above. See supra notes 145-52, 157-63 and accompanying text.
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disenfranchisement. Even if the laws that were in place in 1960 had stayed the same, there still would have been an increase in the number of people disenfranchised.\textsuperscript{224} With the changes that have occurred in the laws, there is still an increase in the number of people disenfranchised, but the rate of increase is less than if the laws had not been changed.\textsuperscript{225} These facts may be an indication that, although some states have made their laws harsher, the overall trend is towards greater leniency.

Despite this fact, the overall numbers are staggering and have reached heights never before seen. At the time of the publication of their book, Manza and Uggen estimate that over five million adults are disenfranchised as the result of felony convictions.\textsuperscript{226} They argue that the high rate of felon disenfranchisement (and felony convictions) is not the result of higher levels of crime but is directly traceable to policy choices, including the fact that the likelihood of a conviction will follow an arrest has increased as well as the average sentence length.\textsuperscript{227}

Alexander Keyssar, on the other hand, seems to suggest that the trend has been otherwise, revealing an increase in felon disenfranchisement laws during the 1980s, but he does so without empirical support. He argues that:

by the early 1970s, the disfranchisement of felons and ex-felons was subject to serious logical and judicial challenge . . . . The challenge to these laws, however, was rebuffed by the Supreme Court in 1974 . . . . History had reared its head once again: language drafted during the cauldron of Reconstruction and seemingly aimed at Confederate rebels was invoked to legitimize the disfranchisement of men and women who trafficked in illegal drugs in the 1980s.\textsuperscript{228}

The one example to which he cites in support of this is Massachusetts, where felons had never before been barred from the polls but whose electorate voted in 2000 to disenfranchise “men and women serving prison time for felonies. The measure was precipitated by the

\textsuperscript{224} MANZA & UGGEN, supra note 20, at 223-24.
\textsuperscript{225} See id.
\textsuperscript{226} Id. at 7.
\textsuperscript{227} Id. at 100.
\textsuperscript{228} ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 330-31 (2000). Keyssar also points to the decrease of some disenfranchisement during the 1960s and 1970s but then focuses on the legal challenges to disenfranchisement in the period that follows rather than on legislative changes. Id. at 302-03.
political activism of some inmates and had strong bipartisan support in the state legislature." 229

III. HOW DO WE REPAIR THIS DAMAGE?

As Part I notes, there are efforts underway to attack felon disenfranchisement laws and the impact of the Census’ usual residence rule principally through litigation. 230 While some limited success may be possible through the courts, the real opportunity for addressing each as well as the cumulative impact of each may be in the policy arena. What follows is a look at efforts on both the local and federal level that offer some hope that the political disempowerment of African-American communities may be redressed.

A. Efforts on the Local Level

As New York begins redrawing its legislative districts as a result of the decennial Census, for the first time in history, it will have to count prison inmates in their home districts as opposed to counting them in the district in which they are incarcerated. 231 This reformulation of how prisoners are counted is the first step in realigning the prison political structure, which has for years benefited jurisdictions that house prisons. This new formulation will likely have a profound impact on the New York political structure and is a model for rethinking the process of reentry for those formerly incarcerated individuals returning home.

Opponents of the new law suggest that prisoners use the same services as those citizens in the communities in which the prisons are located. 232 However, a close examination of that argument reveals that Departments of Corrections in most jurisdictions budget for utilities and other services. 233 The primary issue here is whether the political representation and financial resources of the state and federal government should go to jurisdictions where individuals are in custody

229. Id. at 331.
232. Id.
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(and funds are allocated in the form of Corrections’ budgets) or to communities to which these individuals will be returning (and often where they committed the offenses which landed them in custody).

New York, through recent legislation co-sponsored by Assemblyman Hakeem Jeffries of Brooklyn and Senator Eric Schneiderman of Manhattan, opted to count prisoners in their home communities rather than in prison districts.234 This curtails the practice known as prison-based gerrymandering.235 This practice has often led to increased representation for rural districts at the expense of the urban centers in which most of the prisoners resided prior to incarceration.

Senator Schneiderman, in articulating a justification for his co-sponsorship of the bill states:

The practice of counting people where they are incarcerated undermines the fundamental principle of “one person, one vote”—it’s undemocratic and reflects a broken system. This legislation is as simple as it is fair: it requires that legislative districts at every level of government contain an equal numbers of residents.236

Assembly member Hakeem Jeffries asserted:

This bill is necessary to break the back of the prison industrial complex where certain communities benefit from the criminalization of young people who disproportionately come from low-income neighborhoods across the state. Prison-based gerrymandering is unfair, unethical and unconstitutional, and we will not rest until the process is changed.237

Other justifications for the legislation include the assertion that it is necessary legislation at the state level because the U.S. Census continues to count prisoners in the area of their incarceration rather than their home district. This leads to a “distorting effect . . . on the drawing of legislative boundaries.”238 In addition, this population of individuals is distinct from other groups that are similarly counted away from home, such as college students and military personnel, in that prisoners cannot vote, and they do not interact with the surrounding community. Instead, the entire cost of their presence in these locali-

235. Id.
236. Id.
237. Id.
238. Id.
ties is paid for by the New York State taxpayers. Finally, it is arguable that the Census’ current practice violates federal and state laws. 239

The last justification addressed the direct political consequences of the legislation—that counting people in prison in the prison district “most significant[ly] [impacts] vote dilution . . . in rural communities as most counties, cities, and towns use federal census data to draw their local legislative district and ward boundaries.” 240 To support this last point, they point to St. Lawrence County where prison populations are counted in establishing legislative districts. This led to “a long-running and disruptive controversy.” 241 In contrast, there were numerous counties that “have corrected the census data to remove people in prison before redistricting.” 242 This inequality at the local level was cited in support of change on the state level in order to “address . . . the redistricting inequities that result from relying on the Census Bureau’s counting of people in prison.” 243

The recent explosion of the prison population, coupled with states’ use of census data has given rise to two main problems. First, including prisoners in the census block in which the prison is situated conflicts with the laws of many states, which declare that incarceration does not impact residence. 244 Second, counting prisoners as residents of the correctional facility allows state politicians to artificially inflate a district’s population, in violation of the “one person, one vote” principle established by Reynolds v. Sims. 245

1. State and Local Legislation Addressing Prison-Based Gerrymandering

Some local governments have elected not to include prison populations when drawing district lines. Of the twelve counties studied in California, all but two avoided prison-based gerrymandering despite the sizeable prison populations attributed to them by the Census. 246

239. See Cesar, supra note 231.
243. Id.
246. See Kajstura & Wagner, supra note 86.
In Connecticut, some jurisdictions have taken it upon themselves to modify the Census data to exclude prisoners when redistricting.\textsuperscript{247} States are not required to use federal census data when apportioning their own legislatures.\textsuperscript{248}

Although a number of jurisdictions have introduced legislation to ensure that prisoners are not used to bolster a particular population count, New York joins Maryland as the only state to actually pass such legislation.\textsuperscript{249} Maryland’s law, known as the “No Representation Without Population” Act, requires that all incarcerated persons be counted as residents of their home addresses for redistricting purposes.\textsuperscript{250} Maryland must now collect the home addresses of prisoners and update all relevant data accordingly.\textsuperscript{251} The congressional bill, introduced by Representative Gene Green (D-TX), would require the Census to count prisoners at their pre-incarceration address starting with the 2020 Census.\textsuperscript{252} The federal legislation would make it more difficult for states to use prison addresses for inmates to inflate population data. In addition, ten other states have introduced legislation attempting to eliminate the practice of using prisoners to artificially inflate the population count. These states include Rhode Island, Connecticut, Florida, Illinois, Minnesota, Pennsylvania, Wisconsin, Oregon, Texas, and Michigan.\textsuperscript{253} These bills intend to eliminate prison-based gerrymandering by either excluding prisoners from the population count for redistricting purposes or requiring prisoners to be counted at their pre-incarceration addresses.

Perhaps one of the least chronicled trends in the 2010 Census has been the impact of counting detained immigrants and federal apportionment and funding. Although prisoners have always been counted in the Census, regardless of their immigration status, the recent boom in immigrant detainees is likely to have an impact on this year’s census.\textsuperscript{254} Unlike the controversy over where to count prisoners, which

\textsuperscript{247} See Wagner & de Ocejo, supra note 105.
\textsuperscript{249} Id.
\textsuperscript{251} Id.
\textsuperscript{252} See id.
\textsuperscript{253} See id.
only affects districting and representation at the state level, the decision regarding which detainees to count will have a significant impact at the federal level.

The 2010 Census is the first census to occur since the immigration agencies were reorganized.255 This reorganization led to a 400% increase in the number of immigrants detained compared to fifteen years ago.256 The inclusion of immigrant detainees in their state population count allows for these detention facilities to benefit enormously from the detention explosion in the form of increased representation in the House and increased federal funding.257 According to the Brookings Institute, the payout from the Census during the 2008 fiscal year was $1,469 per person, a significant amount of money, especially when the people it is meant to benefit will no longer be present in the country.258

Some projections suggest that the government will grant over one hundred million dollars in additional funding to areas in which immigrants are detained.259 Texas, specifically, stands to gain the most since it is home to roughly one third of the country’s immigrant detainees.260 A number of Texas Representatives have argued that all detainees should continue to be counted regardless of their immigration status because the additional federal money received helps to fund the detention facilities.261 These arguments mirror state officials’ argument that prisoners use utilities in the jurisdictions where state prisoners are housed.262 The argument fails to account for the funding by Department of Corrections in the same way that immigration detention facilities are funded by the Department of Homeland Security, not by the federal grants given on the basis of Census data.

The other argument often cited by supporters of counting immigrant detainees in the Census is that the Constitution mandates that all residents are counted, regardless of citizenship.263 While the Con-
stition does not mention citizenship status specifically, it does say that all free persons are to be counted, including prisoners.264

In addition to the artificial inflation of a state’s population created by counting detained immigrants and its subsequent effect on federal apportionment, the practice also violates state law. The state laws regarding incarceration and its effect on residency previously discussed apply to detainees awaiting deportation, as well as regular prisoners.265

Another interesting aspect of counting immigrant detainees in the Census is that the detainees are often unaware that they are being counted at all.266 Unlike illegal immigrants in the general population who must elect to fill out the Census forms, Census forms for immigrant detainees are usually completed by prison officials.267 This has resulted in some unique alliances between immigration reformers who want illegal immigrants to boycott filling out Census forms until they are granted citizenship.268 Conservative leaders, such as Rep. Vitter of Louisiana, are also against counting illegal immigrants in the Census, albeit for very different reasons.269

Although many reformers are pushing for a complete overhaul of the Census Bureau’s methodology, which would require all prisoners to be counted in the areas in which they were living prior to their incarceration, the new policy implement for the 2010 Census seems to be moving in the right direction. Many reformers are introducing legislation that would allow prisoners to be counted at their pre-incarceration residences.

Perhaps the administrative or operational hurdles of enforcing a policy to count individuals in their home jurisdictions will be the greatest. The addresses of inmates who are currently incarcerated and will continue to be incarcerated at the time of the next census must be collected. The debate over counting detained immigrants presents different policy questions that will most likely need to be addressed on the federal level. As the topic of immigration reform stays in the spotlight, this issue will no doubt become contentious, with millions of dollars, potential citizenship, and federal representation on the line.

265. Id.
266. See Valdes, supra note 258.
267. Id.
268. Id.
B. Efforts on the Federal Level

The Democracy Restoration Act ("DRA") was introduced in the House by John Conyers\(^{270}\) and in the Senate by Russ Feingold\(^{271}\) in July of 2009. Hearings before House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties took place on March 16, 2010.\(^{272}\)

The DRA would create a uniform rule that the right of citizens to vote in federal elections\(^{273}\) cannot be denied because of a prior felony conviction, unless the individual is incarcerated in a correctional institution or facility\(^{274}\) at the time of the election.\(^{275}\) As previously noted, disenfranchisement laws are governed at the state level and vary widely from state to state.\(^{276}\) Under the DRA, states would retain the right to control voter eligibility for state elections only and would be free to pass laws that afford the right to vote in federal elections on less restrictive terms than those established by the Act.\(^{277}\)

1. Notification of the Right to Vote

Under the DRA, the State or the Director of the Bureau of Prisons would be required to notify those individuals in BOP custody and those convicted of criminal offenses of their right to vote. Such notice would be given in writing to those convicted of a felony either on the day the individual is sentenced, when the sentence is probation only, or when the individual is released from custody, provided he or she is not released into the custody of another State or the Federal govern-

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\(^{273}\) H.R. 3335 § 2. The term “election” means “a general, special, primary or runoff election”; “a convention or caucus of a political party held to nominate a candidate”; “a primary election held for the selection of delegates to a national nominating convention of a political party”; or “a primary election held for the expression of a preference for the nomination of persons for election to the office of President.” Id. § 6(2).

\(^{274}\) Id. § 2. A “correctional institution or facility” includes “any [privately or publicly operated] prison, penitentiary, jail, or other institution or facility for the confinement of individuals convicted of criminal offenses . . . .” Residential community treatment centers, or similar public or private facilities, are not included in this definition. Id. § 6(1).

\(^{275}\) Id. § 3.

\(^{276}\) See Christopher Moraff, Why Are Convicted Felons in Battleground States Being Told They Can’t Vote?, ALTERNET (Oct. 9, 2008), http://www.alternet.org/news/102299/why_are_convicted_felons_in_battleground_states_being_told_they_can’t_vote/.

\(^{277}\) H.R. 3335 § 7(a).
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For those individuals convicted of misdemeanors, notification will be given at the time of sentencing by a State court. The DRA, as drafted, has both a public and private right of action. Enforcement power under the DRA is vested in the Attorney General. There is also a private right of action. Individuals may receive declaratory or injunctive relief in a civil action against the State if they provide written notification of a violation of the Act to the chief election official of the State involved and if the violation is not cured within the time frame specified. Typically, the State has ninety days after receipt of notice to cure the violation. If the violation occurred within 120 days of an election for Federal office, however, the state only has twenty days to cure the violation. In the event that a violation of the Act occurs within thirty days of a Federal election, no written notice is required before bringing a civil action to obtain declaratory or injunctive relief.

One of the most commonly cited arguments in opposition of the DRA is that the Act infringes on States’ rights and that Congress does not have the authority to enact such legislation. Proponents of the bill cite Article 1, Section 4 of the Constitution, the Election Clause, and Congressional power to protect the right to vote under the 14th, 15th, 19th and 26th Amendments as the basis of authority for the DRA.

The Election Clause provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” Proponents argue that the Court has interpreted this power broadly, with at least five Justices acknowledging that Congress had “ultimate supervisory power” over federal elections. This power included broadening voter qualifications, especially when the practice being challenged

278. Id. § 5(a)(1)-(2).
279. Id. § 5(a)(2)(B).
280. Id. § 4(a).
281. Id. § 4(b)(1).
282. Id. § 4(b)(1)-(3).
284. See, e.g., id. at 44 (statement of Burt Neuborne, Legal Dir., Brennan Center for Justice).
286. See Hearing, supra note 283, at 45 (statement of Burt Neuborne).
“had been used to disenfranchise members of racial minorities.”

Opponents, on the other hand, argue that Article 1, Section 4 only gives Congress the right to alter the “times, places and manner” of such elections and not the power to regulate who can vote.

Those supporting the DRA point to the enforcement provisions of the Fourteenth and Fifteenth Amendments as an additional source of authority as both Amendments allow for enforcement “by appropriate legislation.” Under the Fourteenth Amendment, Congressional enforcement power is at its peak when passing legislation aimed at correcting previous policies of government discrimination based on a protected characteristic, such as race. Additionally, Congressional power to enforce the Fifteenth Amendment, the right to vote, has been compared to the Necessary and Proper Clause. Combined, supporters of the DRA see these two Amendments as ample evidence of Congress’ ability to regulate voting laws that were initially intended to differentiate between individuals based on race.

Opponents of the DRA highlight the fact that there is a special provision in the Fourteenth Amendment for those engaged in criminal conduct. Additionally, they posit that the discriminatory intent required to render criminal disenfranchisement laws unconstitutional under the Fourteenth and Fifteenth Amendments cannot be sufficiently demonstrated. Finally, opponents point to the Qualifications Clause in the Seventeenth Amendment, which states that the qualifications of voters in congressional elections must be the same as the qualifications for voters in elections to the most populous branch of the state legislature. Accordingly, passage of the DRA would force states to alter their state voting requirements. This would arguably represent an unauthorized infringement on States’ rights. Those supporting the DRA dismiss this argument by pointing to Court precedent interpreting the scope of the Qualifications Clause, which would allow state voting laws to remain intact.

287. Id.
288. See id. at 55 (statement of Hans A. von Spakovsky).
290. See Hearing, supra note 283, at 47 (statement of Burt Neuborne).
291. See id.
292. U.S. Const. amend. XIV, § 2 (noting that the right to vote can be withheld for “participation in rebellion, or other crime”).
293. Id.
295. See id. at 46 (statement of Burt Neuborne) (discussing Tashjian v. Republican Party of Conn., 479 U.S. 208, 227-28 (1986) (stating that the Qualifications Clause of Article I was in-
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The DRA addresses the inconsistent patchwork structure of voter eligibility as a result of variations in State laws. It also acknowledges the trend to address disenfranchisement nationally. Over the past ten years, twenty-one states have reformed their criminal disenfranchise-ment laws.\textsuperscript{296} With wildly inconsistent voting rules across the country, the DRA seeks to harmonize the national access to the franchise. Access to the ballot varies radically from state to state. For example, Kentucky and Virginia permanently disenfranchise those with felony convictions, unless they are granted clemency by the state, and Maine and Vermont allow everyone with a felony conviction to vote, even while those persons are incarcerated.\textsuperscript{297} The remaining states fall somewhere in between.

Probation and parole add further confusion to the matter. Citizens of Utah can vote as long as they are not in prison; citizens of Colorado can vote while on probation but not while on parole; and citizens of New Mexico must be off both probation and parole before their right to vote is restored.\textsuperscript{298} In addition, some states, such as Alabama, only restrict re-enfranchisement for crimes that fall into specific categories, some of which remain undefined.

In many states, neither parole officers nor voting registration officials are clear on what the voting rules require of those with a felony conviction to become eligible to vote. Not surprisingly, even some local election boards create documentation requirements for convicted felons that are impossible to meet because the documents required do not exist.\textsuperscript{299} As a result, lack of uniformity and bright line rules in criminal disenfranchisement laws can often lead to eligible voters being denied the right to vote.

Scholars such as Burt Neuborne point out that under the Supremacy Clause of the United States Constitution, any state law in conflict with the DRA would necessarily be preempted, as was the

\textsuperscript{296} See Wood & Malhotra, supra note 272.


\textsuperscript{299} See Adam Serwer, Ending the Eternal Sentence, AM. PROSPECT (Mar. 25, 2010), http://www.prospect.org/es/articles?article=ending_the_eternal_sentence.
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case for literacy tests.\(^{300}\) In Kentucky and Alabama, for example, the passage of the DRA would have an immediate impact on their state laws.

Kentucky is one of the states that excludes all persons convicted of a felony or of “such high misdemeanor as the General Assembly may declare” from voting in elections.\(^{301}\) Individuals can only regain their right to vote by an executive pardon; otherwise, they remain disenfranchised indefinitely.\(^{302}\) Alabama bans from voting those convicted of felonies involving “moral turpitude.”\(^{303}\) Individuals who are disenfranchised in Alabama cannot vote again until their civil and political rights have been restored.\(^{304}\) Crimes of “moral turpitude” are broken down into two categories, one of which represents an absolute bar to applying for restoration of civil rights, leaving certain individuals permanently disenfranchised.\(^{305}\) In 2007, the Supreme Court of Alabama issued an opinion including a list of all of the crimes that Alabama courts had previously categorized as those involving moral turpitude. Although not exhaustive, the list did little to clarify who is barred from the franchise.\(^{306}\) In contrast to Alabama, Kentucky provides a list of offenses that contains all felonies and those misdemeanors that have been affirmatively specified by the State legislature. Both states demonstrate the merit in the DRA, the development of a “bright-line rule” that would determine when former offenders would be able to exercise the right to vote.

Another lens through which to view felony disenfranchisement is the extent to which it hampers reentry. Most states and the federal government have acknowledged that part of the purpose of incarceration is to prepare individuals for reintegration back into their home communities.\(^{307}\)

In addition to the systemic issues that criminal disenfranchisement laws present, due to their role in the context of the history of the United States and to the problems they create from an administrative standpoint, criminal disenfranchisement has a real and significant im-

\(^{300}\) See Hearing, supra note 283, at 49 (statement of Burt Neuborne).
\(^{301}\) Ky. Const. § 145, cl. 1.
\(^{302}\) Id.
\(^{303}\) Ala. Const. art. VIII, § 177(b).
\(^{304}\) Id.
\(^{306}\) See id. (delineating a list of crimes “of moral turpitude” pursuant to Section 15-22-36.1(g) of the Code of Alabama).
\(^{307}\) Thompson, supra note 3, at 6.
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Disenfranchisement has never been proven to aid in crime reduction and has therefore been viewed by many as a continuous punishment. Many law enforcement officials support a re-enfranchisement bill because they do not see disenfranchisement as an effective policy to reduce crime.

Disenfranchisement continues to punish those who have been released from prison and have finished serving out their punishment, further setting them apart from the community they are trying to rejoin. It provides a constant reminder of the conduct for which individuals have paid their debt to society and runs afoul of the basic goals of reintegration. The formerly incarcerated face many of the same concerns, responsibilities, and obligations as those without criminal records, but they are consistently denied one of the most basic methods of engagement with their community. This isolation and frustration is often cited as a cause for higher recidivism rates. Permanent disenfranchisement raises the additional issue of “taxation without representation,” as most felons are required to secure employment and therefore pay taxes as a term of their parole or probation.

Opponents point to other deprivations of freedom that criminals must face that would remain unchanged in light of the Act, such as the right to bear arms. They argue that the true motivation behind the DRA lies not in a desire restore a basic civil right, but in a belief held by liberals that former felons will likely vote for Democratic nominees given the makeup of the prison population and that this may help tip the scales in Democrats’ favor in close elections.

CONCLUSION

One of the bedrock principles of democracy is universal suffrage. African-Americans have historically been disproportionately disen-
franchised by default and often by design. The one-two punch of felon disenfranchisement and the usual residence rule have systematically undermined the political viability of black communities nationwide. Undoing felon disenfranchisement and counting individuals in the communities to which they will return after incarceration are vital steps to protecting our democracy.
Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System

YOLANDA VÁZQUEZ*

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ABSTRACT

Latinos currently represent the largest minority in the United States. In 2009, we witnessed the first Latina appointment to the United States Supreme Court. Despite these events, Latinos continue to endure racial discrimination and social marginalization in the United States. The inability of Latinos to gain political acceptance and legitimacy in the United States can be attributed to the social construct of Latinos as threats to national security and the cause of criminal activity.

Exploiting this pretense, American government, society and nationalists are able to legitimize the subordination and social marginalization of Latinos, specifically Mexicans and Central Americans, much to the detriment of the Latino community. This poisonous social construct has many manifestations—it depicts the Latino as a foreigner, a criminal, an “illegal” and it characterizes the Latino as one who comes to this country to cause social chaos by refusing to follow our country’s
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laws, work with authority, or enter with right. These depictions and characterizations instill fear and contempt against the Latino and motivate the creation of harsh immigration laws and enforcement measures. Ironically, these depictions and characterizations are then used as the pretext for legal actions against the Latino community. Currently, the primary vehicle for accomplishing this disguised discrimination has been the incorporation of immigration law into the criminal justice system.

Under the pretext of addressing criminal activity and national security concerns, American law-makers and society use immigration and criminal law to preserve racial inequality and perpetuate the marginalization of Latinos living in the United States. Thus far, these measures have been effective in depriving Latinos of the right to live in this country with rights equal to the majority, and denying them the freedom and privilege of living in the United States without abuse, discrimination, or fear.

This Article will discuss the use of the criminal justice system as the current primary means to stigmatize, punish and remove Latinos, the fallacy of the justifications put forth for this discrimination, and the impact of this governmental course of action on the Latino community. This Article concludes that until the Latino identity is disaggregated from the criminal and immigration contexts, discrimination against all Latinos will persist in a state-sanctioned, society approved and formidable form.

INTRODUCTION

Immigration and criminal law have increasingly become intertwined.1 During the last fifteen years, the number of immigrants deported due to criminal convictions has increased dramatically. For instance, in 2004, 202,842 individuals were removed from the United States, 88,897 of which were removed for a criminal conviction.2 In contrast, in 2009, 393,000 noncitizens were removed from the United States, work with authority, or enter with right. These depictions and characterizations instill fear and contempt against the Latino and motivate the creation of harsh immigration laws and enforcement measures. Ironically, these depictions and characterizations are then used as the pretext for legal actions against the Latino community. Currently, the primary vehicle for accomplishing this disguised discrimination has been the incorporation of immigration law into the criminal justice system.

Under the pretext of addressing criminal activity and national security concerns, American law-makers and society use immigration and criminal law to preserve racial inequality and perpetuate the marginalization of Latinos living in the United States. Thus far, these measures have been effective in depriving Latinos of the right to live in this country with rights equal to the majority, and denying them the freedom and privilege of living in the United States without abuse, discrimination, or fear.

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1. The term “crimmigration” has been coined to express this convergence. See Padilla v. Kentucky, 130 S. Ct. 1473, 1481-82 (2010) (acknowledging the enmeshment of immigration and criminal law in the context of deportation); Daniel Kanstroom, Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases, 113 HARV. L. REV. 1889, 1890-91 (2000) (stating that immigration “laws have brought about a rather complete convergence between the criminal justice and deportation systems”).

States, over 128,000 of which were removed as a result of a criminal conviction.  

Several systemic changes have spurred this increase in removals based on criminal convictions, including: (1) a decrease in the number of remedies available to immigrants convicted of crimes in immigration court, and (2) an increase in the number of criminal convictions that have become removable offenses.

Simultaneously, the criminal justice system has been harnessed to amplify the effects of these immigration law changes, with immigration law increasingly being enforced through the use of the criminal justice system. The criminal justice system has become the primary means to locate, remove, and permanently banish immigrants from the United States. Currently, enforcement, detention, and removal of immigrants pervade every aspect of the criminal justice system. In mass workplace raids, immigrants are criminally prosecuted before they are transferred into the custody of Immigration and Customs Enforcement (“ICE”). ICE is regularly present in local jails. Probation, the government, local law enforcement, and courts across the country are taking it into their own hands to call ICE on defendants that appear before them.

Section 287(g) Memorandums of Agreement and Secure Communities give local law enforcement the power...


4. See Padilla, 130 S. Ct. at 1478 (“The landscape of federal immigration law has changed dramatically over the last [ninety] years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.”); see generally Susan L. Pilcher, Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant, 50 ARK. L. REV. 269 (1997).


6. See Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Mar. 19, 2011) [hereinafter Fact Sheet] (“Currently ICE has 287(g) agreements with [sixty-nine] law enforcement agencies in [twenty-four] states. Since January 2006, the 287(g) program is credited with identifying more than 200,300 potentially removable aliens—mostly at local jails.”).

7. This writer has systematically witnessed and been involved in cases where probation, courts, prosecution, and government workers have called ICE on noncitizens that have appeared before them.

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to notify ICE for any immigrant who is processed for state, local, or federal crimes. Immigrants in the court system are being denied bail based on immigration status. Prosecutions are strategically set to ensure that immigrants are prosecuted to secure their deportation and permanent removal from the United States.

Latinos currently represent the largest minority in the United States. Latinos simultaneously represent the largest immigrant group population. As the overall number of immigrants of color has drastically increased since the 1970s, Latino immigrants have accounted for the largest proportion of that increase. Unfortunately, the number of Latinos removed from the United States has also dramatically increased. Latinos presently represent over 94% of the total number of noncitizens removed. Even more unfortunate, Latinos currently constitute 94% of the number of noncitizens removed from the United States based on criminal convictions. This implores an examination of whether any connection between Latino immigration and crime exists beyond the increased conjoining of criminal and immigration law to remove Latino immigrants. If not, and as this Article argues, then we might inverse the inquiry and ask if the conjoining of criminal law and immigration law is proper in light of its disparate impact on the Latino community.

10. Ariz. Const. art. 2, § 22(A)(4) (imposing no bail for defendants accused of a serious felony offense if defendant has “entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge”).
12. I use the word “Latino” to identify persons of Mexican, Central and South American, Dominican, Puerto Rican, Cuban, and Spanish descent. However, the terms “Latino” and “Hispanic” are used interchangeably throughout this document based upon others’ use of the terms to describe the same group of individuals.
14. See Ian Haney Lopez, White by Law: The Legal Construction of Race 144 nn.5-6 (2006) (discussing the greatest source of demographic change currently to be “the burgeoning Hispanic population”).
16. Id. at 4 tbl.3.
A particular rhetoric has motivated the convergence of immigration and criminal law and insulated the resulting systematic oppression from criticism. The criminal enforcement measures used in the criminal justice system to locate, detain, and remove immigrants are popularly justified by reference to concerns about national security, protecting communities, and criminal behavior. These justifications have been too easily accepted; government officials and politicians have been allowed to create, pass, and enforce laws that would be given greater scrutiny if allegations of protection and security to our country and its citizens were not used.

The harmful effects of this crimmigration disaster are disproportionately being borne by the Latino community—most acutely by Latino immigrants, their families, and the communities to which they belong. Equally concerning, though more insidious, is the overarching impact of this fiasco on all Latinos living in the United States. As a direct consequence of the criminal justice system being used to enforce immigration law, Latinos as a group are being viewed as criminals, “illegals,” individuals incapable of social assimilation, and instigators of social chaos.

This Article discusses the use of the criminal justice system to enforce immigration laws and its consequences on Latinos living in the United States. Part I of this Article summarizes the historical exclusion and marginalization of Latinos in the United States. Part II of this Article illustrates the incorporation of immigration law into the criminal justice system by providing an overview of criminality-related immigration law changes and criminality-related immigration enforcement programs. Part III of this Article demonstrates that a disconnect between immigration control and “dangerous” crime and terrorism discredits the rhetoric used to enact and sustain these crimmigration measures. Part IV of this Article discusses the harmful effects that crimmigration has had on the Latino population and identity in this country. Finally, this Article concludes that crimmigration has become the modern day apparatus for extending a historical and shameful history of Latino exclusion, discrimination, and marginalization in this country. Further, until the Latino identity is disaggregated from notions of crime, terror, and “illegal” immigration, all Latinos will

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continue to be deprived of the opportunity for fair and just treatment in the United States.

I. HISTORY OF THE EXCLUSION OF LATINOS IN THE UNITED STATES

United States immigration law has consistently worked to prevent Latinos, especially indigent Latinos, from migrating or remaining in this country. Likewise, Latinos who have been able to migrate to the United States have historically been treated very poorly. In this way, immigration law has absorbed and reflected this country’s desire to maintain and uphold a “white” national identity, even at the cost of marginalizing Latinos as well as other immigrants of color.

As a result of ideas of white superiority, Latinos have struggled to obtain full membership and benefits of citizenship in United States history. From the beginning of United States’ history, Latinos have been deemed “unwelcome.” Further, like African Americans, Latinos have been seen as inferior to whites.

As early as the late 1800s, when white Americans began to have contact with Mexicans in the Southwest, Mexicans were viewed as worthy of discrimination and characterized negatively. Early accounts described Mexicans as “earless and heartless creatures”, “semi-

18. See Bill Ong Hing, Defining America Through Immigration Policy 115-54 (2004) (discussing how Mexicans have historically been treated in the United States in order to prevent migration and social equality).


20. See Kevin R. Johnson, Fear of an “Alien Nation”: Race, Immigration, and Immigrants, 7 Stan. L. & Pol’y Rev. 111, 113-16 (1995) (discussing opposition to current immigration laws on the basis of race and a need for homogeneity); see also George A. Martínez, Immigration: Deportation and the Pseudo-Science of Unassimilable Peoples, 61 SMU L. Rev. 7, 10-13 (2010) (arguing the popular fear that immigrants constitute a major threat to national identity has led to harsh immigration practices); see, e.g., Peter Brimelow, Alien Nation: Common Sense About America’s Immigration Disaster (1995) (providing a nativist perspective on immigration control, viewed by many as racist).

21. Morin, supra note 19; see Hing, supra, note 18, at 133 (discussing how Mexicans have come to be defined as Non-Americans); see also Reginald Horsman, Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism 208-48 (1981) (describing historical subordination of Mexicans).


23. Morin, supra note 19, at 51-52.
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barbarians”, who were “only interested in satisfying their animal wants.” A traveler on the Texas-Santa Fe expedition stated that “[t]here are no people . . . more miserable in condition or despicable in morals than the mongrel race inhabiting New Mexico.” Mexicans were also labeled “lazy, ignorant, and, of course, vicious and dishonest.”

This initial view of Mexicans held by Anglo-Saxon Americans laid the foundation for a discriminatory disposition by the United States “majority” toward Latinos that continues today. The persistence of this disposition is apparent from various episodes of this country’s history. Although many examples exist that demonstrate the perpetual discriminatory treatment and exclusion of Latinos in the United States, the following examples are used because of their blatant anti-Latino justifications and their particularly marginalizing consequences for Latinos in this country.

A. Denial of the Full Benefits of Citizenship

Since at least the mid-1800s, full citizenship rights have been denied to Latino populations. After the Mexican-American War, Mexico lost approximately 55% of its territory as well as thousands of its nationals that were living in those areas at the time. The Mexican nationals gained United States citizenship in the Treaty of Guadalupe Hidalgo in 1848. However, whether or not a Mexican national could actually enjoy the full benefits of citizenship was ultimately left to the individual states during that time.

24. HORSMAN, supra note 21, at 211 (citing nn. 6, 7).
25. Id. (citing FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS 72 (David J. Weber ed. 1973)).
26. Id. at 212 (citing Waddy Thompson, RECOLLECTIONS OF MEXICO 6, 23, 187, 239 (1847)).
27. The Latino identity encompasses a diverse group of individuals from different countries. The historical experiences of the diverse groups involved would be too numerous to include in this Article. Because Mexicans represent the largest Latino population in the United States and their historical experience and treatment has affected the treatment of the majority of Latinos living in the United States, I will use their experiences to demonstrate the marginalization of all Latinos.
28. MORIN, supra note 19 at 51-56.
30. Id. at art. IX.
31. JUAN F. PEREZA, RICHARD DELGADO, ANGELA P. HARRIS & STEPHANIE M. WILDMAN, RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 265-70 (2000) (stating that Mexicans were generally considered an inferior race unless they could show they were “white” instead of from indigenous ancestry).
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State laws determined whether or not a Mexican individual could enjoy the full benefits of citizenship, such as voting, maintaining property rights, or holding political office in the jurisdiction where he lived in the United States.32 Under United States law, only “free white persons”33 could be United States citizens. Therefore, despite the Treaty of Hidalgo, whether or not a Mexican national could be a citizen of an individual state or enjoy the full benefits of citizenship in most instances focused on the state government’s assessment of whether a Mexican could be classified as white.34 The wording used by the state laws exemplified this differential treatment. For example, California extended voting rights to white male citizens of the United States and “every white male citizen of Mexico, who elected to be a United States citizen under the Treaty of Guadalupe Hidalgo . . .”35

The determination of whether or not a Mexican was “white” under the law turned on Anglo-American perceptions of the race of particular Mexicans.36 Generally, Mexicans could only be citizens if they descended from white countries.37 Therefore, Mexicans of white descent were viewed as being entitled to white status and, therefore, granted citizenship.38 However, Mexicans who descended from Indian, Black, or a “mixed” race were not granted citizenship or the rights that were enjoyed with that status.39 This determination was typically one of perception—how the Mexican looked.40 If the Mexican did not appear or could not pass as being white, he was denied equal status to Anglo-Americans citizens.41

32. See, e.g., People v. De La Guerra, 40 Cal. 311 (1870).
33. Naturalization Act of 1790; see generally Immigration Law: An Overview, LEGAL INFO. INST, CORNELL U. L. SCH., http://topics.law.cornell.edu/wex/immigration (last visited Mar. 23, 2011) (“This Act restricted naturalization to ‘free white persons’ of “good moral character” and required the applicant to have lived in the country for two years prior to becoming naturalized.”).
35. CA. CONST. art. II, § 1 (1849) (emphasis added), reprinted in Cases and Materials, supra note 34, at 21-22.
38. Menchaca, supra note 36, at 587-89.
39. E.g., CA. CONST. art. II § 1 (1849); see also id. at 589.
40. Menchaca, supra note 36, at 587-89.
41. Id.; see De Genova & Ramos-Zayas, supra note 37.
B. Denial of Entry into the United States as a Legal Immigrant

Prior to 1965, citizens from countries in the Western Hemisphere were not subject to the national origin quota system. Latinos, however, were systematically denied legal entry. The enforcement of laws on the books such as the head tax, visa fee, literacy requirement, and various types of medical examinations were strictly enforced so that many Latinos from the Southern Border were forced to enter the country without authorization.

Traditionally, Mexicans have been used in the United States for unskilled labor. The denial of legal entry coupled with a lack of border enforcement allowed the United States to satisfy their desire for temporary Mexican labor. “Permitting” illegal entry was an effective way to ensure that Mexicans would not permanently remain in the United States because it helped to ensure that they did not achieve legal status. Therefore, Mexican immigrants were “allowed” into the United States in an undocumented status as a method to ensure that their stay in the country could only be temporary.

Additionally, when Latinos were allowed into the United States legally, such as during the Bracero Program, their status in the United States was still temporary. The Bracero Program allowed Latino immigrants to work in the United States but did not allow Bracero work-

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44. Ngai, supra note 42, at 67-68, 71 (“Although Mexicans did not face quota restrictions, they nevertheless faces myriad entry requirement, such as the head tax and visa fee, which impelled many to avoid formal admission and inspection.” Also, discussing that race and socio-economic status dictated the procedures at the Mexican border. This included “degrading procedures of bathing, delousing, medical-line inspection, and interrogation.”); Mark Reisler, By the Sweat of Their Brow, Mexican Immigrant Labor in the United States 1900-1940, at 24 (1976); George J. Sanchez, Becoming Mexican American: Ethnicity, Culture, and Identity in Chicano Los Angeles, 1900-1945, at 57 (1993); see Daniel Kantrow, Deportation Nation 158-59 (2007) (discussing the creation of undocumented immigration at the Southern Border); see generally Joseph Nevins, Operation Gatekeeper: The Rise of the “Illegal Alien” and the Making of the U.S.-Mexico Boundary (2002) (discussing the rise in “illegal” at the Southern Border).
46. Id. at 70.
48. Ngai, supra note 42, at 70 (discussing Mexicans entry as “temporary visitors” as well as other “irregular” and “unstable” forms of temporary but lawful entry).
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ers to bring their families with them during their stay.49 This approach further entrenched the idea that Latino immigrants could be tolerated for their labor, but would not be welcome as permanent members of American society.

C. Lynching

Another example of the contempt that Anglo-Saxon Americans felt towards Latinos is the prevalence of lynching incidents in the United States between 1848 and 1928. While historically left out of United States’ history books, the lynching of Latinos, mainly Mexicans, occurred in the Southwest at the same time that Blacks were being lynched in the South.50 During this time, it is estimated that 597 Latinos were lynched in the Southwest.51

Lynching of Latinos in the Southwest occurred as a method to maintain racial hierarchy and social control as well as a way to gain economic resources.52 Anglo-Saxon Americans believed that Mexicans, like Blacks, were inferior and less than human—deeming Mexicans, therefore, unworthy of humane treatment.53

Latinos were lynched or murdered for many of the same reasons that the lynching and murdering of Blacks was prevalent in the South. Mexicans were lynched for allegations of being “uppity,” making advances towards white women, cheating at cards, and refusing to leave land that whites wanted.54 However, Latinos were also lynched for being “too Mexican,” speaking Spanish loudly or displaying their

49. See Leo R. Chavez, Immigration Reform and Nativism: The Nationalist Response to the Transnationalist Challenge, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 61, 72 (Juan F. Perea ed., 1997) (“The Commission’s advocacy of single male workers allowed to work on a temporary basis—without their families accompanying them—was institutionalized in contract labor programs during the 1910s and later during the Bracero Program, which lasted from 1942 to 1964.”).


51. Id. at 299 (citing William D. Carrigan & Clive Webb, The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928, 37 J. SOC. HIST. 411, 413 (2003)).


54. Id. at 418-22.; Carrigan & Webb, A Dangerous Experiment, supra note 52, at 271.
“Mexicanness” too proudly for the comfort of Anglo society. Mexican women were lynched for rebuffing the advances of white men.

In addition to the lynching, lands were taken and property was confiscated throughout the region. Anglo-Saxon Americans reasoned that Mexicans were uncivilized due to their inferiority and, therefore, incapable of properly caring for their property. Rationalizing that their treatment of Mexicans was justified by Mexican inferiority, Anglo-Saxon Americans seized Mexicans’ land and property.

D. The Bisbee Deportation of 1917

Although most deportations purport to target undocumented immigration, the Bisbee deportation illustrates how many instances of mass deportation have actually stemmed from a refusal by Anglo-Saxon Americans to view Latinos as equals and a desire to maintain a status quo of inequality.

In 1917, a mass deportation of mine workers occurred in Bisbee, Arizona. The impetus for this deportation can be traced to a history of discriminatory treatment of foreign and Mexican, both citizen and noncitizen, workers in the city. As of 1881, more than half of Bisbee’s residents were foreign born. Despite this, mine workers in the city were treated differently based on race, citizenship, and the belief in Anglo-American superiority. For example, compensation was directly correlated to one's race and/or citizenship status. White miners received the highest pay, followed by “foreign” workers, and Mexican workers received the least.

By 1917, Mexican and “foreign” workers began to demand better wages and treatment. In response, Anglo-Saxon Americans attempted to enact anti-immigrant and anti-Mexican labor barriers such as the Alien Labor Act, which would have required that four out of five employees in any workplace be native-born or naturalized Americans.

57. Carrigan & Webb, A Dangerous Experiment, supra note 52, at 271.
58. HORSMAN, supra note 21, at 210.
60. Id. at 81.
61. Id. at 199 (stating that the events that occurred in Bisbee in 1917 were shaped by historical assumptions concerning the rights and responsibilities of “white manhood”).
62. Id. at 101 (stating that in 1898, white miners earned $3.50 a day, “foreign” workers earned $2.00 per day, and Mexicans earned $1.50 per day).
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Another proposal would have required 80 percent of workers “in underground or other hazardous occupations” to be English-speaking. On or around June 27, 1817, tensions between White, foreign and Mexican workers came to a peak and a mine worker strike began.

During the two week strike, the town was crippled. The turmoil culminated on July 12, 1917, when a mass deportation of “undesirables” occurred in Bisbee, Arizona. Two thousand vigilantes of Bisbee as well as local law enforcement rounded up and arrested two thousand people, the majority Mexican and Mexican Americans. Approximately thirteen hundred mine workers were forcibly deported from Bisbee, Arizona to Columbus, New Mexico in cattle cars without food or water for the twelve hour trip and left there without money or transportation.

There was no contradiction that the strike was peaceful. However, the deportation of the strikers was justified as being a measure of security for the city and being in defense of American citizens. Many argued the deportation was necessary to defend against enemy aliens, agitators, non-Americans, and those incapable of patriotism. In reality, meeting the demands of the workers would have meant racial equality and the end of racial hierarchy in Bisbee’s miner camp.

E. Mexican Repatriation

October 29, 1929, referred to as Black Tuesday, for many marks the day when the Great Depression hit the world with the U.S. stock market crash. The ensuing Great Depression marked a time of severe economic depression in the United States and around the world. During this time, unemployment in the United States rose to

63. Id. at 201 (noting that both bills were defeated).
64. James Byrkit, The Bisbee Deportation, in American Labor in the Southwest: The First One Hundred Years 88 (James C. Foster ed. 1982).
65. Id.
68. Benton-Cohen, supra note 59, at 212 (stating that one U.S. Marshall described it as the most peaceful and orderly strike he had ever seen).
70. Id. at 211 (“For white workers and managers to admit the equal manhood of Mexican workers would be to topple the teetering racial hierarchy of the white man’s camp.”).
72. Id.
approximately 25%. This economic crisis resulted in the persecution of those perceived to be Mexican immigrants. Although the alleged motive behind the actions taken during the time span of 1929-1939 was to remove all unauthorized immigrants, no other racial or ethnic group was subjected to the harsh treatment that the Mexican community endured. Indeed the mass deportation of immigrants during this period was later named the Mexican Repatriation. Violence and scare tactics were used to push Mexicans out of the United States, and mass deportations through roundups and repatriation drives abounded.

During the Mexican Repatriation period, it is estimated that approximately one million individuals of Mexican descent were forcibly removed from the United States and sent to Mexico. Across the United States, entire neighborhoods disappeared as the Mexican occupants were forced from their homes. Although the rhetoric focused on the use of Mexican Repatriation as a method to target unauthorized immigration and open up jobs for the employment of United States citizens, thousands of those forcibly removed from the United States to Mexico were United States citizens.

F. Operation Wetback

Another government program that targeted Latinos was Operation Wetback. Operation Wetback occurred in 1954 and was a method used to enforce the deportation of undocumented Mexican

74. Id.
75. See generally FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930s (2006) (describing the injustice and discrimination that the Mexican community experienced in 1930s America).
76. HOFFMAN, supra note 43, at 33; BALDERRAMA & RODRIGUEZ, supra note 75, at 147.
78. BALDERRAMA & RODRIGUEZ, supra note 75, at 1.
79. Id. at 3, 9.
80. Id. at 2.
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However, as with the Mexican Repatriation, the net was cast much wider.\(^\text{83}\)

The then Commissioner of U.S. Immigration and Nationalization Service, General Joseph Swing, coordinated with state and local officials and local law enforcement to locate and deport “illegal” Mexican immigrants.\(^\text{84}\) The name of the program made obvious its targets, given that “wetback” is a derogatory term used for individuals from Mexico. True to its name, Operation Wetback targeted Mexican nationals.\(^\text{85}\) Police enforcement focused predominately on Latino neighborhoods in the Southwestern states.\(^\text{86}\) Regardless of where police enforcement occurred, officers looked for “Mexican-looking” individuals and asked those individuals for identification of their immigration status.\(^\text{87}\) Fear of violence, unemployment and the potential militarization of their neighborhoods and homes caused many Mexicans to flee regardless of their immigration or citizenship status.\(^\text{88}\)

Approximately 3.7 million Mexicans were deported during Operation Wetback.\(^\text{89}\) As with Mexican Repatriation, United States citizens of Mexican descent as well Mexican nationals were forcibly removed from the United States.\(^\text{90}\) While many recognized Operation Wetback as a xenophobic and discriminatory act against Mexicans, many applauded the program.\(^\text{91}\) Those individuals and organizations stated that Operation Wetback helped to eradicate the presence of “illegal” aliens in United States, who damaged the health of the American people, displaced American workers, and harmed American retailers. Further they argued that the open-border policy of the American government posed a threat to the security of the United States.\(^\text{92}\)

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83. Carrasco, supra note 81, at 197.
85. Hino, supra note 18, at 133; García, supra note 82, at 172.
86. García, supra note 82, at 183.
87. Id. at 143.
88. Id.
89. Carrasco, supra note 81, at 197.
90. Id.
92. Id.
G. Chandler Roundup

In a more recent historical episode of Latino discrimination and social exclusion, police officers in cooperation with Border Patrol agents targeted individuals in Chandler, Arizona whom enforcement suspected of being “illegal” immigrants.93 During the five days that police and federal officers engaged in this program, also referred to as “Operation Restoration,” police officers and Border agents walked through town asking anyone they suspected of being “illegal” to prove citizenship.94 In their search for “illegal” immigrants, local police and federal agents targeted anyone who was suspected of being Mexican.95 As a result, many United States citizens and legal residents were stopped because they spoke Spanish or looked Mexican.96 Mayor Boyd Dunn acknowledged that officers did engage in racial profiling, and the city settled a lawsuit against them as a result of their behavior.97

II. THE INTERTWINED RELATIONSHIP BETWEEN IMMIGRATION LAW AND THE CRIMINAL JUSTICE SYSTEM

During the last thirty years, immigration law has become increasingly intertwined with the criminal justice system. This phenomenon has resulted from a rhetoric that immigrants have increasingly been responsible for crime and terror that is occurring within our borders. This Part will overview the creation and expansion of the “criminal alien” through immigration reforms in the last three decades, the corresponding increased use of criminal enforcement measures to target this “criminal alien,” and the resulting increase in “criminal alien” expulsions.

93. See generally Mary Romero & Marwah Serag, Violation of Latino Civil Rights Resulting from INS and Local Police’s Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona, 52 CLAY. ST. L. REV. 75 (2005) (discussing urban policy and practice in constructing citizenship).


96. Gorman, supra note 94.

97. Id.
A. Immigration Reform and the Expansion of the “Criminal Alien”

Immigration reforms since the late 1980s have increased the number of removals based upon immigration consequences of a criminal conviction, expanding the category of the “criminal alien.” They have done so in two ways: (1) by increasing the number of criminal convictions that have become removable offenses, and (2) by decreasing the number of relief remedies available to immigrants who have been convicted of crimes in immigration court. Currently, immigration law has made noncitizens increasingly more likely to be convicted of a crime that will result in deportation and has restricted the ability of immigration courts to prevent this removal.

Prior to the late 1980s, the exclusion and removal of immigrants was more limited and immigration enforcement officials had broad discretion in their decision to admit and remove noncitizens convicted of crimes.98 However, beginning in the late 1980s, the climate towards immigrants began to change and subsequent immigration reform legislation began to reflect an increasing desire to remove noncitizens from the United States.99 Much of the immigration legislation enacted after the late 1980s increased the number of noncitizens removable based on criminal activity by increasing the amount of crimes that made noncitizens subject to immigration consequences, either by lowering the sentence required to trigger removability or by adding certain conduct to the list of already established removable offenses.100 For example, in 1988, Congress passed the Anti-Drug Abuse Act (“ADAA”).101 Under the ADAA, the category “aggravated felony” was first introduced, which at that time included three crimes: murder,

99. 533 U.S. at 294-96; Vázquez, supra note 98, at 44-46.
100. Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) of 1996, Pub. L. No. 104-208, § 304(b), 110 Stat 3009-546, 3009-597 (1996) (codified at 8 U.S.C. § 1101(a) (LexisNexis 2006 & Supp. 2011)). For example, a conviction under INA § 101(a)(43)(D), prior to IIRIRA, could only be considered an aggravated felony if the amount of the funds exceeded $100,000. A conviction under INA §101(a)(43)(M) could only be considered an aggravated felony if the loss to the victim exceeded $200,000. After IIRIRA, the loss to the victim in each section was lowered to $10,000 for the conviction to be considered an aggravated felony. In addition, INA § 101(a)(43)(F), (G), (N), and (P), changed from “is at least [five] years” and replaced by “at least one year,” thereby, decreasing the sentence of a conviction to qualify for deportation under each section.
drug trafficking, and illegal trafficking in firearms or explosive devices.\textsuperscript{102} Currently, however, there are twenty-one categories in the INA that enumerate crimes that qualify as aggravated felonies.\textsuperscript{103} While the term “aggravated felony” gives the perception that those who are convicted in this category are dangerous criminals, crimes that would be defined under this category often are neither “aggravated” nor a “felony.”\textsuperscript{104} The aggravated felony category, with its expansion, now includes: a “theft offense (including receipt of stolen property) or burglary offense . . . for which the term of imprisonment [is] at least one year,”\textsuperscript{105} as well as “an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of [two] years’ imprisonment or more may be imposed.”\textsuperscript{106}

Later, legislative acts continued this trend of labeling noncitizens as “criminal aliens,” and subjecting noncitizens to deportation for criminal convictions. The Immigration and Nationality Act of 1990 (“The Act”) and the Immigration and Nationality Technical Corrections Act of 1994 (“INTCA”) both increased the number of crimes that became removable offenses while curtailing the remedies available to those noncitizens convicted of crimes to prevent removal.\textsuperscript{107} As a result of these measures, many noncitizens became ineligible to stay in the United States as they no longer were eligible for immigration relief such as asylum, voluntary departure, registry, naturalization, withholding, or suspension of deportation.\textsuperscript{108}

Then in 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (“IIRIRA”).\textsuperscript{109} As two of the most sweeping immigration acts in history, they further

\begin{itemize}
\item \textsuperscript{102} Id.
\item \textsuperscript{105} INA § 101(a)(43)(G).
\item \textsuperscript{106} Id. § 101(a)(43)(T).
\item \textsuperscript{108} The Act §§ 509, 515(a).
\end{itemize}
increased the number of crimes that became removable offenses and severely limited the relief available to noncitizens.\textsuperscript{110} The acts increased the number of noncitizens who could be classified as aggravated felons, increased the number of crimes that made a person removable, severely restricted judicial review of administrative removal orders, limited remedies for relief from deportation, limited ability for admission into the United States by aggravated felons, and limited the discretionary relief from deportation available by the Attorney General.\textsuperscript{111} One specific example of AEDPA and IIRIRA’s effects was the repeal of INA §212(c) relief from deportation.\textsuperscript{112} Prior to 1996, more than half of the applications under § 212(c) received relief from deportation in immigration court.\textsuperscript{113}

**B. The Use of the Criminal Justice System to Assist in Locating and Expelling the “Criminal Alien”**

While reforms in immigration law have broadened the category of removable “criminal aliens” and decreased their ability to remain in this country through the criminal court system, enforcement of immigration law through the criminal justice system has also assisted in the intertwined relationship of immigration and criminal law that currently exists as well as the increase in the number of noncitizens removed.

The Department of Homeland Security (“DHS”) implemented the Agreement of Cooperation in Communities to Enhance Safety and Security (“ACCESS”). ACCESS houses a series of programs that depend on state and local cooperation with federal agents to enforce federal immigration law, including the 287(g) Memorandum of Understanding program and Secure Communities program.\textsuperscript{114} Under these programs, local and state police officers are used to enforce immigration law for purposes of locating and deporting “dangerous” criminals in order to maintain our national security and keep the country’s neighborhoods safe.\textsuperscript{115} ACCESS is operated by ICE.\textsuperscript{116}

\begin{footnotes}
\footnote{110. See IIRIRA § 304(b); AEDPA § 440(d).}
\footnote{111. Id.}
\footnote{113. Id.}

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While there are many programs that have been implemented, 287(g), Secure Communities as well as Operation Streamline, a program the prioritizes the federal prosecution of immigration violations, are more recent examples of how the criminal justice system currently is used to enforce immigration law in the United States.

1. 287(g) Memorandum of Understanding

One aspect of the enactment of IIRIRA was its addition of section 287(g) to the INA.117 This amendment to the INA allowed for state services to carry out immigration enforcement under agreement with the federal government.118 It was enacted as a mechanism to assist federal immigration officers in locating and removing noncitizens who pose a threat to national security and public safety.119 Under 287(g) Memorandum of Understanding agreements, local law enforcement are permitted to perform immigration functions concerning identification, processing, and detention of immigrants.120 This includes the ability for local authority to arrest and transfer immigrants, to investigate immigration violations, to collect evidence, and to assemble an immigration case for prosecution or removal.121

Although 287(g) agreements were previously available, it was not until after the September 11, 2001 attacks when they began to be used.122 Currently, ICE has agreements with seventy-one law en-
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enforcement agencies in twenty-five states. Since January 2006, ICE states that the programs are “credited with identifying more than 200,300 potentially removable aliens—mostly at local jails.”

2. Secure Communities

Another program used by ICE to locate and remove immigrants is the Secure Communities program. Secure Communities establishes the use of biometrics to share information on everyone who is booked into law enforcement custody between the FBI, DHS, and local law enforcement. By DHS’s own mission statement, Secure Communities was created “to identify, detain and remove from the United States aliens who have been convicted of a serious criminal offense and are subject to removal.” The program has also described its targets as “high-threat” criminal immigrants. Currently, eleven hundred jurisdictions in forty states are part of Secure Communities. ICE plans for all jurisdictions to participate in Secure Communities by 2013. Between October 2008 and February 28, 2011, over sixty thousand noncitizens were identified and removed through Secure Communities.

123. See Fact Sheet, supra note 6.
124. Id.
127. See MEMORANDUM OF AGREEMENT, supra note 126, at 1.
128. NILC SECURE COMMUNITIES, supra note 126, at 3.
130. BRIEFING GUIDE, supra note 126, at 2, n.7 (citing Immigration and Customs Enforcement, Secure Communities State Identification Deployment Briefing, New York State, June 17, 2009, ICE FOIA 10-267-.000800).
3. Operation Streamline

In recent years, federal prosecutors have focused on prosecuting federal immigration violations.131 These recently high numbers of federal prosecutions can be attributed to Operation Streamline.132 Operation Streamline focuses on arresting, prosecuting and removing undocumented immigrants for immigration violations.133 The program was developed by the Bush Administration in 2005.134 It has been described as a means to deter unlawful immigration from the Southern Border through mandatory federal prosecution of all immigration violations, including unlawful entry and unlawful reentry. Prior to Operation Streamline, most apprehended undocumented immigrants were subject only to civil process and possible penalties.135

C. Increasing Expulsion of the “Criminal Alien”

The programs above and the immigration reforms of the last thirty years have led to an increase in the total number of individuals removed from the United States as well as the total number of individuals actually removed based upon criminal convictions. For instance, in 1988, the United States removed 25,829 noncitizens, 5,956 of which were removed based on their criminal or narcotics violations, approximately 23.1% of the total removals.136 In 1996, just ten years later, the United States removed 68,657, with 36,909 noncitizens removed for criminal convictions, accounting for 53.8% of the total re-
movals. In 2004, the number rose to 202,842 noncitizens removed, 88,897 of which were removed for a criminal conviction. Most recently, in 2009, 393,000 total persons were removed from the United States. Of the 393,000 noncitizens removed, approximately 128,000 were removed as a result of a criminal conviction.

III. DISCONNECT BETWEEN IMMIGRANTS, ENFORCEMENT AND “DANGEROUS” CRIME

As this Part will discuss, ICE’s local enforcement programs and increased federal prosecutions of immigration violations under Operation Streamline have done little to locate and remove serious criminals who pose a threat to national security or public safety. In fact, these programs have done little more than to remove noncitizens guilty of drug crimes and traffic offenses.

Nevertheless, the rhetoric used to justify these programs has solidified the belief that immigrants cause more crime and threaten our nation and community. It is now a commonplace belief that noncitizens, especially Latinos, are removed from the United States because they are “dangerous criminals” who threaten the national security and public safety.

A. 287(g) MOAs Fail to Target Dangerous Crimes or Terrorism

ICE maintains as part of their reasoning for 287(g) agreements that:

Terrorism and criminal activity are most effectively combated through a multi-agency/multi-authority approach . . . State and local law enforcement officers play a critical role in protecting our homeland because they are often the first responders on the scene when there is an incident or attack against the United States. During the course of daily duties, they will often encounter foreign-born criminals and immigration violators who pose a threat to national security or public safety.

It also states, The cross designation between ICE and state and local patrol officers, detectives, investigations and correctional officers allows
these local and state officers necessary resources and latitude to pursue investigations relating to violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smugglings and money laundering.\textsuperscript{142}

Based on ICE’s promotion, dangerous crime was, and is, a top priority for this program. However, when looking at the data for the specific types of crimes that noncitizens apprehended had committed, the actual information confirms that noncitizens deported under these agreements, are not the dangerous criminal felons and terrorists that American society believes them to be. Instead, they are typically those who have the misfortune of “driving while brown,” since many detained under this program were charged with minor traffic offenses were Latinos.

For example, in 2008, North Carolina placed three thousand noncitizens in removal proceedings as a result of their 287(g) agreements.\textsuperscript{143} However, of the three thousand noncitizens placed in removal, 23\% were charged with a DWI and 33\% were charged with violations of motor vehicle laws other than DWI, such as driving without a license.\textsuperscript{144} The information was the same in Montgomery County, Maryland.\textsuperscript{145} Out of the 221 noncitizens arrested, 117 were originally charged with driving without a license and twenty-four others were charged with other traffic offenses.\textsuperscript{146} In Cobb County, Georgia and Frederick County, Maryland, approximately 80\% of the individuals they have detained through 287(g) were individuals who committed Level 3 offenses, which are defined as crimes punishable by less than one year, or traffic offenses.\textsuperscript{147}

The unequal levels of crime enforcement under 287(g) and the impact on Latinos is most drastically seen in Alabama. In Alabama, it was revealed that 58\% of motorist stopped by a specific police officer based upon 287(g) were Latinos, although Latinos make up less than

\begin{itemize}
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Mart\textsuperscript{y} Rosenbluth, Southern Coalition for Social Justice, 287(g) and Other ICE ACCESS Programs in 2008, at 2, [hereinafter NCSA Presentation] available at http://www.southerncoalition.org/documents/287g_and_ICE_Access.pdf.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Jeremy Hauck & Sebastian Montes, Casa de Maryland Sues Frederick County Sheriff’s Office, Gazette.net, Nov. 25, 2009, available at http://www.gazette.net/stories/11252008/fred new181637_32489.shtml.
\item \textsuperscript{146} Id.
\end{itemize}
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2% of Alabama’s population.\textsuperscript{148} When asked about his ability to make immigration enforcement decisions, the officer stated, “I may be able to take out a terrorist before he does something else to us.”\textsuperscript{149} There were no records to verify that any of the Latino immigrants that were stopped by this police officer had any connection to terrorism.

In spite of the rhetoric that the program is used to combat threats to public safety and national security, jurisdictions’ statistics vary significantly.\textsuperscript{150} Still, it is estimated that only 50% of the noncitizens apprehended have been defined as convicted of serious crime.\textsuperscript{151} Therefore, although the 287(g) program may have been intended to target noncitizens who pose a risk to national security and public safety, there is currently little connection between acts of terrorism or serious crime and the immigrants who are being apprehended under the 287(g) agreements.

B. Secure Communities Fails to Target Dangerous Criminals

In looking at the statistics on the type of offenses for which noncitizens are being put into the criminal justice system through Secure Communities, we again see the lack of nexus between dangerous crime and immigrants removed.

In 2009, 22% of individuals transferred into ICE custody through Secure Communities were non-criminals.\textsuperscript{152} In 2010, the number had risen to at least 32%.\textsuperscript{153} When one includes the numbers of both non-criminals or those who were picked up for low level offenses, such as traffic offenses or petty juvenile mischief, the numbers rise to 79% since the program’s inception.\textsuperscript{154} In Maricopa County, Arizona, home to Sheriff Joe Arpaio, ICE categorizes more than half (54%) of people deported through Secure Communities as non-criminals. Not surprising, the vast majority, if not all, have been Latinos.\textsuperscript{155}

\begin{itemize}
  \item 149. Id.
  \item 150. Capps et al., \textit{supra} note 147, at 2.
  \item 151. Id.
  \item 153. Id.
  \item 154. Id.
  \item 155. Id. at 3.
\end{itemize}

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C. Operation Streamline Fails to Target Dangerous Criminals

What has arisen from Operation Streamline’s “zero-tolerance” attitude has been an increase in the prosecution of nonviolent immigration crimes while at the same time a decrease in the number of prosecutions for federal weapons, drugs, smuggling, organized crime, corruption, and “white collar” crimes.\(^{156}\)

Prior to the implementation of Operation Streamline, federal prosecutions of immigration violations were normally used for individuals with previous criminal records.\(^{157}\) Today, the majority of federal prosecutions are against those apprehended attempting to cross the border for the first time, many with no prior criminal history or offense for entering the United States.\(^{158}\) Currently, 54% of all federal prosecutions are for immigration violations, the majority have been against Mexican and Central American immigrants.\(^{159}\)

While DHS continues to state that Operation Streamline has been a success, many disagree. Most attribute any decline in the number of immigrants arrested at the border for unlawful entry to several other factors: the decline in the economy, the increased costs of immigration, the increased use of professional smugglers, and false documents.\(^{160}\)

In defense of the implementation of Operation Streamline, ICE states that they put a high priority on “illegal” immigration, which includes targeting illegal aliens with criminal records who pose a threat to public safety.\(^{161}\) However, as the statistics show, most prosecuted under Operation Streamline have done no more than attempt to cross the border for the first time without authorization and have no prior criminal record.


\(^{157}\) Lydgate, supra note 132, at 1.

\(^{158}\) Id. at 3.

\(^{159}\) New Data on Federal Court Prosecutions, supra note 156.

\(^{160}\) Lydgate, supra note 132, at 10.

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D. Drug Offenses, Traffic Offenses, and Immigration Violations
Constitute the Majority of Immigration Removals Based
Upon Criminal Conduct from the United States

In 2009, the three actual leading causes of immigrants being re-
moved from the United States based upon what DHS categorized as
criminal convictions were for drug crimes, traffic offenses, and immi-
gration related violations. These three categories accounted for 61% of
all noncitizens removed that year.\textsuperscript{162} Drug crimes, although catego-
rized as “Dangerous Drugs” crimes in DHS’s Annual Report, in-
cluded simple possession as well as manufacturing of any drug
deeded to be illegal.\textsuperscript{163} Traffic offenses, the second largest criminal
removal category, were not defined at all.\textsuperscript{164} The third highest cate-
gory of removal, immigration violations, included unlawful entry, re-
entry, false claims to citizenship, as well as alien smuggling. No
statistics were available for the percentages of each crime that made
up each removable criminal category.

As for crimes that might truly be considered violent or danger-
ous, such as terrorism, murder or sexual assault, none appear to be a
leading or even considerable cause of removal. Sexual assault of-
fenses accounted for only 2.2% of the total number of immigrants re-
moved for criminal violations. Terrorism and murder did not appear
anywhere on the list of leading causes.\textsuperscript{165}

IV. CRIMMIGRATION’S PRESENT-DAY
IMPACT ON LATINOS

While the enmeshment of immigration law into the criminal jus-
tice system has failed to address or reduce dangerous or terrorist
crime, it has had an incredibly detrimental impact on the Latino com-

\begin{footnotesize}
\begin{enumerate}
  \item[162.] 2009 \textit{Annual Report}, supra note 3, at 4 tbl.4.
  \item[163.] \textit{Id.}
  \item[164.] \textit{Id.} It is worth noting that 2009 was the first year that the DHS Annual Enforcement
           Report listed traffic offenses. This is surprising since the category managed to be the second
           leading type of crime that caused a noncitizen to be removed, but not surprising in light of
           statistical outcomes for 287(g) and Secure Communities programs.
  \item[165.] \textit{Id.} See \textit{Johnson}, supra note 22, at 30 (“With race remaining central to modern immigration
           enforcement, persons of Mexican ancestry have experienced its detrimental impacts.”).
\end{enumerate}
\end{footnotesize}
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has been obscured by society’s focus on the social construct of the
dangerous “criminal alien” who threatens national security and public
safety.167

This section aims to discuss the impact that crimmigration has
had on Latinos. The impact is not only on the noncitizen Latinos who
face removal but on their family, friends, and the community in which
they live.

A. The Number of Latinos Removed from the United States

Latinos currently represent the largest minority in the United
States, representing approximately 15.8% of the total United States
population.168 Latinos also reflect the largest group of immigrants liv-
ing in the United States, approximately 53.1%.169

The staggering number of individuals removed from the United
States each year, including for criminal violations, most greatly affects
Latinos. The majority of noncitizens being removed are from five
Latin American countries: Mexico, El Salvador, Honduras, Guatemala,
and the Dominican Republic.170 In fact, in fiscal year 2009, La-
tinos accounted for approximately 94% of the total number of
removals as well as the total number of noncitizens removed for crimi-
nal violations.171 Further, in the criminal justice system, over 80% of
the individuals prosecuted are poor.172 Therefore, the largest group of
individuals affected by removal from the United States based on crim-
inal convictions is poor Latino immigrants.

B. Impact of Crimmigration Removals on Latino Individuals

In a 1945 decision Justice Murphy stated that “[t]he impact of
deportation upon the life of an alien is often as great if not greater
than the imposition of a criminal sentence. A deported alien may lose

167. Id. at 121-23 (“Often overlooked in the study of ‘criminal aliens’ is the impact of racially
skewed U.S. law enforcement on the deportation of immigrants.”).
168. U.S. CENSUS BUREAU, STATE & COUNTY QUICK FACTS (Nov. 4, 2010), http://quick
facts.census.gov/qfd/states/00000.html (The data is “derived from Population Estimates, Census
of Population and Housing, Small Area Income and Poverty Estimates, State and County Hous-
ing Unit Estimates, County Business Patterns, Nonemployer Statistics, Economic Census, Sur-
vey of Business Owners, Building Permits, Consolidated Federal Funds Report.”).
170. See 2009 ANNUAL REPORT, supra note 3, at 4.
171. See id. at 4 tbl.3.
172. STEVEN K. SMITH & CAROL J. DeFRANCES, OFFICE OF JUSTICE PROGRAMS, BUREAU
OF JUSTICE STATISTICS, INDIGENT DEFENSE 1 (1996), available at http://bjs.ojp.usdoj.gov/content/
pub/pdf/id.pdf.
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his family, his friends, and his livelihood forever. Return to his native land may result in poverty, persecution, and even death.” Sixty-six years later, his statement remains true.

The detrimental impact of removal is acutely born by Latino individuals who are at risk of being removed or have been removed. The immigration consequences of criminal convictions affect an individual’s immigration status, his or her ability to naturalize, and his or her ability to remain in the United States with family and friends. Many individuals that have been removed had been in the United States for many years. Once removed, they are forced to go to a country that they do not know and where they are without family or friends. They may not know the culture, speak the language of that country and may not be able to obtain employment. The citizens of the country they return to may find them “foreign” and treat them differently.

The ability of a deportee to work or earn a living is difficult in countries that are already struggling with issues of poverty and unemployment. Since many that are deported are poor, they arrive to their country with only the clothes on their back. Lawful permanent residents who are removed lose all Social Security benefits they had

174. I am focusing on the detrimental impact experienced by removed Latino immigrants, but Latino Americans also are affected by increased crimmigration removals. For example, Latino Americans face increased racial profiling by law enforcement. One in ten Latino adults in the United States reported that they had been asked by police or other authorities about their immigration status in 2009. Lacayo, supra note 122, at 2 (discussing the 2009 Pew Hispanic Center survey of Latinos).
earned while working in the United States.\textsuperscript{180} Many deportees have few opportunities for employment.\textsuperscript{181}

C. Impact of Crimmigration Removals on Latino Families

Removal affects not only the individual removed, but also the families they leave behind. It is estimated that nearly 10\% of families with children in the United States live in a "mixed status" household.\textsuperscript{182} Mixed status is defined as a family that has both citizen and noncitizen members.\textsuperscript{183} From 1996 to 2007, it is estimated that 1.6 million families in the United States were separated in some form by removals.\textsuperscript{184} Involuntary and unexpected removal of a family member has particularly severe and long-lasting effects on the socioeconomic status and emotional well-being of a family.\textsuperscript{185}

Financially, removal severely diminishes the resources available to the remaining U.S. household.\textsuperscript{186} The removed family member, in many instances the primary wage earner in the family. When his or her income is terminated by removal, many families left in the United States risk homelessness because they are unable to pay rent or mortgage payments.\textsuperscript{187} Affected families often must seek the help of relatives, friends, outside organizations or public assistance programs for basic necessities such as shelter, clothing, and food.\textsuperscript{188}

\begin{itemize}
  \item \textsuperscript{180} 42 U.S.C. § 402(n) (2006) (discussing an immigrant’s inability to collect Social Security benefits if he is removed from the United States and the conditions by which his noncitizen or U.S. citizen family members may be able to receive benefits).
  \item \textsuperscript{182} Michael Fix & Wendy Zimmerman, All Under One Roof: Mixed-Status Families in an Era of Reform, 35 Int’l Migration Rev. 397 (2001).
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} Id.
  \item \textsuperscript{185} Jacqueline Hagan et al., The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives, 88 N.C. L. Rev. 1799, 1818-1820 (2010).
  \item \textsuperscript{186} Id. at 1819-20. Removal also affects any family members in the country of origin who were dependent on remittances regularly sent from the removed person. Id.
\end{itemize}
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The emotional suffering of the family is also significant.\textsuperscript{189} Although the removal is physical, the loss of a family member can have long-lasting and traumatic emotional effects.\textsuperscript{190} The emotional suffering cause by removal of family members has been most studied in regards to its effect on children.

Approximately five million children living in the United States are cared for by undocumented immigrant parents and three million of these children are U.S. citizens.\textsuperscript{191} Between 1998 and 2007, more than one hundred thousand parents of United States citizen children were removed.\textsuperscript{192} It is estimated that for every two undocumented workers detained by ICE, one child is left without a caretaker.\textsuperscript{193} However, the actual statistics may be higher since many detained parents do not provide any information regarding their children, or may provide misleading or incomplete information about them, for fear that government authorities may apprehend their children as well as other family members.\textsuperscript{194} In recent years, an increasing number of women have been detained and removed from the United States; the vast majority have children under the age of ten.\textsuperscript{195}

When parents are removed, families must decide whether the children of the family will depart with their removed parent(s) or remain in the United States, under the supervision and care of individuals who are not their parents.\textsuperscript{196} For children who remain in the United States, the permanent separation from their parents can be

\textsuperscript{189} Hagan et al., \textit{supra} note 185, at 1820.
\textsuperscript{190} Id.
\textsuperscript{194} Id. at 2; \textit{Removal Involving Illegal Alien Parents, supra} note 192, at 1; Marcela Mendoza & Edward M. Olivos, \textit{Advocating for Control with Compassion: The Impacts of Raids and Deportations on Children and Families}, 11 Or. Rev. Int'l L. 111, 117 (2009).
emotionally traumatic and crippling. Children left behind often display severe mental health issues, start to perform poorly in school, display behavioral problems, and have feelings of abandonment as well as resentment. Children who return with their parents to their removed parent’s country of origin do not fair much better. United States citizen children experience multiple traumas as they attempt to integrate into a country, culture, and society that they do not know. They also face economic disadvantages and may face inadequate living conditions. In addition, children who wish to come back to the United States may face problems of reintegration due to barriers with language, education, cultural acclimation and job skills, ending up in poverty.

When parents are suddenly detained, the ability to seek alternative forms of child care may not be possible. Therefore, many children might become wards of the state and placed into the foster care system. Children who grow up in the foster care system are, unfortunately, less likely to be active contributors to society because they are more likely to rely on public assistance and have severe educational deficiencies. They also suffer higher rates of homelessness,


199. Osterberg, supra note 196, at 755.

200. See Eunice Moscoso, Who’s Watching Deportees’ Kids?, ATLANTA J. CONST., Aug. 18, 2006, at C1 (detailing the consequences to citizen children who return to their parent’s country of origin).

201. Osterberg, supra note 196, at 755.


unemployment, and pregnancy and may be more likely to be incarcerated as an adult.\textsuperscript{205}

Sadly the financial and emotional devastation to families caused by removal of family members is often never alleviated. Many families are never reunited under one roof and do not recover from the devastating effects of a family member’s removal.\textsuperscript{206}

D. Impact of Removals of Latinos on Their Communities

The negative effects of Latino removals are also experienced by the communities from which Latino immigrants are removed or targeted.\textsuperscript{207} While the consequences of removals for the community are diverse, four categories of repercussions are often apparent: psychological effects, economic effects, increased mistrust in local law enforcement, and increased strain on civil society resources, community services and local charities.

The psychological trauma inflicted on the community by mass Latino removals alters the culture of the remaining community. Communities are typically enveloped by widespread feelings of immense and constant fear.\textsuperscript{208} Social isolation often develops.\textsuperscript{209} Community-wide depression has been observed.\textsuperscript{210} Anecdotal evidence shows that uncertainty about the future results in community paralysis as individua-
als become fearful to leave their homes, community businesses cease their operations, and necessary future community planning stops.

Second, the economic effects of removals have the potential to financially ruin entire communities. This phenomenon was perhaps best documented in Postville, Iowa, where hundreds of immigrant workers, mostly Mexican and Guatemalan, were detained during a 2008 ICE raid. The raid was described as nothing short of a man-made disaster and had many adverse economic consequences. The raid took place at an Agriprocessors Inc. Meatpacking Company plant, which was the county’s largest employer. As a result of the raid, the company declared bankruptcy and virtually closed within six months, leaving behind hundreds of unemployed workers. In a domino effect, several other local businesses closed. Within approximately eighteen months, the town’s population had depleted by half. Abandoned housing units deteriorated. In addition to these troubles, bank foreclosures, slumping retail sales, and un-


213. See Olsson, supra note 187 (“No one has a project or a plan for the future anymore, because you don’t know what’s going to happen. There’s not any more ‘in the morning’ or ‘next week’ or ‘next month.’ You’re just in between. This is not our community anymore, nor the one we used to have before all these things.”).

214. See KOUlish, supra note 11, at 47 (calling the Postville raid “perhaps one of the most egregious examples of the Bush era criminalization on immigration”).


218. Id.

219. Id.


paid tax bills\textsuperscript{223} drained local government revenues to the point that the town’s council attempted to have Postville declared a federal disaster zone.\textsuperscript{224}

Third, involvement of members of local law enforcement agencies in the removals leads to mistrust of law enforcement and damaged rapport between the police and the community in general.\textsuperscript{225} Section 287(g) programs have been particularly noted to prevent important community and local law enforcement actions.\textsuperscript{226} Crime in affected communities has been reported to increase as residents lose trust in the police and do not report general criminal activity.\textsuperscript{227} Individuals fear reporting crimes committed against them because they fear either they or someone they know may be removed.\textsuperscript{228} Some commentators fear that the use of local law enforcement in immigration enforcement will not only jeopardize future crime prevention but also retard previous gains in crime reduction.\textsuperscript{229}

Last, removals strain community resources to the detriment of the general welfare of the affected communities.\textsuperscript{230} As discussed earlier, removals impoverish numerous individuals and families.\textsuperscript{231} Community volunteer groups, social service organizations, and public aid resources have been taxed to provide livelihood necessities—such as rent and utility payments, as well as basic necessities such as food and diapers.\textsuperscript{232} Many affected individuals must resort to public assistance like Medicaid and food stamps for the first time in their lives.\textsuperscript{233} Schools, early childhood centers, child welfare agencies, churches, and community-based organizations are left to play the role of first responder in helping with the fallout. Community resources are de-
pleated as these institutions are forced to absorb the aftershocks of crimmigration removals.

CONCLUSION

Latinos, both citizen and noncitizen alike, have consistently been marginalized in the United States. The historical experience of Latinos in this country is one composed of multiple episodes of discrimination and exclusion. Latinos have been refused citizenship and its benefits, repeatedly denied legal or permanent entry, violently lynched, and openly targeted for deportation because of their Latino identity.

Most of these historical episodes were blatantly justified by references to the inferiority of the Latino race. In the mid 1800s, Mexicans following the Mexican War could often not become citizens unless they could be deemed “white.” From 1850 to 1935, Latinos could be lynched for being “too Mexican” or speaking Spanish too loudly. From 1929-1939, Mexicans were specifically scapegoated for the country’s economic woes. Mexican Repatriation began the perpetual hunt for “Mexican-looking” individuals in 1929.

In more recent decades, marginalizing measures based on overt Latino prejudice have been challenged. While the 1917 Bisbee deportation was tolerated and even applauded in its era, a successful racial profiling lawsuit followed the Chandler Roundup in 1997. Unfortunately, although overt Latino prejudice is no longer usually tolerated as a proper basis for legal measures, the marginalization of Latinos continues in this country.

Currently, the incorporation of immigration law into the criminal justice system serves to extend and solidify the longstanding marginalization of Latinos to present day. Crimmigration has proven to be an effective vehicle for modern Latino oppression. It has expanded and entrenched a “criminal alien” social construct that both legitimizes and increases the harsh measures against Latinos. Simultaneously, it relies on a national security and safety rhetoric that prevents criticism and examination of the detrimental impact on the Latino population. As the failure of crimmigration measures to address national security threats or dangerous crime becomes apparent, the most successful consequence of crimmigration should be addressed—the continuation of a history of marginalization of Latinos in this country. This is the only solution that will ensure justice and equality for the millions of Latinos living in the United States.
Making Padilla Practical:
Defense Counsel and Collateral
Consequences at Guilty Plea

GABRIEL J. CHIN*

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INTRODUCTION

In Padilla v. Kentucky,1 the Supreme Court held by a seven-to-two vote that “counsel must inform her client whether [the] plea carries a risk of deportation.”2 Although this holding alone makes the case a landmark, the decision suggests that it applies beyond the specific context of deportation. Padilla’s clear implication is that defense

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1. 130 S. Ct. 1473 (2010).
2. Id. at 1486.
attorneys should warn clients about other serious consequences—the “collateral consequences”—that flow automatically from a criminal conviction, even if they are not technically denominated criminal punishment.\(^3\) Because of their importance and their automatic application after certain criminal convictions, strong candidates for Sixth Amendment coverage include sex offender registration and incarceration, losing the ability to earn a living, and losing the ability to have or gain custody of a relative or foster child. Other collateral consequences may loom large with respect to particular clients based on their particular circumstances.

In recent years, imposing collateral consequences has become an increasingly significant function of the criminal justice system. This is, in part, because more people are being convicted of crimes.\(^4\) In addition, criminal records are increasingly available to public and private actors.\(^5\) Finally, more collateral consequences are being added to state and federal statutory and administrative codes, while few are being removed.\(^6\) Accordingly, asking counsel to advise about collateral consequences is no more or less than asking them to recognize and account for a core function of the criminal justice system.

Although occasionally guilty pleas will be invalidated for failure to comply with Padilla, the standards governing ineffective assistance of counsel suggest that withdrawn pleas will be few in number. A defendant must show that counsel’s conduct was below the level to be expected of an ordinarily fallible attorney.\(^7\) Thus, failure to advise about a rare or obscure collateral consequence will not lead to relief, nor will an attorney be expected to offer advice based on facts or cir-


\(^7\) Commonwealth v. Mosher, 920 N.E.2d 285, 299 (Mass. 2010).
cumstances that, after reasonable diligence, remained unknown to the attorney. In addition, the client must show prejudice, in the sense that but for the incompetence advice, the defendant would have declined the plea on the table and gone to trial or sought a different bargain.

As the Court noted in *Padilla*, the fact that a successful ineffective assistance of counsel claim results in undoing the plea bargain and reinstating the original charges imposes an intrinsic disincentive to seeking plea withdrawal—taking back the plea means giving up the benefit of the bargain and facing the original charges once again. Accordingly, successful *Padilla* challenges are most likely to occur in cases involving pleas without a substantial discount from the probable sentence after trial, or relatively low absolute sentence risks, or both. That is, many more people would risk rolling the dice (and therefore knowing about a collateral consequence could have been determinative) if the plea was to an offense that would likely lead to probation or a short sentence even after trial, or to a sentence of roughly the same magnitude as the plea. For these reasons, in most cases, if defense attorneys do not give appropriate advice at and before the plea itself, it is likely that the plea will never be reviewed or that any challenge will be unsuccessful. *Padilla*’s import, therefore, will likely be primarily about the training, practices, and norms of defense attorneys rather than about litigating failure to comply with it.

This Essay examines two significant objections to the idea that defense counsel should systematically advise their clients about collateral consequences. The first objection, discussed in Part I, is that

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11. The Supreme Court has held that there is no right to counsel in post-conviction proceedings. See Murray v. Giarratano, 492 U.S. 1 (1989); see generally Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 Md. L. Rev. 1393 (1999) (discussing right to counsel); Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 Hastings L.J. 541 (2009) (same). Accordingly, even individuals who have both legal grounds to challenge their guilty pleas and little sentencing risk in so doing may well not be able to afford counsel to seek plea withdrawal.
12. For an expression of the idea that a key part of improving indigent criminal defense is changing the attitudes and norms of criminal defense attorneys, see Jonathan A. Rapping, *You Can’t Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 Harv. L. & Pol’y Rev. 161 (2009).
13. This Essay uses the terminology used by several important sources, including the *ABA Criminal Justice Standards*, the *Uniform Collateral Consequences of Conviction Act* (“UCCCA”) and Section 510 of the Court Security Improvement Act of 2007, Pub. L. No. 110-177 (2007). It breaks collateral consequences into two categories. Collateral sanctions apply automatically be-
advising about collateral consequences is an unreasonable demand on defense counsels’ time. Most criminal defendants in the United States are represented by public defenders or other appointed counsel. It was widely recognized before Padilla that public defenders were overburdened; it is certain that lawyers struggling to do basic investigations and legal research may not be eager to have novel duties imposed upon them. While these considerations are real, this Essay proposes that they should not stand in the way of recognizing constitutional rights of defendants, including being made aware of the serious consequences they will face after conviction. Part I also discusses how consideration of collateral consequences could actually make defense counsels’ jobs easier.

The second objection, addressed in Part II, is that satisfaction of the duty, even by defense counsel with a reasonable amount of time to do so, is nearly impossible, because collateral consequences are a black box, difficult to find. In most states, the various collateral consequences have not been compiled, officially or unofficially, in such a way that they are accessible to lawyers, judges, or others who want to understand the consequences of particular criminal convictions on particular individuals. It is pointless to impose a duty on defense counsel that cannot be satisfied, either because it expects herculean research efforts, or because it will accept superficial advice based on moderate research. For Padilla to be implemented across the range of collateral consequences, lawyers must be able to give reasonably accurate advice at a reasonable cost in time and effort. Part II proposes that that we are on the verge of making that possible.

Part III discusses some practicalities about the conversations defense counsel should have with clients about collateral consequences, to find out which ones may be applicable and how they might fit into the case.

I. Padilla and the Indigent Defense Crisis

Defense lawyers are busy, so busy that in many cases they do not have time to perform essential legal tasks; indeed, some indigent defense systems have been subject to lawsuits alleging that they system-
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atically violate the Sixth Amendment. The literature is replete with accounts of attorneys who “meet ‘em and plead ‘em,” i.e., advise their clients to plead guilty minutes after first meeting them in lock-up. Some claim that the plea bargaining process systematically induces guilty pleas from innocent people. Not every public defender agency or appointed private counsel system works like this, of course, but there are enough overburdened, under-funded entities to raise a serious question of whether it is realistic or sensible to ask them to do more. This section advances several reasons that imposing an additional burden on counsel to explain the collateral consequences of criminal conviction is appropriate.

A. The Aspirational Nature of the Standard of Competence

The Supreme Court has described the role of defense counsel in noble terms. So too have the ABA Criminal Justice Standards, which are given some evidentiary weight in Sixth Amendment juris-


18. Thus, in Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2556 (2009), Justice Kennedy, joined in dissent by Chief Justice Roberts and Justices Breyer and Alito, referred to defense counsel’s duty to be a zealous advocate for every client. This Court has recognized the bedrock principle that a competent criminal defense lawyer must put the prosecution to its proof:

[T]he adversarial process protected by the Sixth Amendment requires that the accused have “counsel acting in the role of an advocate.” The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted . . . the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

United States v. Cronic, 466 U.S. 648, 656-57 (1984) (internal citations omitted). See also MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1 (1980), in COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS (2008) (“The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . .” (internal citations omitted)).

19. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 4-1.2(b) (3d ed. 1993), available at http://www.ojp.usdoj.gov/BJA/topics/Plenary4/Workshops/Workshop4E/R_Maher3-CriminalJusticeSecStandards.pdf (“The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation.”).
prudence. Neither the Court nor the ABA describes the duties of counsel as ideals; they take seriously such considerations as cost and efficiency, and recognize that professional judgments will differ. However, they do assume and require vigorous action on the part of defense lawyers.

At the same time, it is clear that professional standards are not always met in the area of criminal defense. They are unmet not because the standards are so difficult or demanding that they are intrinsically out of reach of ordinary attorneys, but because the workloads of many attorneys do not give them the time to prepare cases as carefully as the standards require. These workloads, in turn, are a product of financial decisions. That is, states, counties and cities sometimes elect to finance indigent defense at levels that require attorneys to handle so many cases that they perform sub-standard work, and even work that is below the constitutional minimum. In many instances, defense attorneys are unable to perform basic work associated with representing a client, such as interviewing witnesses, seeking discovery from the prosecution, or studying the caselaw surrounding the charge.

The legal system can respond to the mismatch between law on the books and law in action in several ways. It could reduce the constitutional standard to meet the willingness of political bodies to satisfy it; that is, if it appears that only a sub-minimal level of criminal defense is politically feasible, then that and only that will be demanded by the Constitution. Alternatively, the legal system could continue to develop standards for criminal defense, recognizing that they will not always be immediately satisfied, in the hope that the standards will be met over time. In this context, as with all other laws, laws are not meaningless simply because they are not universally followed. Compromising the Constitution based on governments’ willingness to comply with it seems unwise. As a policy matter, it would

22. See supra notes 15-17 and accompanying text.
likely lead to a race to the bottom. As Robert F. Kennedy observed as Attorney General, “[t]he poor man charged with crime has no lobby.”23 It seems unlikely that the political process will lead to fair outcomes for indigent defendants. Indigent defendants may be the classic discrete and insular minorities for whom judicial review was designed to protect from majoritarian politics.

Allowing the political branches of state governments to determine for themselves what the Constitution means also seems inconsistent with the nature of the constitutional guarantees surrounding the criminal process. The framers of the Bill of Rights and of the Fourteenth Amendment evidently believed that legal process should operate with care and deliberation before a free person lost his liberty.24

The legal system should not jettison basic aspects of legal representation simply because they are not always adequately funded. Accordingly, there is no absolute reason that reasonable duties promising to benefit clients should not be imposed on defense counsel. Realists recognize that some lawyers perform below the minimum professional level now and will do so in the future. However, the solution is to strive to meet the constitutional standard, rather than to admit that the Constitution cannot be followed.

B. The Developing Nature of the Standard of Competence

The content of adequate representation by criminal defense attorneys changes over time. Therefore, there is no reason to reject a new duty merely because it is new. Substantive law and constitutional criminal procedure changes; defense attorneys are, of course, expected to be able to make arguments based on the law as it develops. In addition, the techniques and tasks of legal representation change over time. For example, as DNA and other scientific evidence comes into general use, defense attorneys can be expected to keep current. As new sources of public records and private databases become available, defense attorneys must draw on them if there may be benefits to their clients from so doing. As techniques were developed for generating and presenting certain kinds of mitigation evidence in the penalty phases of capital trials, defense attorneys can be expected to keep up.

24. It is notable that of the Bill of Rights, at least the Fourth, Fifth, Sixth, and Eighth Amendments address the criminal process, although of course, others, such as the First and Second, also limit the criminal authority of government.
Collateral consequences are, in many cases, of deep interest to defendants, more important than the traditional components of sentencing like fines or imprisonment. This is particularly true when the traditional forms of criminal punishment associated with the conviction are relatively minimal. But the mere fact that something is of great interest to a client does not mean that it is within the lawyer’s duty or capacity to engage; clients may be concerned about social stigma or non-legal aspects of family relationships, such as, say, whether a criminal conviction will lead a spouse to choose to initiate a divorce, or future business partners to shy away from investing. Even the most expansive view of counsel’s duty would not include advice about these things or allow withdrawal of a plea if the lawyer’s social evaluation turned out to be wrong.

Collateral consequences are different for two reasons. First, they are legal consequences imposed by the state because of criminal conviction. They are part of the legal response to crime. Thus, they differ from discretionary actions of private citizens because of their legal nature. There is a state interest in warning defendants of the consequences so that they can be enforced, which does not exist in the context of private responses to criminal conviction. There is also an element of unfairness in the state tying legal consequences to a criminal conviction, but then declaring that the state will provide no mechanism for individuals to learn about them as part of the criminal case.

Second, collateral consequences have direct connections to the criminal case, in the sense that they can affect the substance of plea bargaining or the nature of the sentence imposed. Given that plea bargaining and sentencing are duties of counsel, there is no professional reason for defense counsel to ignore legal grounds that may be used to obtain a better outcome for their client.

Padilla itself makes clear that collateral consequences can be legitimate considerations for the prosecutor and the court to consider at plea and sentence. As Justice Stevens wrote for the Court:

26. This is particularly so in that in many instances there is no opportunity to obtain relief. See Margaret Colgate Love, Paying Their Debt to Society: An Assessment of the Relief Provisions of the Uniform Collateral Consequences of Conviction Act, 54 How. L.J. 753, 757-58 (2011).
27. See Carissa Byrne Hessick, Ineffective Assistance at Sentencing, 50 B.C. L. Rev. 1069, 1069 (2009) (“The U.S. Supreme Court has said that the Sixth Amendment right to counsel includes a right to counsel at sentencing.”).
Informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. . . . 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. . . . At the same time, the threat of 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.28

Other authorities support the idea that collateral sanctions are appropriately considered at plea and sentence. For example, the ABA Standards for Criminal Justice on Collateral Sanctions and Discretionary Disqualification of Convicted Persons provides that “[t]he legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender’s overall sentence.”29 The commentary explains that “[i]n accordance with the generally applicable principles of the Sentencing Standards, the sentencing court should ensure that the totality of the penalty is not unduly severe and that it does not give rise to undue disparity.”30

At least as a practical matter, it might be said that collateral consequences are a new, or at least newly recognized, part of criminal sentencing. Just as with DNA evidence, or the bias of a witness, collateral consequences will sometimes be crucial and in other cases be irrelevant.31 In a particular case, understanding collateral consequences may be meaningful to the disposition of the case, and, in another, it will be irrelevant.

From the perspective of law enforcement, bringing collateral consequences into the criminal case makes it more likely that the consequence will be carried out; a client who is actually warned that she may not possess a firearm, for example, may well comply. Similarly, applicable collateral consequences might be made part of probation

30. Id. cmt. 22.
31. That is, DNA evidence might be irrelevant if the defendant does not dispute that she is the source of the biological sample; the bias of a witness might be irrelevant if their testimony is duplicative or undisputed.
conditions. In some cases, a plea bargain can be reached that will avoid a particular collateral consequence. It is possible that bringing collateral consequences into the case will remind a client to seek an available form of relief. The possibility or certainty of severe collateral consequences will sometimes induce some clients to go to trial when they otherwise would have taken a plea.

In addition, awareness of collateral consequences is important for reentry. Almost all people convicted of crimes, even those sentenced to prison, will ultimately be released into free society. Not only the individual involved—but also society as a whole—has a strong interest in those convicted of crimes living law-abiding lives and not returning to crime. Accordingly, prosecutors and courts share with defense attorneys an interest in being aware of what restrictions a convicted individual will face, and in considering whether the collateral consequences as well as the traditional punishment are sensible as a whole. While prosecutors, judges and defense attorneys may disagree about what the proper sentence is in particular cases, they agree in principle that people should not be unjustly over-punished and that sanctions that unnecessarily prevent a person who could do so from living a law-abiding life should be avoided.32

There will be cases where knowledge of collateral consequences makes no formal difference in the outcome of the case; the client takes the same plea to the same charge and suffers the full brunt of whatever collateral consequences exist. Padilla is not a waste of effort even then. One of the most important measures of the perceived justice of judicial proceedings is the perceived fairness of the proceedings.33 Thus, even in such cases, it is worth it to advise the client of the consequences of conviction.

II. MAKING INFORMATION ABOUT COLLATERAL CONSEQUENCES ACCESSIBLE

An additional practical objection to imposing a broad duty of advice under Padilla is that at the moment in many jurisdictions the task


would be herculean. In most jurisdictions, there is no readily available official or unofficial source documenting collateral consequences. Accordingly, comprehensive advice about collateral consequences in any individual case would require massive amounts of research, which would be an unjustifiable expectation in a typical misdemeanor or even felony case. Lawyers can be expected to master particular discrete bodies of law, like a state’s criminal code or rules of evidence, but it is unreasonable to expect ordinary attorneys to make themselves familiar with the details of an entire state code addressing scores of discrete areas of law.

The solution to this problem is collective action. It is unreasonable to expect each attorney to do an immense amount of research for one case. However, it is perfectly reasonable to anticipate that the legal system, somehow, will see to it that research is done that can be shared with all participants in the criminal justice system and that will improve the quality of justice in many of the cases going through the system. The trick is learning how to generate and maintain lists of collateral consequences for each jurisdiction.

Fortunately, this problem is in the process of being solved. The issue was addressed analytically by the ABA Criminal Justice Standards, which instructs the states to maintain a current list of collateral consequences. This idea was also carried forward in the 2009 Uniform Collateral Consequences of Conviction Act promulgated by the Uniform Law Commission. In the Court Security Improvements Act of 2007, Congress directed the National Institute of Justice to carry out a fifty-state survey of collateral consequences created by state law. The contract for the project was awarded to the American Bar Association, which is in the process of connecting and categorizing the collateral consequences of the states and under federal law. Accordingly, in the near future, criminal defense lawyers and others will have access to a comprehensive database of collateral consequences applicable under the laws of the state.

34. ABA STANDARDS ON COLLATERAL SANCTIONS & DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-2.1 (2003) (“The legislature should collect, set out or reference all collateral sanctions in a single chapter or section of the jurisdiction’s criminal code. The chapter or section should identify with particularity the type, severity and duration of collateral sanctions applicable to each offense, or to a group of offenses specifically identified by name, section number, severity level, or other easily determinable means.”)
As it happens, it is likely that there will be several hundred collateral consequences in each state; in some jurisdictions, there will be more. For each state, then, there will be a massive amount of data. This raw data must be converted into digestible form. In addition, the ABA research project will create a snapshot, a collection of collateral consequences on the books as of a particular moment. It is essential that the data be kept up to date as new laws are passed and existing laws amended.

A. Putting Collateral Consequence Data in Usable Form

There is, to some extent, a trade-off between completeness of information and usability; the more complete a dataset is, the less understandable, and hence useful, it will be, and vice versa. Nevertheless, there is a tradition of simplification in this context that may help provide accurate and useful information. In many jurisdictions, bodies of legal data needed by attorneys and judges are digested into readily usable form. For example, some states have sentencing charts outlining the basics of the possible prison terms for convictions for particular offenses.\textsuperscript{37} This same approach could be used to convey information about collateral consequences.

One fact that makes it somewhat easier to convey information about collateral consequences is that some crimes are charged much more frequently than others. Accordingly, detailed information for a handful of criminal offenses will provide most information necessary in most cases. Thus, a useful summary could fit on a few pages. The cheat sheet for a particular state might contain the following lists:

- The immigration consequences of the twenty-five most common offenses of conviction.
- Other major collateral consequences of the twenty-five most common offenses of conviction.
- Crimes leading to loss of public benefits.
- Crimes leading to loss of parental or other family rights.
- Crimes leading to sex offender registration, notification, and incarceration.
- Crimes leading to the loss of the right to vote, serve on a jury, hold office or possess a firearm.

• Any available methods under state law for relieving collateral consequences.

Some of these crimes will be described categorically; for example, “felonies” might lead to the loss of the right to serve on a jury or possess a firearm. While this digest will not cover all of the possible consequences of all possible convictions, it will provide enough information for lawyers to give accurate advice in most situations. Further, it will be much more useful than presenting attorneys or clients with an undifferentiated list of hundreds or thousands of collateral consequences.

B. Maintaining Collateral Consequence Data

The snapshot of collateral consequences being created by the ABA will be an extremely useful data source. However, unless it is maintained, it will become increasingly obsolete and unreliable. Over time, there will be new collateral consequences created and old ones amended. Ultimately, it will be usable only as the basis for preliminary research, rather than as an active resource for reliable information. The success of the project will require some institution in the legal system to regularly update and re-publish the compilation.

The ABA Standards and the Uniform Act both contemplate that the states will enact legislation requiring some arm or branch of government to maintain and update the compilation of collateral consequences. However, neither has the force of law; states are not required to follow either unless they choose to do so through positive legislation. Accordingly, in states not following this guidance, the responsibility may fall to some other institution that chooses to take it up, such as the attorney general’s office, the state affiliate of the National Association of Criminal Defense Attorneys, or the state bar association.


39. One important example of this is the Collateral Consequence Assessment Tool (“C-Cat”), being developed jointly by the North Carolina Office of Indigent Defense and the University of North Carolina School of Government. The project is funded by a grant from the Z. Smith Reynolds Foundation of Greensboro, North Carolina. Daryl Atkinson and Whitney Fairbanks are co-managers of the project, which built on the research done by the American Bar Association Criminal Justice Section. The aim of the project is to create a database that will allow attorneys (and others) to identify the collateral consequences associated with particular North Carolina crimes.
III. WHAT AND HOW SHOULD COUNSEL ADVISE?

Defense attorneys face an inherent tension in advising clients about collateral consequences. On the one hand, a single ordinary conviction may have, in principle, thousands of consequences. A single conviction under the law of any given state will trigger all of the applicable consequences in that state. It will also trigger federal consequences. In addition, should the person move to any other state, it is probable that the conviction would be treated as a conviction in that second state as well. Accordingly, literal advice about every consequence—reading, consequence by consequence, every bad thing that will happen—would take hours or days. In addition, it would not provide much useful information, because no individual will suffer more than a small fraction of the consequences because the consequences cover a wide range of behavior. That is, if a particular state denies a range of occupational licenses or permits to those convicted of felonies, no one individual is, for example, an accountant, and a barber, and a chiropractor, and a doctor of medicine. The challenge is to determine the handful of collateral consequences that are now or may in the future be of interest to the particular client.

On the other hand, there are enough serious consequences that it is problematic simply to identify a few major consequences that will be covered while ignoring the rest. That, as is suggested by the opinions in Padilla, would be misleading. All nine Justices in Padilla rejected a distinction, which had been prominent in lower courts, which treated misadvice differently from non-advice. Lower courts held that even as to an issue, such as deportation, which defense counsel had no duty to affirmatively advise, a guilty plea could be invalidated if a lawyer gave explicit misadvice.40 Thus, under these decisions, failing to warn of deportation was not a constitutional violation, but explicitly informing a client that she would not be deported could warrant withdrawal of a plea.

No member of the Padilla Court was impressed with this distinction. They found no meaningful difference between failing to address an important issue at all and addressing it wrongly, and their reasoning is powerful.41 It is based on the idea that “[a] fiduciary’s silence is

41. Id. (“[T]here is no relevant difference ‘between an act of commission and an act of omission’ in this context.” (internal citation omitted)); Id. at 1487 (Alito, J., concurring in the judgment) (“[A]n attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences
Making Padilla Practical

the same as a stranger’s lie.” 42 Laypeople are entitled to expect that experts will raise all important considerations. Therefore, there is no meaningful difference between a lawyer’s, say, failure to mention that under applicable law the client might have to pay the opponent’s attorney’s fees if the case does not prevail, and affirmatively misadvising that “you will not have to pay the other side’s attorney’s fees even if we lose the case.” Clients expect counsel to raise all significant considerations; if an issue is not raised, the client is entitled to assume that the consideration does not exist. Accordingly, to raise some collateral consequences is an implicit representation that there are no others. If there are no others, or no other important ones, that is wonderful, but partial advice invites misunderstanding. The only stable principle is that counsel must strive to advise about all important and applicable collateral consequences.

The advice must then be both comprehensive and specific; it must focus on the important consequences without failing to warn about all of them—it must simultaneously be thick and thin. Attorneys can achieve this at reasonable cost by offering general information about collateral consequences and engaging the client in a conversation about what collateral consequences might be important to her in particular.

The general advice could be roughly based on what the Uniform Collateral Consequences of Conviction Act asks courts to do as part of the guilty plea colloquy. The script is as follows:

NOTICE OF ADDITIONAL LEGAL CONSEQUENCES

If you plead guilty or are convicted of an offense, you may suffer additional legal consequences beyond jail or prison, [probation] [insert jurisdiction’s alternative term for probation], periods of [insert term for post-incarceration supervision], and fines. These consequences may include:

• being unable to get or keep some licenses, permits, or jobs;
• being unable to get or keep benefits such as public housing or education;
• receiving a harsher sentence if you are convicted of another offense in the future;
• having the government take your property; and

. . . . “); Id. at 1494-95 (Scalia, J., dissenting) (stating that non-advice and mis-advice are beyond the coverage of the Sixth Amendment “[f]or the same reasons”).

By providing this information, an attorney will have conveyed the general contours of possible collateral consequences that might be applicable to the client.

The lawyer should also ask questions to help determine the existence of additional important consequences. The lawyer can discern many of the potential collateral consequences by asking:

- whether the client is a citizen of the United States;
- how the client is employed;
- whether the client owns firearms;
- whether the client receives any public benefits;
- whether the client holds any licenses, permits, or government contracts; and
- whether the client has any questions based on the categorical advisement.

The nature of the charge will determine how the attorney proceeds. If the charge is a serious felony to which alternative dispositions are unlikely, such as a murder or armed robbery, the attorney’s task may merely be advisory; the attorney should advise the client of consequences of the plea, such as deportation and loss of the right to vote or possess firearms.

However, if the charge is less serious, and there are possible alternatives, counsel should explore whether there are any important consequences that would warrant a plea to a different offense that would not carry the consequence, or whether the consequences are so serious that diversion or some other outcome would be appropriate. Identification and articulation of collateral consequences may also persuade the court and prosecutor that a particular sentence is justified.

CONCLUSION

*Padilla v. Kentucky* represents both a blessing and a burden for defense counsel. It is a burden because it requires them to do more work on top of an already demanding set of responsibilities. But there

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43. Uniform Collateral Consequences of Conviction Act § 5 (final draft 2010).
are ways to simplify and institutionalize this work by taking advantage of the ABA’s collection of collateral consequences in each state, organizing them into usable form, keeping them updated, and making them available to counsel and others who can make use of them.

The benefit to the system is clear. Bringing collateral consequences into defense counsel’s strategy and planning in criminal cases may help defendants avoid some serious collateral consequences by seeking plea bargains that do not carry them. In addition, persons convicted of crimes are more likely to comply with any collateral consequences applicable to them if they know about them. Moreover, clients may well feel they have been treated more fairly and respectfully by the system if serious legal consequences they face do not come as complete surprises.
Proving Prejudice, Post-Padilla

JENNY ROBERTS*

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INTRODUCTION

In its 2010 decision in Padilla v. Kentucky, the United States Supreme Court recognized that the critical role defense counsel plays in counseling clients about the consequences of a criminal conviction falls under a defendant’s Sixth Amendment right to the effective assistance of counsel.1 In holding that defense counsel has an affirmative obligation to warn clients about mandatory deportation consequences of a criminal conviction, the Supreme Court paved the way for significant change in the constitutionally-regulated aspects of the relationship between a criminal defendant and his lawyer.2 In an era that has seen an explosion in “collateral” consequences of criminal convictions, the decision recognized a defendant’s right to accurate information about at least one of these harsh consequences—deportation—prior to deciding whether to plead guilty or go to trial.3

Though monumental for ineffective-assistance jurisprudence, the Padilla decision may not help Mr. Padilla. He still faces deportation after living legally in the United States for forty years, serving in the military in Vietnam, working here, marrying a citizen, and raising citizen children, all born in California.4 He has already served his prison...

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2. Id. at 1478.
3. See Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry 9 (2003) (noting difficulties that former prisoners face with employment, parental and voting rights, and access to public assistance and housing). There is no single definition of a “collateral consequence.” See Padilla, 130 S. Ct. at 1481 n.8. The most common explanation, however, is that a collateral consequence has no “definite, immediate and largely automatic effect on the range of the defendant’s punishment.” Cuthrell v. Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973).
sentence. Moreover, unless he can prove that his lawyer’s failure to warn him about deportation prejudiced him, he will get no relief from his conviction and pending deportation.5

Defendants who claim ineffective assistance of counsel must demonstrate two things: attorney error that rose to a level of unreasonable behavior and prejudice flowing from that error.6 In Padilla, the Supreme Court found that defense counsel’s failure to correctly warn Mr. Padilla, prior to his guilty plea, about deportation consequences that were so “succinct, clear, and explicit” under immigration law was attorney error under prong one.7 The courts below, however, had not ruled on the prejudice prong and consequently the Supreme Court remanded for that inquiry.8

There has been much commentary on the first prong of the ineffective-assistance test, cataloguing and critiquing both the courts’ general approach to such determinations and the application of the test to specific cases.9 While there has also been commentary on the prejudice prong,10 the issue has not been fully re-examined in light of the Padilla decision.11 In addition, the Supreme Court granted certio-

5.54 P.M.) (on file with author) [hereinafter E-mail from Arnold]. Since arriving in this country as a teenager, Mr. Padilla has spent approximately two weeks in Honduras, where he still holds citizenship. This was during the 1990s, to visit a sick relative on her deathbed. His only other trip out of the country was to do military service in Vietnam. E-mail from Arnold, supra.
7. See Padilla, 130 S. Ct. at 1490.
8. Id. at 1483-84 (“Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy Strickland’s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.”).
10. See, e.g., Carissa Byrne Hessick, Ineffective Assistance at Sentencing, 50 B.C. L. REV. 1069 (2009) (evaluating the attorney error and prejudice prongs in the context of non-capital sentencing); Jeffrey L. Kirchmeier, Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement, 75 NEB. L. REV. 425 (1996) (arguing that the prejudice requirement should not apply in cases where counsel was asleep or otherwise mentally impaired).
11. For a discussion of potential issues the courts will face in the wake of Padilla, including a brief discussion of the prejudice prong for failure-to-warn cases, see Gary Proctor & Nancy J. 2011] 695
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rari to hear two cases in the 2011-2012 term that squarely raise prejudice issues, Lafler v. Cooper and Missouri v. Frye. 12

Most courts undertake a prejudice inquiry that requires a defendant to demonstrate that, but for the attorney error, there is a reasonable probability he would have gotten a result at trial that is better than what he received with the attorney error. 13 This Article refers to this as the “trial-outcome” prejudice approach. Courts have adopted such an approach based on a narrow reading of the Supreme Court’s ineffectiveness jurisprudence, in particular Strickland v. Washington and Hill v. Lockhart. 14 When the underlying conviction is based on a guilty plea, a trial-outcome approach is problematic on at least two fronts. First, it assumes that rejection of a guilty plea has only one outcome—trial. Second, in a criminal justice system in which well over ninety percent of convictions are the result of guilty pleas, 15 prejudice inquiries do not fit neatly into such a trial-outcome analysis. This is particularly true of failure-to-warn claims.

These problems are illustrated in a case like Padilla, where the ineffectiveness is that defense counsel either misadvised or failed to warn her client about a severe “collateral” consequence of a guilty plea. 16 Collateral consequences do not, by their very definition, factor in any way into the guilt/innocence phase of a trial. The fact finder will not hear about deportation, eviction, or loss of voting rights, which do not relate to any element of the offense and make it neither more or less likely that a defendant will prevail at trial. Thus, even if defense counsel knew (and counseled her client) about the conse-


12. See generally Cooper v. Lafler, 376 F. App’x 563 (6th Cir. 2010) (holding that petitioner was prejudiced by his defense counsel’s advice, based on counsel’s misunderstanding of the relevant Michigan criminal law statute, to reject a plea bargain), cert. granted, 131 S. Ct. 856 (2011) (No. 10-209); Frye v. Missouri, 311 S.W.3d 350 (Mo. Ct. App. 2010) (holding that defendant was prejudiced because counsel failed to inform his client of an offer from the state), cert. granted, 131 S. Ct. 856 (2011) (No. 10-444); see also infra text accompanying notes 101–15 (discussing the Cooper and Frye cases).


14. Hill v. Lockhart, 474 U.S. 52, 59 (1985) (“In other words, in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”); Strickland v. Washington, 466 U.S. 668, 695 (1984) (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.”).

15. See infra note 142.

16. See Padilla v. Kentucky, 130 S. Ct. 1473, 1484 (2010) (recognizing the dangers of differentiating between affirmative misadvice and lack of advice about collateral consequences, and thus treating them the same in imposing an affirmative duty to advise).
Proving Prejudice

quence, this would not lead to a decision to go to trial based on a better chance of winning.

This information, however, may well factor into defense counsel’s negotiation or sentencing advocacy. In other words, the defendant might get a different or better plea bargain if his attorney and the prosecution factor an automatic, harsh consequence like deportation into the bargaining equation. Indeed, the bargained-for sentence might actually be longer in exchange for a charge bargain that allows the defendant to avoid imposition of the collateral consequence. The prosecution or judge might also consider a severe collateral consequence in arriving at the appropriate sentence for the conviction. Finally, if these options are not available, a defendant will have to make a decision about whether to plead guilty and face the collateral consequence or go to trial in the hopes of an acquittal or a conviction on a lesser charge. Most defendants, even some innocent ones, are convicted after pleading guilty. However, disclosure about a severe collateral consequence can radically alter a defendant’s risk analysis, and might lead some defendants to take a risk at trial where acquittal or conviction on a lesser charge is the only way to potentially avoid that consequence.

Thus far, prejudice prong analyses have largely failed to account for this broader picture that recognizes the realities of a non-trial based criminal justice system. Padilla says little about prejudice, which is not surprising given its decision to remand for a lower court ruling on that aspect of Mr. Padilla’s ineffective-assistance claim. However, Justice Stevens’ opinion offers an opening into a broader analysis, noting how “to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would

17. Indeed, the Padilla Court urged the parties to use information about collateral consequences in negotiations. Padilla, 130 S. Ct. at 1486; see also infra text accompanying notes 121–22 (discussing this aspect of Padilla); Robert M.A. Johnson, Message from the President: Collateral Consequences, 35 Prosecutor 5 (May-June 2001) (former prosecutor advocating use of information about collateral consequences in disposition of criminal cases).

have been rational under the circumstances.”

This Article follows up on that opening and calls for a broader approach to the prejudice analysis in a world largely without trials. It proposes a prejudice prong analysis that acknowledges the context and complexity of plea bargaining, sentencing advocacy, and decision-making in a criminal justice system replete with severe “collateral” consequences.

Under such an approach, courts would ask whether it is reasonably probable that a rational person in Mr. Padilla’s position would have rejected the plea had he known that mandatory deportation would follow. In deciding this, courts must ask whether, if the defendant had not taken the plea, it is reasonably probable that there would have been a different outcome. This can come in the traditional Strickland form of a likely successful trial outcome, but can also come in three other forms. First, counsel might re-negotiate, leading to a likely second plea structured to avoid imposition of the consequence (even if it means a higher penal sentence). Second, counsel might secure a sentence that is significantly discounted to account for the harshness of the collateral consequence. Third, a defendant might make a different risk calculation in deciding whether to plead guilty or go to trial. In short, trial-outcome is only one part of a more nuanced and realistic approach.

Defendants facing misdemeanor or low-level felony charges whose defense counsel failed to warn them about a severe collateral consequence comprise the group that will most benefit from application of a broader prejudice analysis. There are two reasons for this. First, the possibilities for re-negotiation, resulting in a disposition that avoids the collateral consequence, are most promising for these defendants. Second, it is this group of defendants who—if re-negotiation fails—are more likely to face the risk of trial in light of a certain, severe collateral consequence as compared to a potential, relatively small sentence of incarceration.

20. See infra notes 149–50 and accompanying text; see also infra text accompanying notes 191-198. Unfortunately, it is defendants facing misdemeanor charges who are most likely to receive ineffective assistance of counsel, because underfunded and overloaded defenders and defender offices often devote fewer resources and less attention to lower-level cases. See Jenny Roberts, Why Misdemeanors Matter, 45 U.C. Davis L. Rev. (forthcoming 2011) (on file with author) (noting need for definition of effective assistance of misdemeanor counsel in professional standards, ethical rules, and Sixth Amendment jurisprudence). Still, there is great potential for creative negotiation and avoidance of unintended collateral consequences with low-level charges, and some defenders certainly offer high-quality representation that looks beyond the narrow confines of the criminal charge. See, e.g., The Bronx Defenders, The Center for
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Part I of this Article briefly sets out the framework of ineffective-assistance-of-counsel claims, including the particular holding of Padilla, with a focus on the prejudice prong. This Article’s proposed prejudice standard is set forth in Part II. Part III points out and responds to potential critiques of this more inclusive prejudice approach.

I. THE PREJUDICE PRONG TEST FOR INEFFECTIVE-ASSISTANCE CLAIMS

This Part examines the development of the prejudice inquiry of ineffective-assistance claims in the guilty plea context. It first explores the predominant trial-outcome analysis for the prejudice prong, driven by the lower courts’ focus on particular language in Strickland and Hill. After a closer reading of Strickland and Hill, this Part then considers the support in Padilla for a prejudice approach that captures the need to broaden the prejudice lens and consider different outcomes outside of the trial setting in a context-specific inquiry.

A. The “Trial-Outcome” Prejudice Inquiry: A Narrow Reading of Strickland and Hill

It is long established that the Sixth Amendment right to counsel means the right to the effective assistance of counsel.21 Courts analyzing ineffective-assistance claims use what one court recently described as the “well-worn, two-prong standard established in Strickland v. Washington,”22 requiring a defendant making such a claim to show: (1) attorney error; and (2) prejudice flowing from that error.23 The

Supreme Court has held the two-part *Strickland* test applicable to guilty pleas.24

Under the first prong of this test, a defendant has to overcome a strong presumption of competence to show that his lawyer fell below prevailing professional norms in an unreasonable manner.25 Under the second prong, *Strickland* requires a defendant to demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”26

Many courts have interpreted this “different outcome” inquiry to mean a different trial outcome—namely, acquittal, or conviction on a lesser charge. Sometimes, courts interpret “different outcome” to include the likelihood of a lower sentence after a trial.27 Most courts thus require a defendant to demonstrate that he would not have pled guilty, but rather would have chosen trial and would have either won that trial or received a lower sentence after trial than he received after pleading guilty. This ignores the fact that initial rejection of a guilty defendant rather than the legitimate ‘prejudice’ contemplated by our opinion in *Strickland*—Williams, 529 U.S. at 392; see also United States v. Glover, 531 U.S. 198, 203 (2001) (“[O]ur holding in *Lockhart* does not supplant the *Strickland* analysis.”). The other “outlier” prejudice situation is that of presumed prejudice, applied in a narrow class of cases that deal with structural rather than individual attorney errors. See *Williams*, 529 U.S. at 391; see also United States v. Cronic, 466 U.S. 648, 659 (1984) (presuming prejudice where defense counsel “entirely fails to subject the prosecution’s case to meaningful adversarial testing”). Failure-to-warn cases are not “windfall” cases, and it is clear from *Padilla* that the Court regards them as the type of case that fits within *Strickland*’s two-prong structure. *Padilla*, 130 S. Ct. at 1482 (“*Strickland* applies to Padilla’s case.”).

24. Hill v. Lockhart, 474 U.S. 52, 58 (1985) ("We hold, therefore, that the two-part *Strickland* v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel.").


26. Id. at 689. In settling on a “reasonable probability” standard, *Strickland* found that requiring a mere showing that counsel’s “errors had some conceivable effect on the outcome of the proceeding,” would provide “no workable principle.” Id. at 693-94. The Court then noted how “[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” Id. at 694. *Strickland*’s “reasonable probability” language thus requires demonstrating something more than “some conceivable effect” yet less than a “more likely than not” effect on outcome. See id. at 693.

27. This is particularly so in capital cases, where—as *Strickland* noted—the capital sentencing hearing is like a trial. Id. at 686-87.
plea does not always lead to trial, but instead might lead to re-negotiation in order to avoid imposition of a collateral consequence, or to the other different outcomes described in the Introduction.

A recent Rhode Island state court decision illustrates how the trial-outcome focused approach fails to account for the complexity and nuance of plea bargaining. Fernelys Brea was charged with one count of felony possession of stolen property.28 He pled guilty in exchange for a five-year suspended sentence and five years of probation.29 Although the court and defense counsel warned Brea that his conviction might have adverse immigration consequences, he was not told that the five-year suspended sentence made him automatically deportable, whereas a sentence of less than one year (even if not suspended) would not have led to this drastic consequence.30 Despite recognizing that this informational failure met the first prong of ineffective assistance given the recent decision in Padilla, the court found a lack of prejudice by using a trial-outcome analysis and completely ignoring a record replete with re-negotiation possibilities.31 Indeed, the court “accepted Brea’s testimony that had he known of the INA’s deportation requirements he would have pled guilty to incarceration and to a non-deportable sentence of less than one year imprisonment—assuming the State had been inclined to offer this to him.”32 Such an outcome hardly seems unlikely, since it would allow the government to achieve conviction on the top count and actual incarceration, rather than a suspended sentence. It also would have allowed the judge to offer such a sentence without prosecutorial consent since Brea was pleading guilty to the charges. Ignoring the reasonable probability of a re-negotiated outcome, the court set out the relevant framework as follows:

Brea was required to prove that there was a reasonable probability he would have rejected the plea offer and would have insisted on going to trial. Brea also was required to prove there was a reasonable probability the criminal proceedings against him would have finally resulted in a different outcome, more specifically either in an

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29. Id.
30. Id. at *2 (noting how Brea had been in the United States since childhood, and had “personal and familial connections to the United States”).
31. Id. at *4-*12.
32. Id. at *8 (internal citation omitted).
acquittal or a conviction coupled with a non-deportable sentence of less than one year.\textsuperscript{33}

In other words, Brea was not allowed to show prejudice by showing that it was probable his attorney could have achieved a non-deportable sentence through negotiation or sentencing advocacy. Instead, he was forced to show that he could have achieved this same result through a trial.\textsuperscript{34}

The origins of the myopic trial-outcome prejudice approach lie in \textit{Strickland}. In particular, there is one section of the decision’s prejudice analysis that explains how “[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.”\textsuperscript{35} However, looking at this passage in isolation ignores its context, as well as other parts of \textit{Strickland}, which explain prejudice more generally. The entire paragraph reads:

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel’s errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.\textsuperscript{36}

\textit{Strickland} involved a capital sentencing proceeding, and the Court noted earlier how such proceedings are “sufficiently like a trial in its adversarial format and in the existence of standards for decision, that counsel’s role in the proceeding is comparable to counsel’s role at trial.”\textsuperscript{37} Thus, the only “governing legal standard” \textit{Strickland} considered was that of a conviction after trial, as compared to a death sentence after a capital sentencing proceeding. This leaves room for recognition that the “governing legal standard” would be different if the context was something other than a trial or trial-like proceeding. In fact, \textit{Strickland}'s later announcement about the “appropriate test

\begin{itemize}
  \item \textsuperscript{33} \textit{Id.} at *6 (internal citation omitted).
  \item \textsuperscript{34} \textit{Id.}
  \item \textsuperscript{36} \textit{Id.}
  \item \textsuperscript{37} \textit{Id.} at 686-87 (internal citations omitted).
\end{itemize}
for prejudice” is that “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”38 This is broader than a narrow trial-outcome inquiry.

Just a year after Strickland, the Court applied its two-part test to ineffective-assistance-of-counsel claims following guilty pleas.39 In Hill v. Lockhart, the Court first noted that attorney error under prong one was essentially the same inquiry in reviewing a guilty plea as it was in reviewing a trial or sentencing phase error.40 At the beginning of the Court’s prejudice discussion, there appears to be some recognition that a trial-outcome approach would not be a good fit for review of guilty pleas. Thus, the Court stated that the prejudice prong should “focus[ ] on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.”41 This implies that going to trial is not the only possible outcome of a rejected plea. However, Hill went on to hold that “to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”42 The decision thus veered back to a trial-outcome focus, noting that “[i]n many guilty plea cases, the ‘prejudice’ inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial.”43

Further, in describing in Hill how a plea-outcome inquiry will often look a lot like a trial-outcome inquiry, Justice Rehnquist offered three examples of alleged pre-plea attorney error: failure to investigate; failure to discover potentially exculpatory evidence; and failure to advise the defendant of a potential affirmative defense.44 In all of these examples, Hill noted, the likelihood that a defendant would

38. Id. at 694.
40. Id. at 57.
41. Id. at 59 (emphasis added). The Court noted that, among other reasons, “requiring a showing of ‘prejudice’ from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the fundamental interest in the finality of guilty pleas.” Id. at 58.
42. Id. at 59.
43. Id.; see also Emily Rubin, Ineffective Assistance of Counsel and Guilty Pleas: Towards a Paradigm of Informed Consent, 80 Va. L. Rev. 1699, 1704-05 (1994) (noting how Hill’s prejudice-inquiry language results in “a de facto requirement that a defendant prove an adverse effect on the outcome of a hypothetical trial in order to make out a successful claim for ineffective assistance”).
44. See Lockhart, 474 U.S. at 59.
have decided to go to trial rather than plead guilty in the absence of the error turns on whether the case without the error offered a likelihood of success at trial.\footnote{Id. (stating how the prejudice assessment in a failure-to-investigate claim “will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial”).} Thus, “where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the ‘prejudice’ inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.”\footnote{Id.}

In short, \textit{Hill} initially articulated a broad prejudice inquiry that asked whether, given competent representation, the outcome of the plea process would have been different. This inquiry appeared to recognize that factors other than the chances of winning a trial figure into a defendant’s decision-making process, and that a different outcome might mean a “better” plea bargain or sentence, and not simply a trial. However, instead of grappling with the ways that lower courts might apply such an inquiry, \textit{Hill} provided examples that effectively adopted a trial-outcome focused prejudice test. In other words, \textit{Hill} asked whether the defendant would have won the trial—either the one that he had, in review of a post-trial conviction, or the one that he never had, in review of a conviction by guilty plea.


\begin{quote}
[T]his alleged omission did not prejudice the defendant because Adeyeye has not demonstrated (nor could he) that the knowledge of this deportation possibility had any effect on his guilt or innocence. Therefore, there is no reason for this court to believe that if Adeyeye had known about the possibility of deportation, the out-
\end{quote}
come would have been different. Accordingly, even if [defense counsel] did, in fact, fail to inform Adeyeye about the possibility of deportation (an allegation directly contradicted by the evidence in the record), we find that this does not rise to level of ineffective assistance of counsel . . . .49

By noting “nor could he,” the Adeyeye court explicitly found that a defendant alleging ineffective assistance for the failure to warn about deportation will never be able to succeed on the claim.50 This would put such claims in a category separate from other ineffective-assistance claims, such as failure to investigate or failure to file a suppression motion, where the defendant might be able to show a different trial outcome “but for” the attorney error.51 It would put them in a category where demonstrating prejudice is impossible. Surely, that cannot be what the Padilla Court intended when it granted certiorari and then ruled that such failures-to-warn violated the first prong of the ineffective-assistance test.

While the Adeyeye decision pre-dates Padilla and takes a rather drastic approach, a number of lower court decisions after Padilla impose a similar trial-outcome focused method on defendants who pled guilty.52 In a less extreme example, a federal district court cited Hill’s

49. Id. at *6 (emphasis added).
50. Id.
51. That is not to say that such failures should only be examined under a trial-outcome lens. A well-developed case for suppression, or a thorough investigation that reveals weaknesses in the government’s case, for example, often lead to a better plea offer from the prosecution.
52. See, e.g., United States v. Hough, No. 2:02-cr-00649-WJM-1, 2010 WL 5250996, at *4-*5 (D.N.J. Dec. 17, 2010) (finding—in case involving counsel’s failure to warn about deportation—that defendant did not show prejudice because the evidence against him was strong, making it unlikely that he would have succeeded at trial); People v. Nunez, No. 6786/94, 2010 WL 2326884, at *5-*6 (N.Y. Sup. Ct. May 21, 2010) (noting that “defendant’s affidavit is bereft of any averment that he, too, would have insisted on going to trial had plea counsel properly advised him” about deportation, and that he failed to show prejudice because the evidence against him was overwhelming and he had not provided any plausible trial defenses).

In the months since the March 2010 decision in Padilla, there have been more than two hundred published lower state and federal court decisions that cite the case. See, e.g., United States v. Gutierrez Martinez, Crim. No. 07-91(5), ADM/FLN, Civ. No. 10-2553 ADM, 2010 WL 5266490 (D. Minn. 2010) (discussing a number of aspects of Padilla); Cristache, 907 N.Y.S.2d at 847-51, slip op. at 13-17 (same). A number of these decisions undertake some type of prejudice analysis, some in dicta and others as part of the ultimate holding. See Brown v. United States, No. 10 Civ. 3012, 2010 WL 5313546, at *6 (E.D.N.Y. 2010) (finding no prejudice when the defendant knew prior to entering the guilty plea that he would likely be deported); State v. Barrios, 2010 WL 5071177, at *4 (N.J. Super. Ct. App. Div. 2010) (asserting in dicta that prejudice could not be met under the facts). An analysis of these cases reveals five basic categories that capture, broadly, the types of prejudice analyses these courts are conducting: (1) No Harm, No Foul; (2) Cure; (3) Evidentiary Threshold; (4) Trial Outcome; and (5) Sentencing and Negotiation Advocacy. There is arguably a sixth, “other,” category, with some unique (and some outlier) analyses. In “No Harm, No Foul” cases, courts have found that the defendant failed to demonstrate prejudice because the consequence he sought to avoid would have happened even without the
language on how a defendant must establish “a reasonable probability that, but for counsel’s unreasonable advice, the defendant would not have pleaded guilty and would have gone to trial.” The court noted how, “[i]n any event, Ramiro makes no showing of prejudice. Ramiro only asserts that he would have gone to trial, but he offers no evidence that the result at trial would have been better than the result he obtained through his guilty plea.” The court mentioned another case in which the defendant showed a likelihood of a different outcome based on the fact that he might have gotten “a downward departure in sentencing, renegotiated his plea agreement, or pled guilty to a lesser charge.” Yet the court did not allow such alternative options in Ramiro’s case, and instead focused on Ramiro’s failure to show a better result flowing from a trial.

What these cases all ignore is that Hill, in fact, left room for a prejudice inquiry that goes beyond the narrow question of likely trial first prong, attorney error. See infra note 179 and accompanying text (discussing Gutierrez Martinez, 2010 WL 5266490, at *4 (D. Minn. Dec. 17, 2010), and other examples). The “Cure” group of cases finds lack of prejudice where the defendant did not feel the effect of his attorney’s incompetence because some other actor “fixed” the problem. See, e.g., United States v. Bhindar, No. 10 Cr. 711-04 (LAP), 2010 WL 2633858, at *5 (S.D.N.Y. June 30, 2010) (rejecting defendant’s claim that defense counsel misinformed him of the immigration consequences of his guilty plea where the court had colloquy about immigration with defendant during his plea allocution). Bhindar and other “cure” cases ignore the clear differences between warnings in a written agreement, or even on the record by the court, and a counseling conversation with one’s own lawyer about deportation. The importance of this difference is underscored by the Padilla decision, which explicitly grounded the right to information about immigration consequences in the Sixth Amendment right to counsel, and not in the Due Process Clause rights that relate more generally to guilty pleas and the colloquy with the trial court. See Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010). However, the Supreme Court in dicta has suggested an analogous “cure” for potential ineffective assistance in the area of defense counsel’s duty to inform her client about his appeal rights. See Roe v. Flores-Ortega, 528 U.S. 470, 479-80 (2000) (“[F]or example, suppose a sentencing court’s instructions to a defendant about his appeal rights in a particular case are so clear and informative as to substitute for counsel’s duty to consult.”).

In the third category, courts have held that the defendant failed to meet the evidentiary threshold necessary to get an evidentiary hearing. Hill was such a case, as the Supreme Court upheld the trial court’s denial of Hill’s claim without any hearing. See Hill v. Lockhart, 474 U.S. 52, 60 (1985) (“Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial.”); see also United States v. McDougal, Nos. 1:10cv24-HSO, 1:08cr91-HSO-RHW-5, 2010 WL 4615425, at *3-*4 (S.D. Miss. Nov. 4, 2010) (finding no need for an evidentiary hearing where the habeas petition contained only a “conclusory statement that [Petitioner] would have gone to trial if advised of the possible inclusion of the cocaine in calculating the guidelines range”). The fourth and fifth categories, “Trial-Outcome” and “Sentencing and Negotiation Advocacy,” respectively, are fully explored in this Article.


Id.

Id.

Id. (“Ramiro, by contrast, shows no likelihood that going to trial would have resulted in a favorable outcome.”).
outcome. The Court stated that “[i]n many guilty plea cases, the ‘prejudice’ inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial.”57 This clearly indicates that there are some guilty plea cases where the prejudice inquiry will differ. The trial-outcome based examples that Hill offered, described above, come after this statement and illustrate the Court’s suggested approach for “many” guilty plea cases. Padilla, and failure-to-warn cases generally, do not fall into the “many such cases” category, as the next section explores.

B. Padilla’s Broader Prejudice Paradigm

Padilla makes clear that the prejudice inquiry should be whether a rational person would have rejected a particular plea, not whether a hypothetical trial outcome would have led to a better result than the plea. Despite decisions to the contrary, Strickland and Hill both note that the prejudice inquiry is informed by context. The evaluation of prejudice in the context of pre-plea negotiations necessitates a realistic evaluation of the impact of severe collateral consequences on rational decision-makers, the opportunities for creative plea bargaining, and the willingness to risk increased incarceration to avoid certain severe collateral consequences. This section briefly explains the Padilla decision as necessary background for understanding the few but important words that the Court devotes to the prejudice prong. It also considers a significant move in Padilla—considering the prejudice prong after the first prong’s attorney error analysis. Finally, it turns to the broader prejudice prong language in Padilla.

1. The Padilla Decision’s Focus on Deportation and the Duty to Warn

Padilla’s central holding related to the attorney error prong of ineffective assistance: where the deportation consequences of a criminal conviction are “succinct, clear and explicit,” defense counsel has a Sixth Amendment obligation to correctly inform his client of this consequence.58 Justice Stevens labored in the majority opinion to distin-

57. Hill, 474 U.S. at 59 (emphasis added).
58. Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) (“In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences for Padilla’s conviction.”). In dicta, the decision also stated that where deportation is “unclear or uncertain,” counsel has a “more limited” duty to simply “advise a noncitizen client
guish deportation from the many other potential collateral consequences of so many criminal convictions. However, the reality is that even Padilla’s narrowly-crafted test will eventually draw other non-deportation consequences into the ambit of the Sixth Amendment duty to counsel. Indeed, it has already done so in the lower courts, which have cited Padilla as they considered consequences ranging from sex offender registration to pension forfeiture.

The most obvious candidate for extension of Padilla’s “succinct, clear, and explicit” test for determining if a defendant has a Sixth Amendment right to information about a collateral consequence is Sex Offender Registration and Notification Act (“SORNA”) consequences. Both state and federal SORNAs typically consist of a list of criminal convictions that qualify an individual for registration and sometimes notification, so they could not be clearer. These laws are explicit in that they require registration or, alternatively, criminal lia-

that pending criminal charges may carry a risk of adverse immigration consequences.” Id. at 1478 (emphasis added).

59. Id. at 1480.

Changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Id. The Court’s language casts a shadow over the previously bright line the Court has attempted to draw between criminal and immigration law. See, e.g., INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (explaining that immigration issues are “purely civil action[s]” because instead of seeking to punish the defendant, these proceedings aim to determine whether the defendant may remain in this country). Scholars have begun to comment on the significance of Padilla for immigration law. See, e.g., Peter L. Markowitz, Deportation is Different 47 (Benjamin N. Cardozo School of Law, Working Paper No. 308, 2010), available at http://ssrn.com/abstract=1666788.


61. See, e.g., N.Y. Correct. Law § 168-a (McKinney 2010) (naming convictions for sexual misconduct, rape in the first degree, sex trafficking, sexual abuse in the first degree, and other crimes in statutory list that leads to mandatory sex offender registration).
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Finally, one could surely call them succinct because they consist of a list of qualifying crimes.

These issues left open after Padilla are critical as they flow from what is already—even with Padilla’s narrow focus on deportation—a monumental shift in the role of the defense lawyer in counseling a client about the advantages and disadvantages of any guilty plea or trial. Padilla is simply the beginning of what is sure to be a robust jurisprudence of ineffective assistance of counsel based on the failure to warn about severe collateral consequences. This body of law, as it percolates in the lower federal and state courts (and perhaps eventually back up to the Supreme Court), will serve to define the constitutional boundaries of defense counsel’s role in such warnings, and thus will deter behavior that falls outside of these boundaries. Indeed, the spate of trainings and practice manuals in the wake of Padilla evidence the influence that a Supreme Court decision can have on attorney behavior. Future developments will also define a person’s right to know about consequences that may often overshadow the criminal sentence and thus factor into the plea/trial decision-making process.

2. Ordering the Two Prongs: The Importance of Considering Prejudice Second

There is a serious potential obstacle to the development of what is surely much-needed guidance to criminal justice system actors on the parameters of Padilla. It takes two prongs to make a successful

62. See, e.g., Id. § 168-t (criminalizing failure to register as a sex offender).
63. Such deterrence is largely informal, as criminal defense lawyers rarely face any type of disciplinary action when a former client claims ineffective assistance. See Meredith J. Duncan, The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform, 2002 BYU L. REV. 1, 43; see also Leslie C. Levin, The Case for Less Secrecy in Lawyer Discipline, 20 GEO. J. LEGAL ETHICS 1, 1 (2007) (noting that state disciplinary agencies formally sanction only about 5600 lawyers per year, despite receiving more than 125,000 lawyer discipline complaints per year).
65. Judges and prosecutors, as well as defense counsel, have an interest in assuring that defendants receive effective assistance of counsel.
ineffective-assistance claim, and there will be a well-developed prece-
dential body of law about failures-to-warn only if at least some de-
fendants manage to get past the high hurdle of the prejudice prong.
In other words, if courts analyzing ineffective-assistance claims turn
first to prejudice, many of those courts will never reach the attorney
competence prong. Alternatively, they may note attorney error in
dicta, only to emphasize the effective immunity of such error by find-
ing failure to prove prejudice, thereby sending a troubling message to
defense counsel and others about the need to warn about collateral
consequences—you must warn, but nothing is likely to happen if you
do not.

The prejudice prong serves several judicially-articulated policy
purposes, including the protection of defense counsel’s strategic deci-

ineffectiveness claims [do] not become so burdensome to defense counsel that the entire crimi-
nal justice system suffers as a result.”).

67. See infra Part III.B.1 (discussing and debunking exaggerated floodgates concerns).

68. See Padilla v. Kentucky, 130 S. Ct. 1473, 1485 n.12 (2010) (“[I]t is often quite difficult for
petitioners who have acknowledged their guilt to satisfy Strickland’s prejudice prong.”). For
notorious examples of egregious attorney error (such as a drunk or sleeping defense counsel)
with no finding of prejudice and thus no remedy, see Kirchmeier, supra note 10, at 455-63.

69. Strickland, 466 U.S. at 697.
sent case we conclude that petitioner’s allegations are insufficient to satisfy the . . . requirement of ‘prejudice.’”

One drawback to a prejudice-first approach is that attorney performance is shaped in part by the backdrop of ineffective-assistance jurisprudence. The high prejudice hurdle, particularly when analyzed first, sends a message to the defense bar that even egregious behavior is unlikely to lead to a finding that the attorney was constitutionally “ineffective.” In addition, if courts never get to the attorney error analysis, then constitutional norms of unacceptable attorney practice will not develop. A full exploration of the potential problems with a prejudice-first approach is beyond the scope of this Article. This brief discussion is intended to highlight the importance of getting prejudice analyses right, particularly if courts undertake this inquiry first and thus make it a gateway to any attorney competence analysis.

Perhaps anticipating the need to further develop attorney competence norms in future failure-to-warn cases, Padilla reversed course and put prejudice last: “Under Strickland, we first determine whether counsel’s representation fell below an objective standard of reasonableness. Then we ask whether there is a reasonable probability that,

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70. Hill v. Lockhart, 474 U.S. 52, 60 (1985); see also Martin C. Calhoun, Comment, How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims, 77 GEO. L.J. 413, 416 n.21 (1988) (finding that 291 of 702 ineffective assistance of counsel claims between 1984 and 1988 were adversely decided solely on lack of prejudice grounds).


72. A similar critique has been aimed at the high “materiality” hurdle in Brady claims, where the message to prosecutors is that most violations (of the Brady right to exculpatory evidence) will not result in reversal of convictions. See, e.g., Alafair Burke, Revisiting Prosecutorial Disclosure, 84 IND. L.J. 481, 488-98 (2009) (arguing that materiality hurdle leads to under-disclosure and prosecutorial cognitive bias).

73. For such an exploration in a closely-related area, see Stephen I. Vladeck, AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication, 32 SEATTLE U. L. REV. 595 (2009) (urging post-conviction courts to evaluate whether a defendant has sufficiently alleged violation of a right before examining the procedural bar of whether the state court’s decision was contrary to, or an unreasonable application of, clearly established federal law).

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but for counsel’s unprofessional errors, the result of the proceeding would have been different.”

While this contradicts Strickland’s advice to lower courts to analyze prejudice first, it remains to be seen what the lower courts do with this contradiction. At least some courts have continued to address prejudice first, which demonstrates the importance of moving from a narrow, trial-outcome inquiry to a broader, more realistic prejudice analysis.

In failure-to-warn cases like Padilla, there is particular difficulty in demonstrating prejudice under the prevailing trial-outcome analysis, which is not well-suited to such cases. This is not to simply say that defendants will have a hard time demonstrating prejudice under the current test—that is already the case in all types of ineffective-assistance claims, and purposely so. Rather, failure-to-warn claims raise unique issues that the current approach does not account for, with its singular focus on a different trial (or sometimes sentence) outcome, “but for” the alleged incompetent lawyering.

3. Padilla on Prejudice

After agreeing with Mr. Padilla that his lawyer had a Sixth Amendment duty to advise him that his guilty plea made him eligible for automatic deportation, the Court noted: “Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.” Except that the Court did address the matter, and did so in a significant way. It did not discuss the merits of any potential


75. See, e.g., Hutchings v. United States, 618 F.3d 693, 699 n.3 (7th Cir. 2010) (“The Padilla decision has no bearing on our decision in this case because we need not decide whether [defense counsel’s] performance was deficient to reach our conclusion that Hutchings was not prejudiced and therefore not entitled to habeas relief.”); United States v. Gutierrez Martinez, Crim. No. 07-91(5) ADM/FLN, Civ. No. 10-2553 ADM, 2010 WL 5266490, at *3-*4 (D. Minn. Dec. 17, 2010) (quoting Strickland’s prejudice-first language in noting how a “finding that the defendant failed to satisfy the second prong is dispositive”).

76. See Kirchmeier, supra note 10, at 455-56 (describing cases dismissing defendant’s claim of ineffective assistance of counsel for failure to prove prejudice, even though counsel’s performance was impaired by drugs or alcohol).

77. See infra Part III.B.1 (discussing finality concerns in criminal cases).

78. Padilla, 130 S. Ct. at 1478; see also id. at 1483-84 (“Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy Strickland’s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.”); id. at 1487 (“Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below.”).
proving prejudice, but the decision spoke to the way in which courts should approach the prejudice determination in a case like Mr. Padilla’s.\textsuperscript{79}

\textit{Padilla} actually moved away from \textit{Strickland}'s and \textit{Hill}'s trial-outcome-based prejudice language. Instead, it noted that “to obtain relief on this type of claim [of failure to warn about deportation], a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.”\textsuperscript{80} In making this statement, the \textit{Padilla} Court cited neither \textit{Strickland} nor \textit{Hill}. Indeed, neither of these decisions used the word “rational” to describe decision-making, nor did they directly discuss the reasonableness or rationality of the decision-making process as the underpinning of a prejudice inquiry. While a “rational under the circumstances” standard does not exclude considerations of trial outcome, it is much broader and allows for consideration of a different type of risk analysis by a defendant. It also allows for recognition of the fact that a rejected plea does not always mean a trial, but rather might lead to a different plea offer or a different sentence. This section will examine \textit{Padilla}'s prejudice statements in more detail.

\textit{Padilla} made its first reference to prejudice when it set forth the general two-prong test for ineffective-assistance claims, quoting \textit{Strickland} for how the prejudice inquiry asks “whether ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ ”\textsuperscript{81} More significantly, the \textit{Padilla} Court returned to prejudice later in the decision. Considering, and ultimately rejecting, the finality and floodgates concerns that various parties and \textit{amici in Padilla} raised about a rule requiring counsel to offer clients pre-plea warnings about any type of “collateral” consequence, the Court observed “that it is often quite difficult for petitioners who have acknowledged their guilt (i.e. have pled guilty) to satisfy \textit{Strickland}'s prejudice prong.”\textsuperscript{82} Continuing to reassure that \textit{Strickland}'s high two-prong bar protects against the opening of any floodgates, the Court then set out the “rational under the circumstances” test.\textsuperscript{83} In this discussion, \textit{Padilla} did not mention \textit{Strickland} or \textit{Hill}.

\textsuperscript{79} See id. at 1483-84.
\textsuperscript{80} Id. at 1485 (emphasis added).
\textsuperscript{81} Id. at 1482 (quoting \textit{Strickland v. Washington}, 466 U.S. 668, 694 (1984)).
\textsuperscript{82} Id. at 1485 n.12.
\textsuperscript{83} Id. at 1485.
Instead, Padilla cited two parts of its 2000 decision in Roe v. Flores-Ortega, which examined “the proper framework for evaluating an ineffective assistance of counsel claim, based on counsel’s failure to file a notice of appeal without respondent’s consent.”84 In one of these parts, Flores-Ortega found that there is such a duty “when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.”85 The decision explained how courts undertaking such an inquiry must “consider[ ] all relevant factors in a given case.”86 While this first part of Flores-Ortega related to the attorney competence prong of the ineffectiveness test, Padilla also cited to another part of Flores-Ortega that squarely addressed prejudice.

In this part of the decision, the Flores-Ortega Court stated a clear prejudice test that would simply “require the defendant to demonstrate that, but for counsel’s deficient conduct, he would have appealed.”87 The Court explained that it would be “unfair” to require a “defendant to demonstrate that his hypothetical appeal might have had merit” in order to show prejudice.88

The Padilla Court never explicitly linked its “rational under the circumstances” language to the prejudice prong. However, a close reading of Padilla and the Flores-Ortega pages to which it cited make clear that this language offers guidance to lower courts determining the proper prejudice analysis for failure-to-warn cases.89 Indeed, Flores-Ortega compared the claim of defense counsel’s failure to consult with a client about an appeal to a claim of counsel’s deficient advice about the consequences of entering a guilty plea.90 The proper analysis does not require a defendant to show that he would have won the appeal he never had the chance to file. Instead, the Court “h[e]ld that

84. Roe v. Flores-Ortega, 528 U.S. 470, 473 (2000); see also id. at 477 (articulating “[t]he question presented in this case” as: “Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?”).
85. Id. at 480.
86. Id.
87. Id. at 486.
88. Id.
89. See, e.g., People v. Henlin, 911 N.Y.S.2d 695, No. 1981-09 (N.Y. Crim. Ct. 2010) (remanding for an evidentiary hearing to determine whether, had the defendant known about the “mandatory deportation consequences which automatically attached to his plea, . . . such knowledge would have led to his rejection of the plea offer and such rejection would have been rational”).
90. Flores-Ortega, 528 U.S. at 485 (discussing Hill v. Lockhart, 474 U.S. 52 (1985)).
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when counsel’s constitutionally deficient performance *deprives a defendant of an appeal that he otherwise would have taken,*" the defendant wins his claim of ineffective assistance and can file his appeal.91

The Supreme Court’s most recent pronouncement in the area of plea bargaining and ineffective assistance of counsel could be seen as a cautious step back from *Padilla*’s potentially far-reaching impact. In *Premo v. Moore*, the Court rejected Moore’s claim that counsel’s advice that he plead guilty, without first seeking suppression of Moore’s confession, was ineffective assistance.92 Justice Kennedy’s majority opinion is full of strong language about the particular need for “strict adherence” to *Strickland*’s highly deferential standard of review for ineffective-assistance claims involving the plea bargain stage.93

However, the Court’s prejudice analysis is largely driven by the particular facts of the case, which underscore the weak nature of Moore’s claim of prejudice. Although Moore’s attorney advised him to enter a plea before filing a motion to suppress his confession to the police, Moore made similar confessions to his brother and his accomplice’s girlfriend, both close in time to the murder with which he was charged.94 Moore also clearly received real benefit from his bargain. He was charged with attacking a man, throwing him into a car trunk, driving to the countryside, and shooting him in the temple, killing him.95 Moore faced potential aggravated murder charges, with a potential sentence of death or life without parole, and he accepted a bargain early in the case under which he pled no contest to felony murder in exchange for a sentence of three hundred months, the statutory minimum.96

*Premo*’s conclusion is also driven by the procedural posture of the case. It came to the Supreme Court on review of a grant of federal habeas corpus relief from a state conviction. Under the restrictive federal habeas statute, such relief lies only if the state court’s decision denying relief “involves ‘an unreasonable application’ of

91. *Id.* at 484 (emphasis added).
93. *Id.* at 741 (noting the potential for eroding principles of acceptance of responsibility and acknowledgment of guilt “if a guilty plea is too easily set aside based on facts and circumstances not apparent to a competent attorney when actions and advice leading to the plea took place”).
94. *Id.*
95. *Id.* at 738.
96. *Id.* A “no contest” plea has the same force and effect as a guilty plea for the purposes of having a conviction and serving a sentence. The only difference is that such a plea allows the defendant to neither admit nor deny the charges. *See North Carolina v. Alford*, 400 U.S. 25, 36 n.8 (1970).
‘clearly established Federal law, as determined by the Supreme Court.’” 97 This stringent standard of review, combined with Strickland’s mandate to defer to defense counsel’s strategic decision-making, effectively results in double deference.98

Much of the Court’s analysis focused on the timing of the plea, and noted how early pleas—while they “might come before the prosecution finds its case is getting weaker”—can also come before “the case grows stronger and prosecutors find stiffened resolve.”99 The Court thus recognized that individuals facing criminal charges take the risks and rewards of pleading guilty into account when making that critical decision, and emphasized the importance of the decision-making process. In this light, the Court noted:

Many defendants reasonably enter plea agreements even though there is a significant probability—much more than a reasonable doubt—that they would be acquitted if they proceeded to trial. Thus, the question in the present case is not whether Moore was sure beyond a reasonable doubt that he would still be convicted if the extra confession were suppressed. It is whether Moore established the reasonable probability that he would not have entered his plea but for his counsel’s deficiency.100

Just as someone might rationally forgo a significant likelihood of acquittal and enter a plea, so might someone rationally take a chance at trial despite a significant likelihood of conviction, where the alternative is a guilty plea followed by a certain, severe collateral consequence.

In the 2011-2012 Term, the Supreme Court will hear two ineffective-assistance-of-counsel cases, both of which raise prejudice issues. In Cooper v. Lafler, the Sixth Circuit found that Anthony Cooper’s attorney provided deficient performance when he advised Cooper to reject a plea bargain.101 Defense counsel told Cooper that he could not be convicted of assault with intent to murder because the bullets

97. Id. at 737.
98. Id. at 740.
99. Id. at 741.
100. Id. On the issue of prejudice, Premo did revert back to Hill’s language that Moore had to demonstrate how, “but for” counsel’s errors, “he would not have pleaded guilty and would have insisted on going to trial.” Id. at 743 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)); see also id. at 745 (quoting same Hill language); id. at 746 (Ginsburg, J., concurring) (same).
101. Cooper v. Lafler, 376 F. App’x 563 (6th Cir. 2010) (affirming district court’s grant of habeas relief “[b]ecause we agree that state courts’ decision rejecting petitioner’s argument was an unreasonable application of Strickland v. Washington’), cert. granted, 131 S. Ct. 856, (2011) (No. 10-209).
that hit the victim entered her body below the waist and thus the state
could not prove intent. 102 As the Sixth Circuit succinctly noted about
this novel defense theory, “[c]ounsel was wrong.” 103 The court also
found that, since Cooper turned down an offer with a fifty-one to
eighty-five month minimum sentence and was sentenced to 185 to 360
months after trial, he demonstrated prejudice. 104 Noting “the impor-
tance of counsel during plea negotiations” and how negotiations are a
“critical stage” of a criminal case where there is clearly a right to
counsel, 105 the court rejected the state’s argument that the Sixth
Amendment protects only the right to trial, and that an individual
who declines a plea and later has a fair trial thus can never show
prejudice. 106 Finally, the court stated that “[t]o say that there is no
prejudice because the petitioner ultimately received a fair trial is to
understate the value of plea bargaining—not just to the state, but also
to defendants.” 107

The Court will also review the Missouri Court of Appeals deci-
sion in Missouri v. Frye. 108 After the state charged Galin Frye with
the felony of driving with a revoked license, it sent his attorney a writ-
ten plea offer: Frye could plead guilty to the felony and do ten days of
“shock” incarceration, or he could serve ninety days if he pled guilty
to a misdemeanor. 109 Frye’s attorney never told his client about this
offer, and Frye later entered an “open” guilty plea to the top felony
count; the court sentenced him to three years. 110 The Missouri court
made short work of its deficient performance analysis, since it could
“conceive of no reasonable trial strategy that would justify trial coun-
sel’s failure to communicate the Offer to Frye.” 111

The Missouri court’s prejudice prong analysis in Frye is signifi-
cant for its sound rejection of the state’s argument—and the lower
court’s conclusion—“that because Frye did not contend that ‘but for’
trial counsel’s failure he would have insisted on going to trial, Frye

102. Id. at 566.
103. Id. at 570.
104. Id. at 566-67, 571.
105. Id. at 572.
106. Id.
107. Id. at 573.
108. Frye v. Missouri, 311 S.W.3d 350 (Mo. Ct. App. 2010), cert. granted, 131 S. Ct. 856
109. Id. at 351-52.
110. Id. at 352-53.
111. Id. at 354.
cannot establish prejudice as a matter of law." As this Article argues, the court found that

reliance on Hill’s “template” that a defendant must contend that “but for” counsel’s ineffective assistance the defendant would have insisted on going to trial as determinative of whether a defendant can establish prejudice completely ignores Strickland’s looser emphasis on whether a defendant can establish “an adverse effect on the defense.”

The court noted how, while a defendant can and often will demonstrate prejudice by showing that he would have gone to trial, Strickland’s call for a context-specific prejudice analysis means that there are other ways to show that “the result of the proceeding would have been different.” In situations like Frye’s, where “insisting on going to trial cannot possibly remEDIATE ineffective assistance that has affected the outcome of the proceeding,” courts must recognize that a different outcome can include a better plea offer.

The Missouri court’s analysis shows an understanding of the realities of the criminal justice system, where plea bargaining and counseling about plea offers, not trials, are where counsel and clients largely interact. It remains to be seen if the Supreme Court will also recognize these realities when it reviews the two cases next term. The Court has long kept the vanishing trial at the center of its criminal procedure jurisprudence, even while acknowledging the fact that guilty pleas dominate the landscape. However, Padilla was a firm step away from the trial-as-touchstone, and towards recognition of

112. Id. at 357.
113. Id. (quoting Strickland v. Washington, 466 U.S. 668, 693 (1984)).
114. Id.
115. Id. at 358. Both Cooper and Frye raise a significant issue about remedies for ineffective assistance of counsel. When the Court granted certiorari in each case, it directed the parties to brief an additional question: “What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convinced [sic] and sentenced pursuant to constitutionally adequate procedures?” Petition Granting Certiorari, Lafler v. Cooper, 131 S. Ct. 856 (No. 10-209) (Mem.) (2011); Petition Granting Certiorari, Frye v. Missouri, 131 S. Ct. 856 (No. 10-144) (Mem.) (2011) (same). Particularly in Frye, where counsel completely failed to communicate an offer and Frye served extra years in jail as a result, the remedy issue is both complex and troubling.
117. Id. (manuscript at 1) (noting how in Padilla, the “Court began to move beyond its fixation upon the handful of cases that go to jury trials” and “began in earnest to regulate plea bargains”).
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the fact that negotiation and client counseling are largely where the impact of the assistance of counsel—be it effective or ineffective—is felt. This Article views the Padilla language as an invitation to move away from the poor fit of the trial-outcome approach that many courts employ in what has been a circumscribed view of the realities of effective counseling about guilty pleas. Instead, Padilla opened a window into the broader type of analysis that this Article encourages, one that also serves the important purpose of avoiding a major problem of a restrictive prejudice approach, namely stunted development of constitutional duty-to-warn norms.

If on remand the Kentucky courts in Padilla apply this same type of prejudice analysis, Mr. Padilla would have to show that, had he known about the automatic deportation that would flow from his guilty plea, it would have been rational for him to reject that plea. That is very different—and a much more expansive inquiry—than showing that he would have chosen trial over the plea because he had a reasonable likelihood of winning that trial or expected a better sentence after a trial. Instead, Mr. Padilla could show either that he wanted a trial because of a reasonable likelihood of winning it or that he wanted to reject that particular plea because it would lead to automatic deportation. This latter method of proving prejudice could be based on Mr. Padilla’s hopes of negotiating another offer to avoid the consequence, if possible. It could also be based on his desire to take his chances at trial, however slim the likelihood of acquittal, so long as that was a rational choice, because it was the only route to avoiding deportation.

II. PROVING PREJUDICE, POST-PADILLA: ACCOUNTING FOR RISK AVERSION, AND THE USE OF COLLATERAL CONSEQUENCES IN NEGOTIATION AND SENTENCING ADVOCACY

When defense counsel fails to warn about a severe collateral consequence of a guilty plea, the case falls under Padilla’s recognition that not all prejudice inquiries fit neatly into a trial-outcome analysis. The primary reason for this is that collateral consequences do not.

118. Most courts and commentators use the term “collateral consequences” to describe non-penal consequences that flow from a criminal conviction. See supra note 3 (explaining the predominant definition of “collateral consequence”). This is not to suggest that “collateral” is an apt term to describe the effect of consequences that can severely overshadow any criminal penalty, but it is certainly the most widely-used term. See McGregor Smyth, Holistic Is Not a Bad
factor into the guilt/innocence phase of a trial in any way. The fact-finder will not hear about deportation, eviction, or loss of voting rights. Thus, if defense counsel had information about the consequence and shared it with her client, this would not lead to a decision to go to trial based on a better chance of winning that trial. However, such information may well, and often should, factor into defense counsel’s negotiation or sentencing advocacy, so that the defendant might get a different or better plea bargain or sentence when the collateral consequence enters the picture.  

In addition, this information will always factor in some way into a defendant’s decision whether to plead guilty.

There are thus two main flaws in the trial-outcome oriented approach to prejudice. First is the failure to consider the negotiation and sentencing advocacy context for ineffective-assistance claims based on a failure to warn the defendant about a serious collateral consequence. Second is the failure to realistically assess the way a “rational” person might make decisions when faced not only with the prospect of the criminal case, but also with the imposition of a severe consequence like deportation, sex offender registration, loss of public housing, or custody of a child. Part II addresses these two issues, both central to any consideration of how defendants alleging that they were provided ineffective assistance of counsel prior to entering a guilty plea might actually suffer prejudice. Part II then explores the facts in Padilla under both prejudice paradigms to illustrate the failure of the trial-outcome model and the need for an analysis that reflects the impact of the failure to warn about severe collateral consequences.

A. Negotiation and Sentencing Advocacy as Leading to a Reasonably Probable Different Outcome

In Padilla, Justice Stevens noted that the Court has “long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”

In one of the more practically-grounded portions of the decision, Padilla noted:


119. See infra note 122 and accompanying text (quoting Padilla on how all parties should take collateral consequences into account during plea negotiations).

120. See infra Part II.B.

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Informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. 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 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.122

This passage is important because it recognizes the reality of the discussions that should precede any guilty plea involving a serious collateral consequence. Unfortunately, there is currently a disconnect, at least in many trial-outcome prejudice inquiries, between the context of the case and the court’s inquiry. If a defendant goes to trial and his attorney commits some sort of trial error, it makes sense during the prejudice analysis to ask whether it is reasonably likely that the trial would have come out differently but for that error. If a defendant pleads guilty, however, there is no longer a trial backdrop as context. Instead, the backdrop is the more nuanced setting of plea bargaining with a prosecutor and perhaps also sentencing advocacy before a judge. In short, trials are different from plea negotiations and sentencing advocacy, and ineffective-assistance jurisprudence should reflect those differences.

There is a glimmer of recognition of these contextual differences in the Strickland decision, where the Court noted how “[t]he governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel’s errors.”123 Strickland mentioned this by pointing out the difference between challenges to effective assistance in relation to a conviction and challenges in relation to a death sentence.124 In the Court’s view, when there is a conviction, “the question is whether there is a reasonable probability that,

122. Id.
124. Id. at 686-87.
absent the errors, the factfinder would have had a reasonable doubt respecting guilt.”\textsuperscript{125} For death sentence challenges, however, “the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.”\textsuperscript{126} The \textit{Strickland} Court correctly distinguished factual contexts here, and noted how the prejudice inquiry must be appropriately tailored to the particular context.\textsuperscript{127}

However, \textit{Strickland} and \textit{Hill} failed to recognize that not all convictions preceded by some type of ineffective assistance are the same. Some convictions come after a defendant chooses a trial, and after attorney error at that trial. The vast majority of convictions come after the defendant pleads guilty, often after plea negotiations over the terms of that plea. In these instances, the attorney error was not at the trial, but instead took place at some point leading up to the guilty plea. This can include factual or legal investigation errors, negotiation errors, and counseling errors when sharing information with a client. It is critical to integrate into the prejudice inquiry these realities of plea bargaining, which include negotiating over both charges and sentence, and the effect of these negotiations on a defendant’s decision-making process. In short, it is not simply a matter of the strength of the government’s case, although that plays a role in the analysis, but is also about what the plea or sentence decision-makers would have likely done with full information.

The right to effective assistance includes the right to attorney-client counseling about the decision to plead guilty or go to trial.\textsuperscript{128} If there was any question about this before, the link between client counseling and the Sixth Amendment became clear when the Court decided \textit{Padilla}.\textsuperscript{129} A major purpose of attorney-client counseling is to provide information so that the defendant can make a voluntary, informed choice among the available options. If full information

\begin{itemize}
\item \textsuperscript{125} \textit{Id.} at 695.
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{See id.}
\item \textsuperscript{128} \textit{See Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).}
\item \textsuperscript{129} \textit{Id.} (“We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.”); \textit{see also id.} at 1486 (“[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”).
\end{itemize}
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about required matters—which now includes automatic deportation and such “direct” consequences as the maximum sentence—would lead a defendant to reject the plea, three things could follow: (1) he could go to trial; (2) his attorney could attempt to re-negotiate the plea for one that either avoided imposition of the consequence or lowered the charge and/or sentence in recognition of the fact that deportation, or some other harsh consequence, would follow the conviction; or (3) assuming the plea did not include a sentence bargain, his attorney could use the additional consequence in post-plea sentencing advocacy before the judge. While a factual inquiry is of course required to determine whether any of those different outcomes are reasonably probable, it is certainly possible for any of these three post-plea rejection scenarios to lead to an outcome that is “better” than the rejected outcome. Trial-outcome focused inquires fail to recognize these other possibilities.

Some courts have undertaken appropriately context-specific prejudice analyses that appear to appreciate the realities behind the plea decision-making process, as well as what follows in the wake of a plea rejection. For example, a 2005 Ninth Circuit decision focused squarely on a defendant’s claim that, had he known about the automatic deportation consequence of his guilty plea, he would not have accepted the same plea deal. Instead, he would have either asked for a sentence from the judge that would have kept the conviction from qualifying as a deportable offense or attempted to re-negotiate the plea to avoid that qualification. The court found that “[h]ad counsel and the court been aware that a nominally shorter sentence would enable [the defendant] to avoid deportation, there is a reasonable probability that the court would have imposed a sentence of less than one year.” The court also credited the potential for renegotiation or, if that failed, the defendant’s ability to choose a trial: “Kwan could have gone to trial or renegotiated his plea agreement to avoid deportation; he could have pled guilty to a lesser charge, or the parties could

130. See Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 Stan. L. Rev. 29, 32 n.10, 82 (2002) (“In a charge bargain, the prosecutor agrees to dismiss some charges in return for a plea of guilty to the remaining charges,” whereas sentence bargains entail a “conversation [that] relates directly to the sentence rather than to the crime of conviction.”).

131. United States v. Kwan, 407 F.3d 1005, 1017 (9th Cir. 2005). Kwan’s case was before the Ninth Circuit on a petition for a writ of coram nobis, and the court conducted a two-prong ineffective-assistance-of-counsel inquiry under one of the writ’s four requirements—“fundamental error.” Id. at 1014 (“Kwan may satisfy the fundamental error requirement by establishing that he received ineffective assistance of counsel.”).

132. Id. at 1017.
have stipulated that Kwan would be sentenced to less than one year in prison.”

In crediting the defendant’s claim of prejudice, the court noted that Kwan asked counsel about immigration consequences before pleading, thus placing “particular emphasis” on this aspect of his decision-making process. The court also noted that he went “to great lengths to avoid deportation and separation from his wife and children, who are all United States citizens.”

The Ninth Circuit was certainly correct about the possibility of sentencing advocacy in order to avoid deportation. In an Arlington County, Virginia case, the trial judge revisited a sentence that he had imposed some five years earlier, noting that “[i]f this Court had been made aware of the fact that [the defendant’s] single criminal conviction could result in deportation without the possibility of discretionary relief, an alternative sentence may have been reached.”

In another Virginia county, the judge granted a coram nobis motion seeking resentencing to avoid deportation. After that resentencing, the pending deportation proceedings were dismissed.

The Ninth Circuit was also correct to focus on the objective likelihood of a different sentence, or a re-negotiation of the plea deal. Strickland cautioned that an evaluation of the likelihood that the result would have been different but for counsel’s ineffectiveness should be made objectively, without regard for the “idiosyncrasies of the particular decisionmaker.” Later quoting the same Strickland language, the Second Circuit accepted a defendant’s argument that, but for his counsel’s failure to correct the prosecution’s erroneous belief about his prior felony status, it is reasonably likely that he would have secured a more favorable plea bargain. In granting the defendant’s motion for either re-sentencing or a trial, the court rejected the state’s claim that the particular trial court would not have accepted a more generous plea bargain, even without the erroneous information.

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133. Id. at 1017-18.
134. Id. at 1015-16.
135. Id. at 1017.
138. Id.
141. Id. at 142.
These cases illustrate a prejudice inquiry that is broader than the myopic trial-outcome focused analysis, and that pays attention to the important advocacy dynamics behind plea bargaining. In a criminal justice world where more than ninety percent of convictions come from a guilty plea rather than a conviction after trial, those dynamics cannot be ignored.

B. Collateral Consequences, Guilty Plea Decision-Making, and Risk Aversion

If lower courts are true to Padilla’s direction on prejudice—namely that the prejudice task is to determine whether a rational person would have declined to plead guilty under the same circumstances—then one question is: What would a rational decision-making process encompass? Collateral consequences influence the decision-making process, and severe collateral consequences often overshadow the direct penal consequence. This is particularly true with low-level charges or charges where the defendant does not face many years in prison. The vast majority of criminal cases involve misdemeanor charges with relatively low jail time exposure. Yet many misdemeanor convictions lead to serious collateral consequences. A misdemeanor drug conviction can lead to deportation, loss of public housing, benefits, or federal student loans. Misdemeanor sex crime convictions can lead to lifetime registration on a sex offense regis-

142. See Sean Rosenmerkel et al., U.S. Dep’t of Justice, NCJ 226846, Felony Sentences in State Courts, 2006—Statistical Tables 1 (2009), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (stating that ninety-four percent of felony offenders sentenced in 2006 pled guilty); see also Ronald Wright & Marc Miller, Honesty and Opacity in Charge Bargains, 55 Stan. L. Rev. 1409, 1415 (2003) (“The proportion of guilty pleas [in the federal system] has been moving steadily upward for over thirty years, and has seen a dramatic increase of over eleven percentage points just in the past ten years, from 85.4% in 1991.”)


144. See 8 U.S.C. § 1227(a)(2)(B)(i) (Lexis Nexis 2006 & Supp. 2011) (“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 [thirty] grams or less of marijuana, is deportable.”); 42 U.S.C. § 1437d(l)(6) (2006) (allowing for the eviction of a tenant in federal housing where the tenant, a member of the tenant’s household, or even a guest of the tenant is convicted of, or involved with, drug-related activity); 20 U.S.C. § 1091(f)(1) (Lexis Nexis 2006 & Supp. 2011) (suspending student loan eligibility for varying time periods for any “student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance”).
try. Any misdemeanor conviction will create serious obstacles to future employment, due in part to the widespread electronic availability of criminal records. In such cases, a defendant’s risk aversion is going to be different than in a case involving only direct consequences. The same is also true even in some cases involving higher-level charges.

Imagine that you face felony charges in a case where the typical post-trial sentence falls close to the maximum of ten years, and where your chances of winning at trial are approximately twenty percent. You are offered a deal in which you would plead guilty to a somewhat lower-level felony with a two-year sentence as the only consequence. A court reviewing this deal would likely find that a rational person would take it. Imagine now that in addition to two years in prison, the conviction would lead to mandatory registration under that state’s sex offender registration law for the rest of your life. This means that your photo, address, and other information will be posted on a publicly-available website. The plea and ensuing conviction also comes with a five percent chance that the state would succeed in having you deemed a “sexually violent predator” (“SVP”). Such classification means that the state could continue to civilly confine you—for up to the rest of your life, in a state prison wing for “civil” SVP confinements—after you serve your criminal penalty. Suddenly, the decision to turn down the deal does not look at all irrational. Indeed, a rational choice might be to focus on the twenty percent chance of victory at trial and not play the odds with a guilty plea followed by certain SORNA and possible highly severe civil confinement SVP consequences.

In an even easier example, imagine facing misdemeanor cocaine possession charges where conviction will lead to loss of public housing for you and the five family members who share your mother’s apart-


147. Of course, this is a somewhat unrealistic example because there are always collateral consequences, such as the difficulty finding work with any type of conviction, misdemeanor or felony.

148. See infra text accompanying notes 174-75 (discussing SVP Acts and registration).
You are in a jurisdiction that requires many court appearances, lasting much of the day, before you can get a suppression hearing and trial date. Unaware of the harsh housing consequence, you decide to plead guilty after several court appearances, unwilling to lose more days of work despite the fact that your attorney advised you that you have a good chance of winning a suppression hearing and eventually having your case dismissed. Obviously, many prosecutors would be willing to work creatively with defense counsel to avoid imposition of this consequence, in particular since it would affect innocent third parties from the family who also live in the public housing apartment. However, even assuming that creative negotiation did not lead to avoidance of the consequence, it is clear that you would now reconsider taking the “easy” guilty plea in order to avoid burdensome court appearances. This burden now pales in comparison to the loss of the family home.

My own years of experience representing indigent defendants and supervising cases—many of which involved immigration, sex offender, and other serious consequences—bears out the potential reactions described in these hypotheticals. Clients who are fully informed that something severe, like certain deportation or sex offender registration, will follow a guilty plea are simply more likely to reject that plea. They might do so in the hopes of receiving a “better” offer that would avoid the consequence, even if that would lead to more jail or prison time, or might do so despite knowing that turning down the offer means taking their chances at trial.

This is particularly true where the stakes in the direct criminal case are relatively low—a misdemeanor with a maximum of one year in jail—or where the difference between the likely penalty after trial is not significantly different from the offered penalty upon a guilty plea. Mr. Padilla’s case would certainly fit into the latter category,

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

150. See infra note 190 (describing such a situation in New York City’s lower criminal courts).

151. On the other hand, if deportation was not a concern that overshadowed the criminal case, the defendant would be less likely to file an ineffective-assistance claim based on counsel’s failure to warn about deportation. He would have already decided to accept the benefit of the plea bargain, and new information about deportation in such a situation would not change that decision. See infra text accompanying notes 177–79 (describing situations involving a visitor to the U.S. with few ties).
as he accepted a five-year sentence plea but only faced a maximum of ten years after trial. Further, it is reasonably probable that he would have received a lighter sentence, especially because a jury would have determined any post-trial sentence, it was a marijuana case in a jurisdiction known for leniency with marijuana, Mr. Padilla had no prior criminal convictions, and he was a veteran with a stable family and employment history.\textsuperscript{152}

The various considerations described above make it clear that applying a broader, more realistic prejudice lens, that accounts for negotiation and sentencing advocacy as well as consideration of risk aversion in the face of severe consequences, is no easy task for a judge analyzing this prong of an ineffective-assistance-of-counsel claim. However, reconstructing a trial that never occurred and doing so in the absence of attorney error that did occur, is also no easy task.\textsuperscript{153}

C. Applying a Broader Analysis to the Facts in \textit{Padilla}  

The \textit{Padilla} facts illustrate the problems with the current prejudice analysis’ trial-outcome focus and the need for a new approach. Jose Padilla, with his family, migrated to the United States from Honduras as a teen. He continued to live in the country as a legal permanent resident, living here for forty years at the time of his arrest.\textsuperscript{154} Mr. Padilla served in Vietnam, worked, and raised U.S.-citizen children.\textsuperscript{155} With all of these ties to the United States, deportation is quite a severe consequence for Mr. Padilla.

There was no full adversarial testing of the facts in the criminal case against him, as Mr. Padilla pled guilty after his lawyer allegedly told him that he would not suffer any immigration consequences due to the conviction. However, at least based on the state’s allegations, the case against Mr. Padilla was fairly strong once he lost the suppression hearing challenging the legality of his stop and interrogation. The police found more than one thousand pounds of marijuana in his licensed commercial truck, after he signed a form to consent to the

\textsuperscript{152} See infra text accompanying notes 162–64 (describing the sentencing possibilities for Padilla).

\textsuperscript{153} See infra Part III.B.2 (discussing potential critique that this Article’s proposed approach raises institutional competence concerns).


\textsuperscript{155} See supra notes 4-5 and accompanying text (describing Padilla’s personal circumstances).
search during a “driver paperwork safety inspection.” Mr. Padilla allegedly answered “maybe drugs,” when asked about the contents of packages in the back of the truck. The police also found a pipe and a small amount of marijuana in the cab of the truck. Mr. Padilla was charged with felony marijuana trafficking, as well as the misdemeanors of possession of marijuana and drug paraphernalia and failing to have a weight and distance tax number on his truck.

Mr. Padilla had two potential defenses at trial on the felony trafficking count. First, Kentucky law requires that the state prove a defendant’s actual knowledge of the presence of the marijuana. This means that the state would either have had to rely on a statement from Mr. Padilla on the issue of knowledge, or offer evidence of circumstances that would support a reasonable inference that Mr. Padilla knew what he was hauling in the back of his commercial truck. Second, even if the state proved that he knew he had marijuana in his truck, Mr. Padilla could have argued failure to prove that he had the mental state required to show “trafficking.” In short, Mr. Padilla had trial defenses, even if they were not the most promising. In addition, even if he lost the trial and faced a maximum of ten years on the felony count, he could have actually received closer to the five-year minimum. This is particularly true given the fact that after trial Mr.

157. Brief for Petitioner, supra note 4, at *3.
160. Reply Brief for Petitioner, supra note 4, at *26 (noting that Mr. Padilla could argue at trial that he did not know he was transporting marijuana and that he did not have the mental state required by statute); see also Ky. Rev. Stat. Ann. § 218A.1421(1) (West 2010) (“A person is guilty of trafficking in marijuana when he knowingly and unlawfully traffics in marijuana.”); Ky. Rev. Stat. Ann. § 501.020 (West 2010) (defining mental state of “knowingly”); Martin v. Commonwealth, 96 S.W.3d 38, 61-62 (Ky. 2003); Love v. Commonwealth, 55 S.W.3d 816, 824-25 (Ky. 2001) (both cases cited in Padilla’s briefs to the Supreme Court, on the issue of knowledge).
161. Reply Brief for Petitioner, supra note 4, at *27.
162. See Ky. Rev. Stat. Ann. § 218A.1421(1), (4) (West 2010) (criminalizing marijuana trafficking and classifying trafficking in five or more pounds as a Class C felony); Ky. Rev. Stat. Ann. § 532.060 (2)(C) (setting forth five-year minimum and ten-year maximum penalties for class C felonies); Brief for Petitioner, supra note 4, at *8-9 (noting how Mr. Padilla was charged, among more minor crimes, with the Class C felony of marijuana trafficking).
Padilla would have had the right to a jury sentence. His appellate attorneys have noted “the relative leniency of Kentucky juries in sentencing for non-violent marijuana offenses.” On the other hand, under the deal Mr. Padilla accepted, he got a ten-year sentence, with five years probated. Going to trial would have also allowed Mr. Padilla, if convicted, to appeal the denial of his suppression motion based on the “driver paperwork safety inspection” stop.

Considering only the direct consequences of a loss at trial, it may have made some sense for Mr. Padilla to plead guilty and limit his sentence exposure. However, now the Supreme Court has found that he did not receive effective assistance of counsel in that plea process, if he can prove prejudice. Under a trial-outcome prejudice analysis, Mr. Padilla will almost certainly lose his claim on remand. Such a myopic inquiry would first ask if, given correct information about the certain deportation based on the proposed plea, Mr. Padilla’s trial attorney still would have counseled him to take the plea. To answer this question, the court would look back further to ask if, in light of the correct deportation information, Mr. Padilla had a reasonable probability of success at trial. If not, then the court would find it unlikely that Mr. Padilla would have rejected the offer and chosen trial. Since the deportation information would have absolutely no effect on Mr. Padilla’s chances at trial and since this type of inquiry imagines a world in which rejected pleas always lead to trials, nothing has changed between the time Mr. Padilla and his attorney believed he would avoid deportation and the time they both knew he would certainly be deported based on his drug conviction.

Consider now a broader prejudice analysis that recognizes the full meaning of correct knowledge about collateral consequences in negotiation and sentencing advocacy as well as counseling about the plea

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163. Reply Brief for Petitioner, supra note 4, at *29.
164. Brief for Petitioner, supra note 4, at *9.
165. In Kentucky, as in most states, a guilty plea forecloses appeal on denial of a suppression motion unless the plea was conditioned on the ability to appeal. See Ky. Rev. Stat. Ann § 8.09 (West 2010) (“With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion.”); see also Dickerson v. Commonwealth, 278 S.W.3d 145, 149 (Ky. 2009) (describing only three instances in which a court will consider issues on appeal from a conditional guilty plea).
166. Indeed, he has already lost at the trial-court level, although he is appealing that decision. See supra note 5.
decision-making process. This inquiry requires the court to objectively step into Mr. Padilla’s shoes and ask whether under all of the circumstances, including certain deportation upon conviction on the current charges, it would be rational to reject the plea. This introduces several new aspects into the analysis. First, the difference between a possible ten-year maximum after trial (and likely less) and a certain five-year sentence with another five probated after a plea, is not so significant when compared to certain deportation from one’s home country where one has worked and lived with family for forty years. The differences are even less significant in light of Kentucky’s parole eligibility rules, under which Mr. Padilla would have been eligible for release after serving twenty percent of his sentence. Indeed, Mr. Padilla pled guilty to all charges against him except for the failure to have a weight and distance tax number on his truck, and he essentially received the maximum sentence, albeit with five years probated. There was, quite simply, not much benefit to the bargain. A rational person in such a situation might well find that even a small likelihood of success at trial is a risk worth taking. In short, the risk aversion analysis has completely changed, with a much heavier hand on the scale in favor of trial and the possibility of acquittal.

In addition to recognizing varying levels of aversion to the risk of going to trial, the court must acknowledge that Mr. Padilla’s rejection of the initial plea offer might not lead to a trial. Instead, the relevant inquiry would be whether rejection of the initial plea might have led to a different plea or sentence. The court would ask, for example, whether it is reasonably likely that the prosecution, had Mr. Padilla rejected the initial offer, would have been amenable to a guilty plea to some other charge, namely one that avoided automatic deportation.

For a potential critique of this approach, raising issues of complexity and institutional competence, and a response to that critique, see infra Part III.B.2.

For Mr. Padilla’s case, and with deportation based on controlled substance offenses generally, this is quite difficult. This is because 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. 8 U.S.C. § 1227(a)(2)(B)(i) (2006); see also 8 U.S.C. § 1101(a)(43)(B) (2006) (defining “aggravated felony” to mean “illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in
The court would also ask whether the prosecution, or the court itself, would have offered a lower prison sentence in recognition of the fact that Mr. Padilla would be deported based on his guilty plea. These are all “different outcomes” that are not recognized under the prevailing prejudice inquiry simply because they are not “different trial outcomes.” In light of this broader analysis, Mr. Padilla’s chance of success on remand for the prejudice inquiry looks quite different and not nearly so grim.

III. A PROPOSED PREJUDICE APPROACH, AND RESPONSES TO POTENTIAL CRITIQUES

This Part proposes a prejudice test, sets out some factors that reviewing courts should take into account in applying that test, and responds to potential critiques of the proposed approach.

A. Proposed Prejudice Approach and Factors for Courts to Consider

Courts considering a claim of ineffective assistance of counsel based on the failure to warn about a collateral consequence prior to a guilty plea should take two steps in determining whether the defendant has demonstrated prejudice. First, the court should ask whether it is reasonably probable that a rational person receiving effective assistance relating to the guilty plea decision-making process would have declined to plead guilty. Second, the court should ask...
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whether, if the defendant had not taken the plea, there is a reasonable probability that there would have been a different outcome. This could be satisfied either in the traditional *Strickland* and *Hill* form of a reasonably probable successful trial outcome, or in two other forms: (1) reasonable probability of a second plea that is more favorable to the defendant; or (2) reasonable probability of a sentence that is more favorable with effective assistance than it was with ineffective assistance. The second step of this inquiry is not independent of the first, as the likelihood of a different outcome is something a defendant would factor into his decision about whether to reject or accept a proposed plea. Both steps require a court to consider the likely risk analysis of an individual facing criminal charges, but also severe collateral consequences that will flow from any conviction.

Applying this to the scenario in *Padilla*, namely defense counsel’s failure to warn (or incorrect warning) about automatic deportation, the court’s initial inquiry would consider whether it is reasonably probable that the defendant, had he known about the severe consequence at issue, would have rejected the offer. As part of this inquiry, the court would ask if there is a reasonable probability that defense counsel, using information about deportation in her negotiations, could have structured a different plea bargain in order to avoid it, even if that meant a higher penal sentence. The court would ask, alternatively, if it is reasonably probable that the prosecutor or judge would have offered a significantly discounted sentence to account for the harshness of deportation, if the negotiation had not led to avoidance. The court would also consider whether, in light of all of the facts and circumstances of the charges as well as the deportation consequences, a rational person in Mr. Padilla’s situation would have taken his chances at trial.

This Article does not attempt to set forth each and every factor that might be relevant to such context-specific prejudice analyses.

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Keane, 99 F.3d 492, 494-95, 497, 499 (2d Cir. 1996) (finding ineffective assistance when defendant got post-trial sentence of twenty-years-to-life, after turning down offer of 1-3 years when his attorney failed to share his opinion that it was a good offer, and that going to trial was “suicidal” given the facts of the case and the likely jury). The Supreme Court will consider a reverse guilty plea ineffectiveness claim in the 2011-2012 Term. See Cooper v. Lafler, 376 F. App’x 563 (6th Cir. 2010), *cert. granted*, Lafler v. Cooper, 131 S. Ct. 856 (2011) (No. 10-209), 2011 WL 48029. Although less common, reverse guilty plea situations can arise with failure to warn about collateral consequences claims. An example would be rejection of a plea that would have avoided deportation in favor of a trial that led to deportation, where defense counsel failed to advise the defendant that the plea had this significant merit.
Still, there are several factors likely to be common to most such determinations and the following sections describe them.

1. Severity of the Attorney Error, in Context

In deciding if it is reasonably probable that a defendant would have rejected the plea but for the attorney error, the nature and severity of that error will be a major consideration. This is essentially the risk aversion analysis that Part II.B calls for, where full disclosure about the relevant consequences will influence how much risk a defendant is willing to take in rejecting an offer.

In cases involving the failure to warn about a collateral consequence of a guilty plea, the severity of the consequence is central. *Padilla* describes how deportation is on the far end of the severity spectrum. There are a few other obvious candidates on that end of the spectrum. One example is civil commitment under state or federal “sexually violent predator acts,” where a defendant first serves his criminal sentence and is then immediately confined, for as long as the rest of his life, based on predictions of future sexual dangerousness. This consequence raises liberty concerns similar to deportation. However, this form of punishment can be more severe than deportation because individuals are banished to correctional (or similarly secure) facilities rather than to another country. Mandatory lifetime registration as a sex offender, with all of the work and living restrictions that accompany it, as well as notification on a publicly-available website, are other severe consequences.

It is difficult to categorize the severity of the consequence in a vacuum, and thus the importance of the particular consequence to the

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173. *Padilla*, 130 S. Ct. at 1481 (“We have long recognized that deportation is a particularly severe ‘penalty’ . . . .”).


particular defendant, given the objective circumstances, will also be part of a court’s inquiry. Certainly, there are ways to objectively rank the severity of a collateral consequence. There would be little argument that deportation or lifetime sex offender registration is more severe for a defendant than a six-month driver’s license suspension. However, a consequence can be more severe for some than others and thus the defendant’s background and circumstances become relevant. To return to Mr. Padilla’s case, deportation would be highly severe given his number of years in the country, family ties, and work history. A student who recently arrived in the United States on a visa, whose entire family is in her home country, will not have the same claim to prejudice as Mr. Padilla. Prejudice will be particularly difficult to prove for defendants who face an independent basis for imposition of the collateral consequence. Examples would include a person unlawfully in the United States, already subject to deportation, or someone facing a deportation order based on a conviction that preceded the one related to the claim of ineffective assistance. In sum, the more severe and far reaching the consequence for the particular defendant, the heavier its weight on the scale of plea rejection.

Criminal law is replete with this type of fact-specific inquiry. Indeed, within ineffective-assistance jurisprudence, the Supreme Court has examined cases where the defendant was deported subsequent to pleading guilty. In United States v. Gutierrez Martinez, No. 07-91(5) ADM/FLN, 2010 WL 5266490, at *4 (D. Minn. Dec. 17, 2010) (noting that Gutierrez Martinez “was subject to deportation both before and after his guilty plea. As his guilty plea had no bearing on his deportability, the information about the immigration consequences of his guilty plea would not have affected his decision whether to plead or go to trial.”); LaPorte v. Artus, No. 9:06-cv-1459 (GLS/ATB), 2010 WL 4781475, at *2 (N.D.N.Y. Nov. 17, 2010) (“LaPorte has failed to demonstrate prejudice such that but for his trial counsel’s alleged failure to advise him of the risks of deportation, he would not have pled guilty. . . . Instead, the record conclusively establishes that LaPorte’s removal and deportation was ordered . . . based on a prior, unrelated conviction.”); see also Haddad v. United States, Civil No. 07-12540, Criminal No. 07-12540, 2010 WL 2884645, at *7 (E.D. Mich. July 20, 2010) (rejecting application to withdraw guilty plea to federal drug possession misdemeanor where other, state felony conviction also rendered defendant deportable).
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Court has noted: “As with all applications of the Strickland test, the question whether a given defendant has made the requisite [prejudice] showing will turn on the facts of a particular case.”181 Similarly, courts constantly undertake “reasonableness” analyses, which require examination of the “objective” facts and circumstances of the particular situation. For example, to demonstrate a Miranda violation, a defendant must show that he was in custody and the police interrogated him.182 The Supreme Court’s custody-prong jurisprudence states that “custody must be determined based on how a reasonable person in the suspect’s situation would perceive his circumstances.”183 In such inquiries into custody, courts consider factors including:

the time, place, and purpose of the interrogation; the persons present during the interrogation; the words the officers spoke to the suspect; the officers’ tone of voice and general demeanor; the length and mood of the interrogation; whether any restraint or limitation was placed on the suspect’s movement during interrogation; the officers’ response to any of the suspect’s questions; whether directions were given to the suspect during interrogation; and the suspect’s verbal or nonverbal responses to such directions.184

Courts also undertake such inquiries in the plea-bargaining arena, including a consideration of the defendant’s subjective beliefs. For example, to determine whether a conversation between a government agent and a defendant is an inadmissible “plea discussion,” courts ask whether “the defendant exhibit[ed] a subjective belief that he is negotiating a plea, and that belief is reasonable under the circumstances.”185 Qualified immunity is another area with a fact-specific reasonableness inquiry. In order to get qualified immunity in a civil rights action, a prosecutor must “establish that his alleged action . . .

181. Roe v. Flores-Ortega, 528 U.S. 470, 485 (2000); see also Hessick, supra note 10, at 1088 (“[T]he uncertain connection between counsel’s performance and the sentence imposed does not make ineffective assistance at sentencing in discretionary systems unique.”).
182. See Miranda v. Arizona, 384 U.S. 436, 444 (1966) (“[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”).
183. Yarborough v. Alvarado, 541 U.S. 652, 662 (2004); see also Thompson v. Keohane, 516 U.S. 99, 112 (1995) (noting “[t]wo discrete inquiries . . . essential to the determination [of custody]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.”).
was done in the good faith belief as to its lawfulness and that such a belief was reasonable under all of the circumstances then existing.”

It may not be simple or formulaic to ask whether Mr. Padilla’s family ties in the United States are strong enough to make a reasonable person in his situation take a chance at trial in order to avoid deportation to a country he does not know. However, as demonstrated above, courts constantly make determinations based on the facts and circumstances of the particular case. Surely, a court that can determine the “mood” of an interrogation, or an officer’s “general demeanor” is capable of determining the factors that a person would weigh in deciding whether to plead guilty or go to trial. This is the type of inquiry that courts must undertake in order to determine if an individual was truly prejudiced by counsel’s failure to warn about a collateral consequence.

2. Strength of the Evidence Against the Defendant, Strength of Potential Defenses

The strength of the evidence against a defendant, as well as the strength of potential defenses, is a common area of inquiry for courts using trial-outcome as well as other types of analyses. Clearly, the likelihood of a conviction after trial is something that factors into the process by which rational people decide whether to accept a particular plea bargain or to plead guilty to all of the charges.

In failure-to-warn cases, this factor should not weigh as heavily. This is because the relevant initial inquiry is simply whether, given fully accurate information about the collateral consequence, it is reasonably probable that the defendant would have rejected the plea offer. Such rejection could be based on a defendant’s rational belief that re-negotiation upon disclosure and discussion of the collateral consequence will lead to an offer structured to avoid the consequence, or his belief that it will lead to a different sentence. This may happen even where the evidence against a defendant is strong, and the potential defenses are weak. This is particularly true when the criminal charge is fairly minor, the collateral consequence is severe, and the prosecution agrees that avoidance of that consequence is a legitimate goal for both sides. For example, a single misdemeanor cocaine possession conviction leads to automatic deportation for any non-citizen,

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regardless of that person’s immigration status and ties to this coun-
try.187 In this situation, many prosecutors will be amenable to an al-
ternative plea or some type of deferred dismissal upon completion of
drug treatment. This is so even if the evidence against the defendant
is strong and the case is an “easy win.” As the former president of the
National District Attorney’s Association has noted, “How can we ig-
nore a consequence of our prosecution that we know will surely be
imposed by the operation of law?”188

Still, there will be cases where the evidence is so strong and the
allegations so serious that re-negotiation is not reasonably probable.
One example would be a capital murder trial with strong factual evi-
dence of guilt against the defendant as well as strong mitigating evi-
dence that might lead the jury to impose a life sentence without
parole, rather than a death sentence. Here, if the prosecution offers a
plea with a life-without-parole sentence, and the defendant accepts
without knowledge that the conviction will render him deportable, a
strong factual case against the defendant for the guilt/innocence phase
might lead to a finding of failure to demonstrate prejudice in any later
ineffective-assistance claim. In such an extreme situation, it may not
be reasonably probable that defense counsel, using information about
automatic deportation, could have negotiated a better bargain. This is
in large part because the fact that the defendant would spend life in
prison renders any later deportation irrelevant.189 It is also because in
a murder case it is unlikely that there is any plea that would avoid
deportation, or lead to a lower sentence. In general, the more serious
the underlying criminal charges, the harder it will be for the defendant
to prove prejudice resulting from a failure to warn about a collateral
consequence.

The strength of any potential defense will also sometimes be rele-
vant. Returning to the misdemeanor cocaine possession charge, imag-

187. See supra note 170 (describing how all drug convictions other than possession of a small
amount of marijuana for personal use lead to automatic deportation); see also Juliet P. Stumpf,
(on file with author) (exploring “the unique role that measurements of time play in determining
the exclusion of a noncitizen from U.S. society”).
188. See Johnson, supra note 17, at 5.
committing aggravated felonies” and stating that such expedited proceedings “shall be con-
ducted . . . in a manner which assures expiditious removal following the end of the alien’s incar-
ceration for the underlying sentence”) (emphasis added); see also Pena v. United States, No. 01
(2006) and holding that “the general rule is that the Attorney General may not remove an alien
before that alien has completed a sentence of imprisonment”).
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ine that the defendant pled guilty in order to expedite the process because the many required court appearances meant he risked losing his job.\footnote{See K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 297 (2009) (noting how in New York City lower courts, a “decision not to accept a disposition at arraignment leads to a number of court appearances which impose a considerable burden on the accused”); Ian Weinstein, *Special Feature: A Conference on New York City’s Criminal Courts, The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1162 (2004) (noting the “structural features which make lower courts process, rather than adjudicate, cases”).} He pled guilty despite knowing that he had a strong argument that the search of his pockets during the street stop was unlawful and that if he could just come to court enough, he would have a suppression hearing. Imagine also that his attorney failed to warn him that the conviction would lead to his automatic deportation. Here, even without considering the likely re-negotiation possibilities described above, a rational person would likely have risked the job loss and returned to court, rather than suffer certain deportation.

3. Probability of a Different Plea Offer, or Different Sentence

Courts applying this factor of a prejudice analysis should consider whether, given the facts and circumstances of the particular case, it is reasonably probable that rejection of the original plea that results in a collateral consequence would lead to either a different plea or a different sentence. In some cases, this will be a fairly straightforward inquiry.

Consider a hypothetical case in which a defendant in New York State is charged with rape in the third degree for statutory rape based on strict liability. This low-level felony prohibits a person who is at least twenty-one years old from “engag[ing] in sexual intercourse with another person less than seventeen years old.”\footnote{N.Y. PENAL LAW § 130.25 (McKinney 2010) (stating that rape in the third degree is a Class “E” felony); id. § 55.05(1) (listing Class E felonies as the lowest-level felonies).} Under New York’s Sex Offender Registration Act (“SORA”), a person convicted of third degree rape must register for a minimum of twenty years, and possibly for life. This person may also be listed in a public subdirectory, available on the Internet.\footnote{See N.Y. CORRECT. LAW §§ 168-a(1)-(2) (McKinney 2010) (defining “sex offender” to include those convicted of rape in the third degree); id. §§ 168-h(1)-(2) (duration is either twenty years or life, and depends on risk level classification); id. § 168-q (describing the subdirectory for “level two and three sex offenders” as including “the exact address, address of the offender’s place of employment and photograph of the sex offender along with the following information, if available: name, physical description, age and distinctive markings. Background information including the sex offender’s crime of conviction, modus operandi, type of victim targeted, the name and address of any institution of higher education at which the sex offender is enrolled,} This defendant decided to plead guilty to a
reduced charge, the misdemeanor of sexual misconduct, after incor-
correct assurances from defense counsel that the conviction did not qual-
ify for registration under the state’s SORA. Counsel, in his plea
negotiations with the prosecution, mentioned his client’s concern with
SORA consequences, as a basis for the reduction in charges. The
prosecution agreed to the offer, in part based on her agreement that
avoidance of SORA in this statutory rape case was an acceptable goal.

In such a situation, it is reasonably probable that the parties
would have negotiated a non-registration disposition had they been
aware that the plea in fact led to mandatory registration for a mini-
mum of twenty years. Such alternative dispositions were readily avail-
able, and the objective evidence during negotiations demonstrated
the prosecution’s willingness to structure such a plea. In a recent
prejudice analysis, the Seventh Circuit explored the type of “objective
evidence” a defendant must demonstrate to “prove that there is a rea-
sonable probability that he would not have pled guilty absent his at-
torney’s deficient conduct.” Among such evidence, according to
the court, was “the nature of the misinformation provided by the at-
torney to the petitioner and the history of plea negotiations.”

A similar example demonstrating the probability of a guilty plea
structured to avoid a severe collateral consequence is when a judge
imposes a year-long sentence where none of the parties or the court
realized that a 364-day sentence would have avoided automatic depor-
tation. There are many cases demonstrating how judges in such sit-
uations are willing to re-visit the sentence, even years later, to help a


194. See, e.g., N.Y. Penal Law § 260.10 (McKinney 2010) (“A person is guilty of endangering the welfare of a child when: (1) He or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old . . . .”). This example is based in part on a case that I supervised where criminal defense clinic students successfully represented a client in his motion to withdraw a guilty plea that he had entered years prior. The client was eventually allowed to re-plead to a non-registration offense of endangering the welfare of a child.

195. Hutchings v. United States, 618 F.3d 693, 697 (7th Cir. 2010).

196. Id. (emphasis added).

197. See Mary E. Kramer, Immigration Consequences of Criminal Activity 250 (4th ed. 2009) (listing five general categories of offenses that “are aggravated felonies under INA Section 101(a)(43)(O) [and thus make a person mandatorily deportable] only if the sentence of imprisonment imposed is at least one year”).
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defendant avoid unintended collateral consequences. In cases where the imposition of an alternative plea is readily available, and where there is no indication that the parties intended imposition of the collateral consequence, there should be little debate over prejudice.

The “different outcome” inquiry will require more probing in situations where the prosecution’s or judge’s willingness to re-structure the guilty plea is not explicit, or as easily implied. Thus, a defendant might demonstrate that a particular prosecutor’s office has re-structured pleas in similar cases. Or, a defendant might show the total absence of evidence that the prosecution sought the particular collateral consequence, combined with the ready availability of different plea options that met other prosecutorial goals—of conviction and sentence. These are simply a few examples of the many potential ways to approach such inquiries. They are also the types of inquiries that courts make in many criminal procedure contexts, an issue that is explored more fully above in Part III.A.1, and below in Part III.B.2, which addresses the institutional competence concerns of this proposed prejudice approach.

B. Potential Critiques, and Responses, to Proposed Prejudice Approach

There are a number of potential critiques of a prejudice inquiry that looks beyond a narrow likely trial-outcome analysis to consider different possible outcomes based on sentencing and negotiation advocacy, as well as risk aversion when a serious collateral consequence is part of the equation. Any proposal to broaden ineffective-assistance analyses will raise the claim of likely opening of the floodgates and the need for finality, at least from some critics. In addition, asking courts to consider potential outcomes of plea negotiations might raise institutional competence concerns.

1. Floodgates and Finality

Finality threatened by the opening of floodgates to future claims, in the wake of a particular holding, is a common cry in criminal cases. Indeed, the State of Kentucky, the Solicitor General, and some amici

198. See supra text accompanying notes 136–38 (describing two Virginia re-sentencing cases).
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raised such concerns in *Padilla*. In his majority *Padilla* opinion, Justice Stevens gave “serious consideration to the[se] concerns . . . regarding the importance of protecting the finality of convictions obtained through guilty pleas.” Justice Stevens had expressed such concerns himself before. In a 1979 case, he warned:

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

Justice Stevens gave this warning at a time when the Court had just begun its forays into plea bargaining jurisprudence in the 1970s.

Thirty-one years later in *Padilla*, perhaps with benefit of the knowledge that the floodgates had not opened in those intervening years, Justice Stevens sounded quite a different note. Noting how the Court “confronted a similar ‘floodgates’ concern in *Hill* [v. *Lockhardt*], but nevertheless applied *Strickland*’s ineffective-assistance test] to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty,” Justice Stevens declared that a “flood did not follow in that decision’s wake.”

*Padilla* cited four reasons why floodgates are unlikely to open in the wake of the Court’s articulation of a Sixth Amendment duty to warn about deportation consequences. First, lower courts are experienced with application of *Strickland*, and “can effectively and efficiently use its framework to separate specious claims from those with substantial merit.” Second, the fact that professional norms have called for deportation warnings “[f]or at least the past [fifteen] years” should lead the Court to “presume that counsel satisfied their obliga-

200. *Id.*
202. *See Albert Alschuler, Plea Bargaining and Its History*, 79 CO L. REV. 1, 40 (1979) (“By 1970, the due process revolution had run its course, and the Supreme Court, which bore a share of responsibility for the dominance of the guilty plea, was ready at last to confront this central feature of American criminal justice.”).
203. *Padilla*, 130 S. Ct. at 1484-85 (internal citations omitted).
204. *Id.* at 1485.
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...tion to render competent advice at the time their clients considered pleading guilty.” Third, in the twenty-five years since the Court first applied Strickland to ineffective-assistance claims following guilty pleas, “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. But they account for only approximately 30% of the habeas petitions filed.” Fourth, full information about deportation “can only benefit both the State and noncitizen defendants during the plea-bargaining process.” This is because defense counsel “may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation” and other severe collateral consequences.

There is no doubt that the Padilla decision will cause, at least temporarily, a spike in ineffective-assistance claims based on the failure to warn. This would be true almost any time the Supreme Court articulates a rule favorable to a potential litigant, particularly in criminal cases. However, for many of the reasons that Padilla noted, given past experience, the floodgates concern should not be exaggerated. It should certainly not stand in the way of the articulation of an important criminal procedural right.

2. Institutional Competence

This Article’s proposed prejudice inquiry may raise concerns of institutional competence, although for the reasons discussed in Part III.A.1 as well as below, those concerns are ultimately misplaced. The concern would sound like this: The proposal asks courts to speculate about the likely outcome of negotiations that included informa-

205. Id. Although the existence of professional norms calling for such warnings has surely shed light on the need for warnings and certainly more (but far from all) attorneys at least attempt to follow the norms, as a close observer of the lower criminal courts in several different jurisdictions, I would beg to differ with this overly-optimistic statement.

206. Id.

207. Id. at 1486.

208. Id.; see also Johnson, supra note 17, and accompanying text.

209. See Jackman, supra note 136, at B1 (“A recent U.S. Supreme Court ruling that noncitizens in criminal cases must be advised of the possible consequences of a conviction has sparked a flurry of appeals by defendants who claim that they didn’t know that conviction would lead to deportation.”).


211. See supra text accompanying notes 180–86.
tation about collateral consequences, and to compare this to a negotiation that happened without that information. Under most state criminal codes, negotiation is an area that courts enter lightly or not at all.212 The proposal also asks courts to opine about a defendant’s likely aversion to the risk of trial, given correct information about a collateral consequence. In both of these areas, under an argument of institutional incompetence, the judge is not normally a part of the process, one that instead takes place between opposing counsel operating in an adversarial system that currently has little place for judicial scrutiny of the bargaining leading up to the plea, so long as the plea itself is entered knowingly and voluntarily.213

While it is true that the proposed prejudice approach would require courts to reconstruct events that did not occur and to predict the reasonably likely outcomes of negotiations they did not take part in, such tasks sound quite similar to tasks courts already undertake. For example, a trial-outcome approach to prejudice in a guilty plea context requires the court to predict the probable outcome of a trial that never happened, based on evidence that was never developed in an adversarial proceeding. Even if there was a trial, the court must ask whether—but for defense counsel’s error—the jury would have convicted of some lesser charge or acquitted entirely.214 As Professor Carissa Hessick has noted, courts undertake prejudice determinations in reviewing the harm of attorney error in a capital sentencing proceeding despite such uncertainties: “Because juries do not articulate the reasoning behind their decisions, there is no definite answer in capital cases whether counsel’s performance affected the sentence imposed . . . .”215 Professor Hessick makes the important observation that such lack of a “definite answer” is why Strickland set forth a “rea-

212. See, e.g., Fed. R. Crim. P. 11(c)(1) (“An attorney for the government and the defendant’s attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.”) (emphasis added)); see also Louisiana v. Bouie, 817 So. 2d 48, 54 (La. 2002) (“Although not objected to in this appeal, the judge’s active participation in the plea negotiations evokes our concern. The ABA Standards recommend that the trial judge should not be involved with plea discussions before the parties have reached an agreement.”). But see N.C. Gen. Stat. Ann. § 15A-1021 (West 2010) (“The trial judge may participate in the [plea] discussions” between defense counsel and the prosecution); Ill. Sup. Ct. R. 402 (same).


214. See supra Part I.A.

215. Hessick, supra note 10, at 1088 (“This ‘reasonable probability’ standard is easily applied to non-capital discretionary sentencing; in order to assess prejudice, the Court need only determine ‘the probability that a defendant would have received a shorter sentence’ had she received effective assistance.”).
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sonable probability” test.216 Such a test allows for flexibility in determining prejudice in situations where it is difficult to determine causation with any certainty.

There are significant problems with the ex post facto approach to prejudice, and it has received much-deserved critique in scholarship addressing the issue.217 The fact that this Article works within this structure should not indicate approval of the general approach to ineffective-assistance jurisprudence, which has a troubling track record.218 However, the Supreme Court has used this flawed paradigm since Strickland in 1984 and is unlikely to change the fundamental two-pronged structure of ineffective-assistance claims.219 Given that, the point here is simply that if the Supreme Court believes judges are competent to look back and reconstruct trials that never happened, surely it should find that they are also competent to look back at negotiation and sentencing as well as a defendant’s risk aversion given full disclosure. After all, judges preside over far more negotiated and un-negotiated guilty pleas and sentences than trials.220

It may be challenging for a court to predict what a defendant might have decided had he been provided with correct information prior to the guilty plea. It may be similarly challenging for a court to consider what defense counsel might have been able to achieve, in terms of negotiating alternate outcomes, had she used the fact of the collateral consequence. However, courts constantly undertake “but for” inquiries that require them to re-imagine an event without one factor or aspect of that event, or to determine the casual connection between a factor and the ultimate event.221 Courts also regularly ask

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216. See id.
217. See, e.g., Alan W. Clarke, Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part One), 29 U. R ICH. L. R EV. 1327, 1357-58 (1995) ("[P]recisely because so little is understood about how juries exercise their discretion, it will be difficult to prove convincingly that lawyers' poor performance made a difference, even if it did."); William S. Geimer, A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel, 4 WM. & MARY BILL RTS. J. 91, 121 (1995) ("The difficulty inherent in hindsight is said to be of such a degree that it virtually precludes any objective evaluation of attorney performance. In the application of the prejudice prong, however, these inherent difficulties apparently disappear.").
218. See Kirchmeier, supra note 10.
220. See supra note 142 and accompanying text (describing how the vast majority of convictions are secured by guilty plea and citing DOJ statistics on this well-known fact).
221. See, e.g., 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (2006) (stating that a court may not award damages if the respondent can show that “respondent would have taken the same action in the absence of the impermissible motivating factor”); Henderson v. Kibbe, 431 U.S. 145, 156-57 (1977) ("W)e reject the suggestion that the omission of more complete instructions on the causation issue so infected the entire trial that the resulting conviction violated due process.”).
what a reasonable person would have done or experienced under the particular circumstances,\textsuperscript{222} thus entering the realm of prediction about decision-making that the proposed approach encompasses. With ineffective-assistance claims based on a failure to warn, the court will also have the benefit of the defendant's pleadings, which will allege (and perhaps in some detail) what the defendant would have done had he known of the severe collateral consequence. If the court holds an evidentiary hearing, it will have the further benefit of testimony.

The Seventh Circuit demonstrated its ability to look at a "history of . . . plea discussions," among other factors, in considering an ineffective-assistance claim.\textsuperscript{223} David Julian rejected a plea offer of twenty-three years, proceeded to trial, and received a sentence of forty years.\textsuperscript{224} During post-conviction evidentiary hearings, both Julian and his trial attorney testified that the attorney had erroneously informed Julian that the maximum he could get after trial was thirty years when the maximum was in fact sixty.\textsuperscript{225} In its prejudice analysis, the court noted how the record had more than Julian's "mere allegation" that he would have accepted the twenty-three year offer, but for the erroneous advice:

In this case . . . we are faced with several pieces of evidence indicating that, but for the ill-advice, Julian would have taken the plea. First, as we just noted, Julian testified that he would not have gone to trial but for the misinformation. Second, Julian . . . altered course at the last minute just after receiving the erroneous information [by rejecting a plea he was about to enter]. Third, the information provided by Julian's attorney grossly misstated the risk of going to trial. Thus . . . we have testimonial evidence, a history of the plea discussions, and the type of mis-information likely to impact a plea.\textsuperscript{226}

Institutional competence concerns raise legitimate issues about the complex nature of a prejudice inquiry that looks beyond mere probable trial outcome to consider factors that actually reflect the harm done in failure-to-warn cases. However, a closer look at these issues reveals that they are the same as, or similar to, difficulties that courts work through in a variety of contexts. In the end, they simply highlight areas in need of particular attention and development, but

\textsuperscript{222} See supra notes 180–86 and accompanying text.
\textsuperscript{223} Julian v. Bartley, 495 F.3d 487, 499 (7th Cir. 2007).
\textsuperscript{224} Id. at 489-90.  
\textsuperscript{225} Id. at 489-91.  
\textsuperscript{226} Id. at 499.
do not demonstrate any judicial incompetence to undertake the broader analysis.

CONCLUSION

The Padilla decision opened a new constitutional window into the attorney-client relationship, by holding for the first time—and in the face of many circuit courts of appeal and state high court decisions that went the other way—that defense counsel has an affirmative duty to inform clients about deportation consequences. The decision also provided clear guidance that the prejudice inquiry in failure-to-warn cases must ask whether severe collateral consequences would change the guilty-plea decision of a rational defendant.

In a world of convictions secured almost entirely by guilty pleas, with a number of severe consequences flowing from even minor convictions, courts must consider non-trial advocacy approaches that might improve the overall outcome of the criminal case for a defendant. This Article’s proposed prejudice framework recognizes the impact that fully-informed attorneys can have in mitigating severe collateral consequences. It also recognizes how the risk calculation that a defendant facing such a consequence might make differs from a risk calculation without that factor on the scale.

Failure-to-warn cases will be a small percentage of ineffective-assistance claims, which are already small in number compared to the number of pleas. But they are cases with serious stakes. They are also cases with great potential for creative advocacy so as to avoid unintended and severe consequences of a criminal conviction. A more robust, realistic prejudice inquiry will help provide a remedy in those cases where lack of knowledge about the consequence really does harm the defendant.
Collateral Consequences: 
Role of the Prosecutor

CATHERINE A. CHRISTIAN*

New York State’s highest court has ruled that the “collateral consequences” of a criminal conviction—the focus of this Symposium—“are peculiar to the individual and generally result from the actions taken by agencies the court does not control.”¹ My views on this topic are primarily from the perspective of a prosecutor; I have also worked as a defense attorney, a judicial clerk and am an active member of local, state and national bar associations which all weighs in on my perspective. These professional experiences have shown me that what offenders discover after they have been convicted by plea (or after trial) is that they will continue to suffer the consequences of their convictions long after they have completed their sentences.

How much should the prosecutor consider consequences that are “peculiar to the individual and generally result from actions taken by agencies”² not within the court or their control? While it is expected that the defense counsel will investigate and advise a defendant regarding the consequences of criminal convictions, practically and ethically, the prosecutor should also consider the effects of collateral consequences during the prosecution of a criminal case. Over sixty years ago, when he was the Attorney General of the United States, Robert H. Jackson stated:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous . . . . If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should

¹. People v. Ford, 657 N.E.2d 265, 267-68 (N.Y. 1995) (illustrating several examples of collateral consequences, including: the loss of the right to vote or travel abroad, loss of civil service employment, loss of a driver’s license, and loss of the right to possess firearms).

². Id.
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get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.3

The ethical prosecutor appreciates the importance of objectivity and fairness in prosecution. A wise and ethical prosecutor wants a defendant to have the most effective assistance of counsel during all stages of the criminal litigation. This not only protects convictions from subsequent litigation, but more importantly it furthers the interests of justice. Additionally, a just and fair prosecutor will consider the collateral consequences that may apply in a particular case and take them into account when considering a disposition.

How can prosecutors help prevent unjust collateral consequences that follow a criminal conviction?

Pre-conviction:

Dispositions That Avoid Incarceration and a Criminal Record. Prosecutors should be made aware of possible collateral consequences that may apply and factor them into disposition considerations. Offenders, especially first-time offenders, who commit minor or non-violent offenses and therefore risk losing their professional licenses or employment, should be afforded an opportunity of a more favorable disposition.

Immigration Consequences.4 Prosecutors should receive training on the possible immigration consequences of criminal convictions. In Padilla v. Kentucky, the United States Supreme Court held that a defense attorney is required to provide competent legal advice to a non-citizen defendant regarding the immigration consequences of a guilty plea.5 A defendant who pled guilty without such advice may raise a


4. The New York County District Attorney’s Office distributes to defendants, their lawyers and the court, a written notice of immigration consequences urging defendants to consult with their attorneys about the consequences of a plea. The statement also lists crimes designated as deportable offenses under the U.S. Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2) (West 2006 & Supp. 2010). In addition, the notice informs defendants that if the offense constitutes an “aggravated felony,” or if defendant is not a lawful permanent resident of the United States (or have not been such for at least five years with at least seven years continuous residency) and the offense is any deportable offense, there will be additional consequences, including, but not limited to, ineligibility for discretionary cancellation of removal by the Attorney General.

5. Padilla v. Kentucky, 130 S. Ct. 1473, 1484, 1486 (2010) (“It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation. . . . The
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claim of ineffective assistance of counsel and may be entitled to have his or her conviction vacated. Prosecutors should consider offering a disposition that will not affect the defendant’s immigration status where there is no indication that an immigrant defendant poses a danger to the community.

Alternatives to Incarceration Programs. Prosecutors should support programs designed to divert addicted non-violent misdemeanor and felony drug offenders into treatment and rehabilitation plans. Effective drug diversion programs are critical in minimizing public safety risks, maximizing the likelihood of success of those in treatment, and reducing repeat offenses. They also accommodate individuals with special needs, including, offenders with mental health issues, adolescents and young adults.

Post-conviction:

Re-entry Programs. It is well documented that the majority of offenders who are re-arrested for crimes are unemployed at the time of their re-arrest. Eighty-nine percent of recidivists who violate the terms of their parole or probation are unemployed at re-arrest. The absence of gainful employment is the most apparent cause of recidivism. One of the most common collateral consequences and a significant barrier to obtaining sustainable employment is the discretionary denial of employment or professional licenses based solely on prior convictions. We have all read about ex-offenders who have been thwarted in their efforts to start a new life because of their past. For example, there is the formerly incarcerated offender who received barbering training but was unable to obtain a license in his trade because of his prior conviction or the graduate student unable to obtain a professional license because of a regrettable youthful mistake. For these ex-offenders, after they complete their sentences, they will continue to suffer the consequences of their convictions. As part of a

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.”.

6. Id. at 1482 (concluding that “advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel”).


8. The New York County Lawyers’ Association established “Project Restore,” a pro bono program where attorneys provide assistance to individuals with misdemeanor and felony convictions who are denied vocational licenses by the New York Department of State because of their criminal history. Pro Bono Opportunities, NYCLA, http://www.nycla.org/index.cfm?section=pro_bono&page=Pro_Bono_Opportunities (last visited Nov. 15, 2010).
crime reduction strategy, prosecutors should support programs that enable offenders to successfully re-enter society. A successful re-entry program ultimately improves public safety and reduces recidivism.9

Our primary duty as prosecutors is to ensure justice and protect the public from crime. In keeping with that mission, we must also consider the collateral consequences of the convictions we obtain to ensure that justice is achieved.

9. Since 1999, the Kings County District Attorney’s Office has run a program called “Community and Law Enforcement Resources Together” (“ComALERT”). See ComALERT, KING’S COUNTY DISTRICT ATTORNEY’S OFF., http://www.brooklynda.org/ca/comalert.htm (last visited Nov. 15, 2010). ComALERT aids ex-offenders by providing them with transitional housing, educational assistance, counseling, and permanent job placement assistance. Id. The New York County District Attorney’s Office works with the New York State Division of Parole and many re-entry providers to address the major issues confronting ex-offenders, which include the availability of programs offering substance abuse treatment and job training, as well as the critical need for housing. Id.
Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act

MARGARET COLGATE LOVE*

Today there are millions of Americans with a criminal record who are trapped permanently in semi-outlaw status and cannot hope to pay their debt to society. The premise of this Article is that the goal of the justice system must be the full and early reintegration of a convicted person into free society—with the same benefits and opportunities available to any other member of the general public—free of unreasonable status-generated penalties and the stigma of conviction. The development of an effective mechanism for avoiding or mitigating these collateral consequences should be a priority for every U.S. jurisdiction interested in promoting successful offender reentry. This policy goal, which finds new legal support in the Supreme Court’s groundbreaking decision in Padilla v. Kentucky, can best be achieved by incorporating a relief mechanism into the scheme by which the penalty is imposed. An effective relief mechanism should come into play as early as sentencing itself to promote successful reentry, and it should also provide at some point for a fuller restoration of legal rights and social status. It must acknowledge and forgive the crime rather than attempt to conceal and deny it, if only because modern technology makes it hard to have confidence in expungement and sealing schemes.

This Article argues that the relief provisions of the Uniform Collateral Consequences of Conviction Act (“UCCCA”) provide just such a

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mechanism. It begins by telling the story of Darrell Langdon, a Chi-
cago man whose status as a "convicted felon" barred him from a job he
had performed well for many years, but who was able to overcome this
barrier with the help of an Illinois law similar to the relevant provisions
of the UCCCA. It then reviews the dysfunctional state of relief mecha-
nisms in most U.S. jurisdictions today and how they got that way. Fi-
nally, it describes the integrated approach to collateral consequences
taken by the UCCCA, suggests how Darrell Langdon's case would
have fared in that framework, and concludes that the UCCCA provides
a comprehensive and functional way of extending forgiveness and rec-
ognizing redemption, both essential capabilities of a mature justice
system.

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INTRODUCTION

A half century ago, Chief Justice Earl Warren observed that
“[c]onviction of a felony imposes a status upon a person which not
only makes him vulnerable to future sanctions through new civil disa-
bility statutes, but which also seriously affects his reputation and eco-
nomic opportunities.”1 It is this semi-outlaw status more than any

1. See Parker v. Ellis, 362 U.S. 574, 593-94 (1960) (Warren, C.J., Black, Douglas & Bren-
nan, J.J., dissenting). See also James B. Jacobs, Mass Incarceration and the Proliferation of Cri-
minal Records, 3 U. ST. THOMAS L.J. 387, 387 n.1 (2006) (“A criminal record is a stigma, the
management of which becomes a major challenge and preoccupation for its holder.”).
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prison term or fine that is frequently a criminal defendant’s most serious punishment.

In 1960, the phenomenon of “internal exile” had a limited impact on American society because conviction was comparatively rare, criminal records were hard to access, and official forgiveness was relatively easy to obtain. All that has changed. The status imposed by conviction has become increasingly public, the sanctions generated by it have become more severe and harder to mitigate, and the number of people trapped in that status—usually for life—has ballooned. Today there are millions of Americans with a criminal record who cannot hope to pay their debt to society. If we still imagine our country as the “land of second chance,” as a practical matter our laws and policies point in the opposite direction. The fact that people of color

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5. See, e.g., Text of President Bush’s 2004 State of the Union Address, WASH. POST (Jan. 20, 2004), http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html (“America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.”).

are disproportionately branded and ostracized as criminals should be cause for alarm.\textsuperscript{7}

Yet change may be in the wind. For one thing, policy-makers are beginning to appreciate how degraded status and lost opportunities exact a high price in public safety and taxpayer burden.\textsuperscript{8} For another, the Supreme Court has recently given criminal law practitioners new reason to concern themselves with status-generated penalties. In its groundbreaking decision last Term in \textit{Padilla v. Kentucky},\textsuperscript{9} the Court held that criminal defense lawyers must advise their non-citizen clients considering a guilty plea that they are likely to be deported as a result.\textsuperscript{10} Characterized by the concurring Justices as a “major upheaval in Sixth Amendment law,”\textsuperscript{11} \textit{Padilla}‘s rationale is hard to confine to deportation consequences alone but potentially extends to other status-generated penalties that are sufficiently important to a criminal defendant to influence his willingness to plead guilty.\textsuperscript{12} Because of

\begin{itemize}
\item [8.] In 2003, the American Bar Association concluded that:
[T]he dramatic increase in the numbers of persons convicted and imprisoned means that this half-hidden network of legal barriers affects a growing proportion of the populace. More people convicted inevitably means more people who will ultimately be released from prison or supervision, and who must either successfully reenter society or be at risk of reoffending. . . . If promulgated and administered indiscriminately, a regime of collateral consequences may frustrate the chance of successful re-entry into the community, and thereby encourage recidivism.
\textit{Am. Bar Ass’n, ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons} 8-10 (3d ed. 2003) [hereinafter \textit{Collateral Sanctions Standards}]. See, e.g., Attorney General Eric H. Holder, Jr., Speech at the European Offenders Employment Forum (Oct. 10, 2010), available at http://www.justice.gov/iso/opa/ag/speeches/2010/ag-speech-101008.html (“If having a job is central to successful reentry, then it is no wonder that half of all released prisoners will be reincarcerated within three years.”); Andrew von Hirsch & Martin Wasik, \textit{Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework}, 56 \textit{Cambridge L.J.} 599, 605 (1997) (“The more that convicted persons are restricted by law from pursuing legitimate occupations, the fewer opportunities they will have for remaining law abiding.”).
\item [9.] \textit{Padilla}, 130 S. Ct. 1473 (2010).
\item [10.] \textit{Id.} at 1481 (“We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under \\
\item [12.] See, e.g., Stephanos Bibas, \textit{Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection} 40 (Univ. of Pa. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 10-33), available at http://lsr.nelleco.org/cgi/viewcontent.cgi?article=1344&context=upenn_wps&sei-redir=1#search=%22Regulating+the+Plea-Bargaining+Market:+From+Caveat+Emptor+to+Consumer+Protection%22 (“The Sixth Amendment test should be not whether a consequence is labeled civil or collateral, but whether it is severe enough and certain
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Padilla, competent defense lawyers will now advise their clients about these penalties and incorporate them into negotiations over the disposition of criminal charges. Judicious prosecutors will take steps to protect against post-conviction challenges based on consequences no one was aware of, and may be more open to alternative dispositions that do not result in a conviction record. Courts may no longer declare certain consequences of conviction to be “none of our business” just because they do not control their imposition.13

If the effects of the Padilla decision will initially be felt primarily at the front end of a criminal case, as pleas are negotiated and sentences imposed, Padilla’s long arm will in time extend to mechanisms for relieving collateral sanctions.14 In finding a constitutional obligation to warn, the Court emphasized that deportation is a “virtually inevitable” consequence of a guilty plea since Congress has eliminated judicial and administrative mechanisms for discretionary relief.15 And, the availability of relief from collateral sanctions in enough to be a significant factor in criminal defendants’ bargaining calculus.”); The Supreme Court, 2009 Term—Leading Cases: Constitutional Law: Criminal Law and Procedure: Six Amendment—Effective Assistance of Counsel, 124 Harv. L. Rev. 199, 199 (2010) (“The Court implicitly rejected the current approaches to determining Strickland’s reach and created a new category of covered topics that cannot reasonably be restricted to the deportation consequence alone.”); Gabriel J. Chin & Margaret Colgate Love, Status as Punishment: A Critical Guide to Padilla v. Kentucky, 25 Crim. Just. 21, 24 (2010) (noting that many other consequences “follow automatically from conviction and [are] thus tied directly to the criminal case, they are important to the individuals involved, and they may therefore drive plea bargains”).

13. While the “direct v. collateral” distinction appears to have survived Padilla insofar as it defines a court’s duty to advise a defendant about the consequences of a guilty plea, see, e.g., Smith v. State, 287 S.E.2d 177, 189 (Ga. 2010) (immigration consequences); People v. Gravino, 928 N.E.2d 1048, 1049 (N.Y. 2010) (sex offender registration and residency requirements), a court’s institutional interest in securing guilty pleas is reason enough to be concerned with defense counsel’s compliance with its obligations under the Sixth Amendment. In this regard, the ABA Criminal Justice Standards require a court “to ensure, because accepting a plea of guilty, that the defendant has been informed of [applicable] collateral sanctions. . . . [b]y confirming on the record that defense counsel’s duty of advisement . . . has been discharged.” See Collateral Sanctions Standards, supra note 8, at Standard 19-2.3(a).

14. The term “collateral sanctions” as used in this Article means a penalty or disability imposed by operation of law as a result of an individual’s status as a convicted individual, following the definitions in the Collateral Sanctions Standards and the Uniform Collateral Consequences of Conviction Act. See Collateral Sanctions Standards, supra note 8, at Standard 19-1.1(a); Uniform Collateral Consequences of Conviction Act § 2(2) (2010) [hereinafter UCCCA], available at http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010final_amends.pdf. A “collateral sanction” is to be distinguished from a “discretionary disqualification,” also a status-generated penalty but one that is imposed after an individualized inquiry by an agency or court. See Collateral Sanctions Standards, supra note 8, at Standard 19-1.1(a)-(b) (“Definitions”); UCCCA §§ 2(2), (5). “Collateral sanctions” and “disqualifications” together comprise “collateral consequences.” See UCCCA § 2(1).

15. See Padilla, 130 S. Ct. at 1478. The Padilla Court’s characterization of deportation as “intimately related” to the criminal process and “most difficult” to divorce from the conviction itself appears to be derived from the fact that deportation is “nearly an automatic result” of
post-conviction proceedings has been held relevant in constitutional challenges to their imposition in the first instance. But even if the availability of relief does not affect the Sixth Amendment analysis, competent representation requires defense lawyers not only to know about what collateral sanctions apply, but also how to avoid or mitigate them, including at sentencing itself. Prosecutors and judges need this information too, in order to understand their own obligations to core principles of proportionality and fairness. These principles must apply to status-generated sanctions that affect significant private interests and that otherwise will last a lifetime, particularly where they bear no reasonable relationship to the underlying criminal conduct.

Finally, policy-makers need to know if status-generated sanctions are a form of reasonable regulation or simply additional punishment that impairs the ability for self-support in the legitimate economy and perpetuates social alienation. If status-generated sanctions do more to increase crime than to prevent it, there must be a way to relieve them. The law must, in a word, be willing and able to recognize “redemption from the mark of crime.”

conviction. Id. at 1481. If a collateral penalty is less certain, and if relief is readily available, less may be expected of a lawyer in terms of warning the client about it, and more may be required to show that the client was prejudiced by the lawyer’s performance, in either case failing the test of constitutionally ineffective assistance of counsel set forth in Strickland v. Washington, 466 U.S. 668 (1984).

16. See State v. Letalien, 985 A.2d 4, 31 (Me. 2009) (“The retroactive application of the lifetime registration requirement and quarterly in-person verification procedures of SORNA of 1999 to offenders originally sentenced subject to SORA of 1991 and SORNA of 1995, without, at a minimum, affording those offenders any opportunity to ever be relieved of the duty as was permitted under those laws, is, by the clearest proof, punitive, and violates the Maine and United States Constitutions’ prohibitions against ex post facto laws.”). Doe v. Sex Offender Registration Bd., 882 N.E.2d 298, 308 (Ma. 2008) (“[T]he retroactive imposition of the registration requirement without an opportunity to overcome the conclusive presumption of dangerousness that flows solely from Doe’s conviction, violates his right to due process under the Massachusetts Constitution.”). The Padilla Court pointed out, respecting pre-1996 immigration law, that “preserving the possibility of discretionary relief” from deportation “would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.” Padilla, 130 S. Ct. at 1483 (quoting INS v. St. Cyr, 533 U.S. 289, 323 (2001)). It also noted that the Sixth Amendment had been held applicable to requests for relief from deportation under the JRAD authority that existed prior to 1990, on the theory that seeking relief from deportation was “part of the sentencing” process. See id. at 1480 (citing Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986)).

17. See, e.g., Schware v. Bd. of Bar Exam’rs, 353 U.S. 232, 239 (1957) (noting that while states may establish qualifications for entry into particular professions, “any qualification must have a rational connection with the applicant’s fitness or capacity to practice”).

18. See Alfred Blumstein & Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, 47 CRIMINOLOGY 327, 327 (2009) (proposing that “some point in time is reached when a person with a criminal record, who remained free of further contact with the criminal justice system, is of no greater risk than a counterpart of the same age—an indication of redemption from the mark of crime”).
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The premise of this Article is that the goal of the criminal justice system must be the full and early reintegration of a convicted person into free society—with the same benefits and opportunities available to any other member of the general public—free of unwarranted collateral penalties and the stigma of conviction. This policy goal, which finds new legal support in the reasoning of the Padilla decision, can best be achieved by incorporating a relief mechanism into the scheme by which the penalty is imposed. Where a penalty is automatic upon conviction, requiring no further administrative action to be effective, relief ought to be the important responsibility of the legislature and the courts. An effective relief mechanism should come into play as early as the sentencing process itself to promote successful reentry, and it should also provide at some point for a fuller restoration of legal rights and social status. It must acknowledge and forgive the crime rather than attempt to conceal and deny it, if only because modern technology makes it hard to have confidence in expungement and sealing schemes.19

This Article argues that development of an effective mechanism for avoiding or mitigating status-generated penalties, along the lines described in the preceding paragraph, should be a priority for every U.S. jurisdiction interested in promoting successful offender reentry. It demonstrates that the relief provisions of the Uniform Collateral Consequences of Conviction Act (“UCCCA”)20 provide just such a mechanism. Part I sets the stage by telling the story of Darrell Langdon, a Chicago man whose status as a “convicted felon” rendered him ineligible for a job he had performed well for many years, but who was able to overcome this barrier with the help of a newly enacted Illinois law similar to the relevant provisions of the UCCCA. Part II reviews the dysfunctional state of relief mechanisms in most U.S. jurisdictions today and how they got that way. Part III describes the integrated approach to collateral consequences taken by the UCCCA, suggests how Darrell Langdon’s case would have fared in that framework, and concludes that the UCCCA provides a comprehensive and functional way of extending forgiveness and recognizing redemption, both essential capabilities of a mature justice system.


20. See generally UCCCA, supra note 14, §§ 10-11 (“Sections 10 and 11 create new mechanisms for relieving collateral sanctions imposed by law.”).
I. DARRELL LANGDON’S CASE:
A SECOND CHANCE STORY

At the time Darrell Langdon came to public attention in the sum-
mer of 2010 he had just been turned down for a job as a boiler room
engineer with the Chicago Public Schools (“CPS”), under a state law
barring anyone with a drug conviction from working in the public
school system.21  Langdon’s 1985 conviction for possession of cocaine
was relatively minor, and he had gotten a court order relieving him of
this employment bar.  Still, CPS refused to give him a chance.  It was
Langdon’s good fortune that Dawn Turner Trice of the Chicago Trib-
une took an interest in his story: “Darrell Langdon made a mistake
more than two decades ago.  A Cook County judge believes Langdon
deserves a second chance.  Until Monday, Chicago Public Schools of-
ficials didn’t—but, in response to my questions, they’re taking a sec-
ond look.”22

What made Langdon’s case unusual was that he had worked suc-
cessfully for CPS years before.  In fact, he had been employed by CPS
in 1985 when he was caught with a half gram of cocaine and sentenced
to six months’ probation.  He had been able to keep his job, but strug-
gled with his addiction.  Finally, in 1988, CPS sent him to its employee
assistance program for drug treatment.  It was a turning point.  Lang-
don later reported, “I did so well that I was eventually called on to tell
my story and help others with their addictions.”23

Langdon’s recovery was remarkable, and he became a responsi-
ble family man and well-respected member of his community.  He
continued to work for CPS until 1995, when he was laid off along with
hundreds of other public school employees as part of an agency re-

21. The facts of Darrell Langdon’s case in this section are taken from articles about his case
that appeared in the Chicago Tribune, cited herein; from Langdon’s petition to Cook County
Circuit Court for a “Certificate of Good Conduct,” a copy of which is in the author’s files; and
from the author’s interview with Beth Johnson of Cabrini Green Legal Aid, who represented
Langdon in the certificate proceeding.

22. See Dawn Turner Trice, CPS: Good Conduct Certificate Not Good Enough, CHI. TRIB.,
cps-0728-20100728_1_cps-boiler-room-second-chance.

23. Id. The story of Langdon’s remarkable recovery, including gaining custody of his two
children and raising them as a single parent when their mother could not conquer her own drug
addiction, consistent attendance at AA meetings and eventual sponsorship of newcomers to the
program, and steady support for friends and family over the years despite considerable adversity,
is detailed in papers filed with the court in support of his petition for a Certificate of Good
Conduct. The letters of support from employers, co-workers, friends, and family members attest
to his many talents and capacity for hard work, to his resilience and generosity, and to his success
as a parent, as a family man, and as a friend.
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For the next thirteen years, Langdon worked in his own mortgage business until the real estate market downturn made it necessary for him to return to his old career as a building engineer. He was hired into the maintenance department of a local hospital, but decided to reapply for his old job with CPS because the pay was better, disclosing his drug conviction in his job application. By that time Langdon had been sober for two decades, raised two sons as a single parent, and had had no further trouble with the law. CPS interviewed him three times over the next sixteen months, and gave him various tests to determine his engineering aptitude and skills. In January 2010, he was told he had been hired, pending a background check. A few days later, however, after he had signed the necessary paperwork to start work, CPS informed him that he was ineligible for employment because of a provision in the Illinois School Code prohibiting people convicted of a long list of crimes, including felony drug offenses, from working in the school system in any capacity.24

Determined to get his old job back, Langdon sought help from Cabrini Green Legal Aid, where he found an advocate who was familiar with various relief provisions in Illinois law. Beth Johnson advised him against trying for a governor’s pardon because it would take too long to get his request considered.25 While Langdon was eligible to have his conviction sealed, this relief would not benefit someone applying for school employment.26 However, Johnson knew that Illinois courts had recently been authorized to issue a Certificate of Good Conduct (“CGC”) that lifted statutory barriers to employment, including those applicable to employment at CPS, for someone deter-

24. The law in question has barred employment of most drug offenders in Illinois public schools since the early 1980s, and would have required Langdon’s termination if it had been enforced against Langdon at the time of his conviction in 1985. See 105 Ill. Comp. Stat. 5/34-18.5 (West 2011). CPS may not have known about the conviction, or it may have looked the other way.


26. Under Illinois law, with certain exceptions, an expunged or sealed record “may not be considered by any private or public entity in employment matters, certification, licensing, revocation of certification or licensure, or registration.” See 20 Ill. Comp. Stat. 2630/12(a). Employment in the public schools is one of the exceptions to the sealing law. Id. at 2630/13(a) (excepting from sealing protection employment for which a background check is required by state or federal law).
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mined by a court to be “a law-abiding citizen and . . . fully rehabilitated.”27 With only one conviction so long ago and a strong record of rehabilitation, Langdon was a likely candidate for a CGC. Johnson filed a petition seeking this relief in Cook County Circuit Court, attaching letters attesting to Langdon’s two decades of sobriety and dedicated service to others in recovery through Alcoholics Anonymous, his steadfast commitment as a parent despite many difficulties, the respect and affection of his neighbors and business associates, and even his talents as a cook. At a hearing before Judge Paul Biebel, Langdon spoke movingly about his journey to sobriety in the 1980s, and how he had maintained his sobriety over the years. Satisfied that Langdon met the statutory standard,28 Judge Biebel issued him the certificate. It was the first Certificate of Good Conduct that Judge Biebel had issued under his new authority.29

This should have been the end of Langdon’s story, since CPS was no longer legally barred from hiring him. But Langdon ran into that bureaucratic aversion to risk that people with a criminal record fre-

27. See 730 ILL. COMP. STAT. 5/5-5.5-25(a-6). As originally enacted into law in 2003 under the sponsorship of then-Illinois Senator Barack Obama, the CGC had no clear legal effect other than to evidence an individual’s rehabilitation, and was available only upon application to the Illinois Prisoner Review Board. Under 2009 amendments to the Illinois Unified Code of Corrections, a circuit court is authorized to issue a CGC “to relieve an eligible offender of any employment bar.” Id. Persons convicted of certain serious violent felonies are ineligible, as are persons with more than two felony convictions. See 730 ILL. COMP. STAT. 5/5-5.5-5. Issuance of a CGC does not preclude consideration of the conviction by a court or administrative agency, and does not limit access to a criminal record, but it does provide an employer some protection from liability: “An employer is not civilly or criminally liable for an act or omission by an employee who has been issued a certificate of good conduct, except for a willful or wanton act by the employer in hiring the employee . . . .” See id. at 5/5-5.5-25(c). Under another provision of the same law, convicted persons may also apply for a Certificate of Relief from Disabilities ("CRD") to qualify for a variety of professional licenses. See id. at 5/5-5.5-15. As originally enacted in 2003, the certificate program applied only to first felony offenders, and both the CRD and CGC had a more limited legal effect. Also, the Illinois Prisoner Review Board had authority under the law as originally enacted, along with courts, to issue both types of certificates.

28. In order to make the required determination, a court must hold a “rehabilitation review” and make “a specific finding of rehabilitation with the force and effect of a final judgment on the merits . . . .” 730 ILL. COMP. STAT. 5/5-5.5-30(a).

29. When interviewed by the author in December 2010, Judge Biebel reported that he had issued only four CGCs and a handful of CRDs since the passage of the 2009 law, and a handful of CRDs. Interview with the Honorable Paul Biebel, Judge, Cook County Criminal Court (Dec. 1, 2010). Judge Biebel stated that to the best of his knowledge he is the only judge in the State of Illinois who has issued any certificates at all in the seven years of the program’s existence. Id. The Prisoner Review Board issued a total of forty-four CGCs and 121 CRDs between January 2004 and January 2010, when its authority under the certificate program ended. Author’s conversation with Ken Tupy, Clemency Specialist, Ill. Prisoner Review Bd. (Sept. 2010).
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As Trice reported, “the law still gives the district the final word” and “[u]ntil I began asking about Langdon’s case, that word had been a firm ‘No.’” A CPS official explained to Trice that “we have to ensure we’re hiring people who won’t put our children in jeopardy,” though the official was unable to explain how the decision had been reached in Langdon’s case. But Trice’s interest in Langdon’s case evidently provided the necessary encouragement for CPS to consider his application more seriously. Eight weeks after her article appeared in the Chicago Tribune, CPS offered Langdon his old job back. During that period, CPS had developed a new protocol for handling employment applications from people with a criminal record, and Langdon satisfied its eligibility criteria: his conviction was a lower-grade felony more than seven years in the past, and he had been awarded a Certificate of Good Conduct by an Illinois court. The facts of Langdon’s own case evidently had established the baseline against which all future applicants for employment at CPS would be measured.

In many ways Darrell Langdon’s story is fairly typical in terms of the difficulties faced by people with a criminal record seeking employment: even where there are no disqualifying legal barriers, and even with convincing evidence of ability and good character, they may be excluded without rational explanation. In other ways Langdon’s story is happily atypical: he had a skilled advocate for his cause, a legal system that was well-suited to his particular need, and a sympathetic advocate.

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30. See, e.g., Rodriguez & Emsellem, supra note 6, at 1 (“[B]ased on a survey of online job ads posted on Craigslist, major companies as well as smaller employers routinely deny people with criminal records any opportunity to establish their job qualifications.”).
33. Id. Langdon told Trice: “I will be one of the best boiler room engineers they’ve ever had . . . . When I go to work, I go looking for things to do. Boiler rooms are normally dingy, and I clean them up and fix stuff that hasn’t worked for years. They won’t regret this decision.” Id. (internal quotations omitted).
34. A recent study has shown that “a criminal record has a significant negative impact on hiring outcomes, even for applicants with otherwise appealing characteristics,” and that “the negative effect of a criminal conviction is substantially larger for blacks than for whites.” See Devah Pager & Bruce Western, Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men 4 (2009), available at http://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf; see also Harry J. Holzer, Steve Raphael & Michael A. Stoll, Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and Their Determinants, in The Consequences of Mass Incarceration on Families and Communities 205-46 (Mary Pattillo-McCoy et al. eds., Russell Sage Foundation 2004).
and determined reporter to tell his story and to shame a risk-averse employer into doing the right thing. Most people are not so lucky. But Darrell Langdon did more than simply get his old job back. He smoothed the way at CPS for others coming after him, by encouraging the agency to develop a more enlightened way of dealing with convicted persons who apply to work there.

Darrell Langdon’s case also shows how useful the Certificate of Good Conduct may be for Illinois employers as well as aspiring employees, as evidenced by its incorporation directly into CPS’s hiring guidelines. The CGC is evidence that there has been a thorough review and assessment of an applicant’s character by a respected jurist, and it specifically limits an employer’s liability for any action taken by an employee who possesses one.35 The system worked, at least for Darrell Langdon.36 One can only hope that it will not require intervention by the Chicago Tribune for other government agencies in Illinois to do the same right thing.

Having told the good news of Darrell Langdon’s encounter with the Chicago Public Schools, and the promising efforts by the State of Illinois to craft a functional relief system, it is time to describe the less propitious legal terrain in most other U.S. jurisdictions.

II. THE FAILURE OF FORGIVENESS IN AMERICA

A. Forgiving and Forgetting Before 1984

For the first 150 years of America’s existence as a nation, restoration of rights and reputation after conviction was accomplished through the mechanism of executive pardon, that unruly patriarch of modern early release and mitigation procedures.37 In the 1950s, utilitarian law reformers set out to create a substitute for pardon, which they considered inherently arbitrary and subject to corrupt influ-

35. See 730 ILL. COMP. STAT. 5/5-5.5-25(c) (West 2011).

36. The shortcomings of the CGC relief scheme in different factual circumstances are discussed in Part III, infra. Notably, it offers no immediate relief from a collateral sanction, as Langdon himself might have needed in 1985 had CPS learned about his conviction when it occurred. The fact that CPS apparently did not learn about it was fortunate for Langdon, since by all rights the conviction should have resulted in his dismissal. Id. At the present time, the only state in the country that offers relief from legal disabilities as early as sentencing is New York, which offers it only to misdemeanants or first felony offenders not sentenced to prison. See CORR. LAW § 703-b (McKinney 2010). All others must satisfy an eligibility waiting period of one to five years. Id.

37. See generally W.H. Humbert, The Pardoning Power of the President 95-133 (1941) (documenting frequency of pardoning in 19th century); Love, The Twilight of the Pardon Power, supra note 3, at 1172-93 (discussing presidential pardoning from 1789 to 1980).
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Like the utilitarian philosophers two centuries before, they thought clemency “a virtue which ought to shine in the code, and not in private judgment.”

A handful of states provided for automatic restoration of civil rights upon completion of a sentence, but this did not provide sufficient confirmation of good character to overcome occupational and professional licensing restrictions. And so these reformers set out to build a more reliable legal framework to limit collateral legal penalties and make it easier for those convicted of crimes to re-establish their good name in the community.

They believed that “[a] theory of law which withholds the finality of forgiveness after punishment is ended is as indefensible in logic as it is on moral grounds.” And as a practical matter, they were convinced that giving people a chance to clear their record and regain their status in the community was the best way to reduce recidivism. It was not enough simply to restore legal rights; they would also have to address the more subtle punishment represented by societal prejudice. The reformers believed that the courts were better suited than executive officials to manage the mechanism by which rehabilitated individuals could be returned to society’s good graces.

In 1956, the National Conference on Parole, held under the joint auspices of the Attorney General of the United States, the United States Board of Parole, and the National Council on Crime and Delinquency, called for the abolition of laws depriving convicted persons of civil and political rights, describing them as “an archaic holdover from early times.” More radically, the conference called for the adoption of laws empowering a sentencing court, at the point of discharge from sentence or release from imprisonment, “to expunge the record of conviction and disposition, through an order by which the individual...”

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38. See Kathleen Dean Moore, Pardons: Justice, Mercy, and the Public Interest 35-45 (1989) (describing the utilitarian critique of pardon).
42. See, e.g., Aidan R. Gough, The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status, 1966 Wash. U. L.Q. 147, 148 (1966) (“There is considerable evidence to indicate that the failure of the criminal law to clarify the status of the reformer impedes the objective of reintegrating him with the society from which he has become estranged. The more heavily he bears the mark of his former offense, the more likely he is to reoffend.”).
43. Love, Starting Over with a Clean Slate, supra note 40, at 1707-08.
shall be deemed not to have been convicted.”45 The concept of expungement or sealing of convictions had developed in the 1940s in connection with specialized state sentencing schemes for juvenile offenders, whose susceptibility to antisocial conduct was thought to be temporary and who were therefore considered “easier to rehabilitate than adults.”46 Already, federal law included a “clean slate” concept for certain youthful defendants between the ages of eighteen and twenty-six, making them eligible to have their convictions “set aside” if the court released them early from probation.47 The federal courts could never agree about the effect of a “set-aside,”48 and states took varying approaches in allowing access to and use of records that had been “expunged” or “sealed.”49 Practitioners and scholars debated the relative merits of forgiving and forgetting as a criminal justice strategy.50

45. Id. at 137.

[Congress'] primary concern was that rehabilitated youth offenders be spared the far more common and pervasive social stigma and loss of economic opportunity that in this society accompany the “ex-con” label. While the legislative history offers little guidance as to the reasoning behind the drafters’ choice of terminology, it is crystal-clear in one respect: they intended to give youthful ex-offenders a fresh start, free from the stain of a criminal conviction, and an opportunity to clean their slates to afford them a second chance, in terms of both jobs and standing in the community.

606 F.2d 1226, 1234-35 (D.C. Cir. 1979).
48. Compare Webster, 606 F.2d at 1244 (holding that record of YCA conviction that has been set aside must be sealed, and the government must respond in the negative to all inquiries about the offense), and United States v. Purgason, 565 F.2d 1279, 1280 (4th Cir. 1977) (holding that a felony conviction that has been set aside cannot constitute be predicate for firearms felon in possession prosecution), with Bear Robe v. Parker, 270 F.3d 1192, 1195 (8th Cir. 2001) (finding that a set-aside conviction may serve as a basis for termination of employment), and United States v. McMains, 540 F.2d 387, 389 (8th Cir. 1976) (holding that the YCA set-aside provision does not authorize expungement).
49. The term “expungement” is not defined in the same way from state to state, and may mean anything from a limited withdrawal of records from public access to actual physical destruction of the record. See MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 39-61 (2006) [hereinafter RELIEF] (collecting state laws). In 1983, the American Bar Association proposed that expungement should “annul[] the fact of conviction and, thus, invalidate[] adverse actions taken . . . on the basis of the conviction.” ABA STANDARDS FOR CRIMINAL JUSTICE: LEGAL STATUS OF PRISONERS Standard 23-8.2 (Supp. 1986) [hereinafter LSOP STANDARDS].
In 1962, the Model Penal Code ("MPC") rejected the idea of concealment on which the expungement approach was premised, and instead proposed that the sentencing court should be responsible for certifying that a defendant had paid his debt to society. Section 306.6 of the MPC proposed a two-tiered procedure by which the court would relieve "disqualifications and disabilities" upon satisfaction of the sentence or shortly thereafter, and later vacate the record of conviction after satisfying itself that the defendant had "led a law-abiding life" for some period of time. In this paradigm, as long as the person did not commit another crime, collateral penalties would end when the court-imposed sentence did. But even the fuller "vacatur" relief would not preclude "proof of the conviction as evidence of the commission of the crime" if relevant to the exercise of official discretion, or "justify a defendant in stating that he has not been convicted of a crime, unless he also calls attention to the order." The Model Penal Code judicial vacatur was in concept and function similar to an executive pardon.

Over the next twenty years, national commissions and professional organizations urged attention to the problem of collateral consequences and discrimination based on past crimes. By the early 1980s, there appeared to be a "consensus that arbitrary restrictions on the rights of former offenders should be eliminated," but no single way of accomplishing this could command general support. In state legislatures, efforts were made to dismantle the statutory apparatus of

51. See Love, Starting Over with a Clean Slate supra note 40, at 1711.
52. Section 306.6 and other relief provisions of the Model Penal Code are discussed in detail in Love, Starting Over with a Clean Slate, supra note 40, at 1711-13. They were not widely adopted in the states.
53. MODEL PENAL CODE § 306.6(3)(d), (f) (2009). The MPC's vacatur is similar in some respects to the process of "rehabilitation" in the French Code of Criminal Procedure, described by Mirjan Damaska in his 1968 survey of collateral consequences worldwide: the French Code process "vacates the judgment of conviction and puts an end to all disqualifications flowing therefrom." Mirjan R. Damaska, Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study (Part 2), 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 542, 565 (1968). Under French law, a vacated conviction is not removed from the criminal records. Id. On the other hand, unlike the MPC proposal, under French law a "cancelled judgment cannot be used as a basis for adjudication of recidivism." Id.
56. See Love, Starting Over with a Clean Slate, supra note 40, at 1713-15 (discussing various proposals to restore civil rights and address the problem of licensing restrictions and employment disqualifications).
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civil death,\textsuperscript{57} to enact nondiscrimination laws applicable to employment and licensing,\textsuperscript{58} and to devise diversionary dispositions that would avoid a conviction record \emph{ab initio}.\textsuperscript{59} A number of courts struck down on constitutional grounds laws excluding convicted felons from certain occupations.\textsuperscript{60} Some states enacted expungement and sealing statutes, whose aim was to conceal the conviction, while others adopted the more transparent set-aside approach of the Model Penal Code, whose aim was to undo it. In either case, these laws frequently authorized recipients to deny they had ever been convicted. Still other states stuck with the traditional remedy of pardon, whose aim generally was to forgive it.\textsuperscript{61} In 1983, the American Bar Association appeared to come down in favor of expungement, but offered a functional definition of that term that made it look suspiciously like a set-aside.\textsuperscript{62} The ABA could be forgiven this bit of legerdemain since it

\begin{itemize}
  \item \textsuperscript{57} In 1973, the National Advisory Commission reported that thirteen states still regarded a person convicted of a felony to be civilly dead and thus prohibited from contracting or from bringing or defending a lawsuit. See \textit{NAT'L ADVISORY Comm'N, supra} note 54, at 592; see also Note, \textit{Methods of Circumventing the Civil Disabilities of Convicts}, \textit{48 YALE L.J.} 912, 915-16 (1939) (describing judicial efforts to limit laws representing “an unwarranted survival of medieval moral and political beliefs”). By the mid-1970s, most state laws limiting a convicted person’s access to courts had been invalidated or repealed. See Note, \textit{Civil Death Statutes and the Convict’s Right to Bring Civil Suit}, \textit{4 CAP. U. L. REV.} 123, 125 (1975); see also Love, \textit{Starting Over with a Clean Slate, supra} note 40, at 1714-15 nn.35-42. In England and other parts of the world, there was a similar trend toward replacing automatic (punitive) disqualifications with discretionary (utilitarian) case-by-case disqualifications depending upon the nature of the crime and extent of a person’s rehabilitation. See Damaska, \textit{supra} note 53, at 567.
  \item \textsuperscript{58} By 1982, “at least nine” states had enacted some form of protection against automatic disqualification from employment and licensing based solely on a criminal conviction. See H.R. Rep. No. 98-1017, at 134 n.6 (citing laws from Connecticut, Florida, Hawaii, Minnesota, New York, South Dakota, Washington, and Wisconsin); see also \textit{RELIEF, supra} note 49, at 62-84. But no state went as far as the English Rehabilitation of Offenders Act of 1974, under which a conviction was “spent” and the convicted person “free of any handicap” after a specified period of crime-free behavior. See \textit{MOORE, supra} note 38, at 224. England has not been immune from the recent trend toward more restrictive laws. See Hirsch & Wasik, \textit{supra} note 8, at 603 (reporting in 1997 on the “clear trend” in English law for employment disqualifications “to increase in number and complexity”).
  \item \textsuperscript{59} See \textit{RELIEF, supra} note 49, at 49-59.
  \item \textsuperscript{61} See \textit{RELIEF, supra} note 49, at 39-49. Pardon was made the basis for judicial expungement in some states. \textit{Id.} at 58-60.
  \item \textsuperscript{62} \textsc{LSOP Standards, supra} note 49, at Standard 23-8.2 (“Each jurisdiction should have a judicial procedure for expunging criminal convictions, the effect of which would be to mitigate or avoid collateral disabilities.”). The commentary to Standard 23-8.2 states that expungement “in
confidently predicted that collateral sanctions were on their way to extinction: “As the number of disabilities diminishes and their imposition becomes more rationally based and restricted in coverage, the need for expungement and nullification statutes decreases.”

The high water mark of reform efforts came in 1984, when the House Committee on the Judiciary approved a federal sentencing bill whose chapter on “Restriction on Imposition of Civil Disabilities,” had the avowed goal of “restor[ing] the convicted person to the same position as before the conviction.” It did this by prohibiting “unreasonable” restrictions on eligibility for federal benefits and programs, and for state or federal employment, based on a federal conviction; and by extending the judicial “set-aside” provisions of the Federal Youth Corrections Act (“YCA”) to all federal first offenders. It settled the judicial disagreement about the legal effect of a “set-aside” order under the YCA, specifically providing that such an order restores all rights and privileges, seals the criminal record for most purposes, and “grants the offender the right to deny the conviction.” It dealt rather fecklessly with the ticklish problem of candor by providing that an individual who is granted a set-aside “is not guilty of an offense for failure to admit or acknowledge such conviction.” In the end, 1984 turned out to be the tipping point when federal sentencing reform took a very different course with the passage of the rival Senate bill as the Sentencing Reform Act of 1984. Rather than extend

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63. Id. The LSOP Standards urged repeal of “archaic” laws and rules requiring the imposition of collateral penalties and disabilities, Standard 23-8.1, and adoption of procedural protections in connection with imposition with any that remained “to assure that there is a determination in each individual case that the disability or penalty is necessary to advance an important governmental or public interest.” Id. at Standard 23-8.3(a). Further, any disability or penalty imposed pursuant to this process should be time-limited, after which the person should be entitled to have its appropriateness reconsidered. Id. at Standard 23-8.3(c). The Legal Status of Prisoners Standards urged repeal of restrictions on voting rights; judicial and domestic rights; property and financial rights, including social security and other public benefits, insurance, credit; and public and private employment and licensing. See id. at Standard 23-8.4-8.8.

64. See H.R. REP. NO. 98-1017, at 133-34 n.2 (1984) (pointing out that very little had been done at the federal level to relax restrictions on persons with convictions, and listing numerous statutes disqualifying such persons from employment or licenses); see also id. at 147.

65. Id. at 26-27.

66. Id. at 138-42.

67. Id. at 139 (approving the interpretation of the YCA in Doe v. Webster, see discussion supra note 47, at 1234-35). See also cases cited supra note 48.

68. Id. at 142.

or clarify the YCA, Congress repealed it altogether.\footnote{70} No proposal for restoration of rights to persons with a federal conviction has gotten as far as a committee hearing in Congress since that time.

B. Collateral Consequences Come Roaring Back

For twenty years after the passage of the Sentencing Reform Act of 1984, the official position of the federal government was that criminals were to be labeled and segregated for the protection of society, not reclaimed and forgiven.\footnote{71} States were encouraged to follow suit.\footnote{72} Along with increased reliance on prison to carry out militant anti-crime policies, during the 1980s and 1990s new collateral sanctions and disqualifications were introduced into state and federal codes to augment and reinforce what remained of the old.\footnote{73} Concerns about security after the terrorist attacks of 9/11 made background checks routine, and conviction became a common sorting and risk-management device.\footnote{74} The immutability of criminal offenders’ degraded legal status gave social sanction to their exclusion from many benefits and opportunities, ranging from employment and licensing to housing and public benefits.\footnote{75} Disqualifications once reserved for those convicted of felonies were extended to misdemeanants.\footnote{76} De-
ffered adjudication laws enacted in the 1970s, whose purpose was to enable certain defendants to avoid a conviction record, were overridden by laws penalizing guilty pleas even if charges were later dismissed.77

At the federal level, Congress took collateral consequences to a new level of irrationality by making a single felony drug conviction grounds for automatic exclusion from financial and other assistance under the federal social safety net.78 Discretionary decision-makers at all levels of government were permitted and even encouraged by federal laws and policies to bar people with a record from a variety of benefits and opportunities, including public housing and even access to government buildings, without regard to the actual risk posed.79 Federal laws and rules encouraged states to apply exclusionary policies in their own hiring practices and in those of their private contractors and grantees, even with new evidence that recidivism sharply declines after a period of law-abiding conduct.80 Many of the legal barriers to employment in major areas of the economy (health care, education, transportation, child- and elder-care) were categorical and permitted no exceptions.81 Only the military, ever pragmatic, found it

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80. See Blumstein & Nakamura, supra note 18; see also Megan Kurlychek, Robert Brame & Shawn Bashway, Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Recidivism?, 5 Criminology & Pub. Pol’y 483 (2006) (establishing that eighteen-year-olds with conviction records had a substantively similar probability of being arrested as those without a record after having no contact with the criminal justice system for six to seven years).

81. See generally Internal Exile, supra note 79 (cataloguing federal collateral consequences).
expedient to relax its restrictions against hiring and contracting with convicted persons.\footnote{82. See 10 U.S.C.A. § 2408(a) (1996). Persons convicted of fraud or any felony arising out of a contract with the Department of Defense are prohibited for a period of “not less than five years after the date of conviction” from working in a management or supervisory capacity with a defense contractor, or from serving on the board of directors or acting as a consultant for any company that is a defense contractor; waiver prior to five years available from Secretary of Defense “in the interests of national security.” See id. Persons convicted of a felony and actually incarcerated for a period of not less than one year are ineligible for a Department of Defense security clearance; waiver may be available “if there are mitigating factors.” 10 U.S.C. §§ 986 (c)(1), (d).}

Discrimination based on criminal record also pervaded the private sector. By the first decade of the 21st century, most private employers were running routine background checks on current and prospective employees,\footnote{83. According to a survey published in 2010 by the Society of Human Resources Management, ninety-two percent of their members perform criminal background checks on some or all job candidates, while seventy-three percent perform checks on all job candidates. See SOCIETY FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010); see generally Jacobs, supra note 1 (arguing that criminal records must be accurate).} under advice from their lawyers or insurers not to take a risk on hiring someone with a criminal record, no matter how dated or minor the conviction.\footnote{84. A recent study of online job ads posted on Craigslist in five major cities noted widespread use of blanket policies refusing to hire anyone with any type of conviction in entry-level jobs such as warehouse workers, delivery drivers, and sales clerks. See RODRIGUEZ & EMSELLEM, supra note 6; MAURICE EMSELLEM, NEW MODEL STATE POLICIES IMPROVE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH A CRIMINAL RECORD 4 (2010), available at http://www.nelp. org/page/-/SCLP/2010/ModelStateHiringProtections.pdf?mocdn=1 (announcement of job openings in data entry and clerical positions by Bank of America warned that applicants will not be considered if a background check reveals either a felony or misdemeanor conviction).} Many businesses hoping for a government contract or grant feared having to report that one of their key employees had a criminal record. Many volunteer opportunities were closed to someone with a record, no matter how minor or dated. Parents convicted years before of minor fraud or drug possession could be barred from volunteering at their children’s school or coaching their sports. Political candidates were reluctant to accept campaign contributions from a person with a record.

At the same time, new technologies made it almost impossible to hide a criminal record.\footnote{85. Dietrich, supra note 75, at 19; Jacobs & Crepet, supra note 19. It is now surprisingly easy to delve anonymously into other people’s past: a “Google” name search may bring up an uninvited offer from a private screening company to do a criminal background check on the person for a nominal fee.} After the terrorist attacks of 9/11, an entirely new industry devoted to background screening sprang up almost over-
night, and even now remains essentially unregulated. Quality control of public records systems is notoriously poor, and mistakes are common. While the Federal Trade Commission has taken the position that the Fair Credit Reporting Act (“FCRA”) covers the activities of private background screeners, in practice FCRA gives individuals little protection from mistakes or unwarranted invasions of privacy. Few jurisdictions have generally applicable laws prohibiting discrimination based on a criminal record, and those laws that do exist are costly to enforce and easy to avoid. Tentative efforts to extend the federal civil rights laws to discrimination based on criminal record appear to have stalled in the Equal Employment Opportunity Commission (“EEOC”), and in any event employers and staffing firms


89. In the 1970s, a number of states enacted statutes prohibiting disqualification from public employment and/or licensing based on conviction unless the offense conduct was somehow (usually “directly” or “substantially”) related to the job or license in question. These laws remain on the books, but most make no provisions for enforcement. See RELIEF, supra note 49, at 62-84. See also Sheri-Ann S.L. Lau, Employment Discrimination Because of One’s Arrest and Court Record in Hawai’i, 22 U. HAW. L. REV. 709, 722-35 (2000) (discussing different jurisdictional approaches to employment discrimination based on criminal records). Only three states (Hawaii, New York, and Wisconsin) prohibit discrimination based on conviction in public and private employment as part of their fair employment law; further and it is not clear that employment and licensing practices in those jurisdictions are a great deal more favorable to people with a criminal record than elsewhere. See, e.g., Thomas M. Hruz, The Unwisdom of the Wisconsin Fair Employment Act’s Ban of Employment Discrimination on the Basis of Conviction Records, 85 MARQ. L. REV. 779, 781-99 (2002) (arguing that the “substantial relationship” test has been easy for employers to evade). See also Lau, supra, at 711 (concluding that Hawaii’s nondiscrimination law restricts the efficient conduct of business).

90. The most recent guidance from the EEOC is now twenty years old. See Policy Statement on the Issue of Criminal Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982) (Feb. 4, 1987), in II EEOC Compliance Manual § 604 (explaining that because a policy denying employment based on criminal records has a disparate impact on African-Americans and Hispanics, such a policy would violate Title VII); Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (July 29, 1987), in II EEOC Compliance Manual App. § 604-B (ex-
appear to be either “unaware of civil rights and consumer protections for people with criminal records or indifferent to them.” There have been few recent court decisions invalidating employment barriers on constitutional grounds.

C. In Search of an Effective Relief Mechanism

The proliferation of exclusionary laws and hardening of social attitudes toward people with a criminal record has begun to generate push-back as the public safety implications of exclusionary employment and housing policies is becoming apparent. In search of systematic ways to encourage hiring of people with a criminal record, a few states and municipalities are experimenting with so-called “ban-the-box” schemes that postpone background checks until after the preliminary hiring decision has been made, on the theory that rejection is harder once a personal relationship has been formed. Others have attempted to impose limits on pre-employment inquiries, or enacted laws limiting employer liability for negligent hiring where certain precautions have been observed. Despite some progress, however, at the present time many employment opportunities remain off-limits for someone with a conviction, either by law or because decision-makers are reluctant to take a chance on someone with a spotty past.

Systemic remedies can only go so far. What is needed to supplement them is a way of officially recognizing an individual’s rehabilitation and good character, one that has both legal teeth and the hallmark of a respected official decision-maker, and that is generally

91. See Rodriguez & Emselfel, supra note 6, at 18. The Attorney General of New York has been unusually aggressive in enforcing state law protections regulating criminal background checks, and has reached settlements with three major employers (RadioShack, ABA Industries, and Aramark) and a private background screening firm (Choicepoint). Id. at 10-11 (including case citations).

92. See generally Aukerman, supra note 60 (noting the paucity of current case law providing constitutional protections for the employment rights of people with criminal records).


94. See Emselfel, supra note 84, at 19.

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accessible to ordinary people. Most existing relief mechanisms, whether intended to forgive or forget, fall short in some respect. If collateral penalties cannot be avoided in the context of the criminal case itself, through charge bargaining or other defense techniques,\(^{96}\) there are few opportunities to mitigate them afterwards. In almost every U.S. jurisdiction (including the federal system), post-conviction mechanisms for relieving collateral sanctions—e.g., pardon, expungement, and certificates of good conduct—are inaccessible or ineffective or both, having been narrowed and neglected over the three decades in which crime has been a central part of American politics. Only a very few jurisdictions have even attempted to implement a coherent statutory scheme by which a convicted person may fully regain the legal status of an ordinary citizen, much less their reputation in the community.\(^{97}\) Mostly, the picture is a hodge-podge of inaccessible and overlapping provisions, riddled with qualifications and exceptions, and of uncertain legal effect.

Pardon is still assigned an important role in the criminal justice system of almost every U.S. jurisdiction.\(^{98}\) Indeed, for the vast majority of adult criminal offenders, a pardon offers the only way of avoiding or mitigating the collateral consequences of conviction.\(^{99}\) Pardon is also the most effective way of overcoming legal barriers to jobs and other opportunities. Not only does pardon remove legal barriers, it is the “gold standard” for confirming good character, so that an employer, landlord, or lending institution will have some level of comfort

\(^{96}\) See Padilla, 130 S. Ct. at 1486 ("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."). See generally Michael Pinard, An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals, 86 B.U. L. REV. 623 (2003) (urging a holistic approach to defense advocacy to avoid collateral consequences); 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 (2005) (arguing that advocacy in the criminal case can mitigate collateral damage of criminal proceedings such as eviction or job loss).

\(^{97}\) Connecticut and New York are the states that come closest to having comprehensive relief schemes, the latter with administrative certificates and a strong non-discrimination law, and the former with a robust pardoning program, a state-wide ban-the-box scheme, and legal restrictions on consideration of conviction in public employment and licensing. See MARGARET LOVE & APRIL FraZIER, Certificates of Rehabilitation and Other Forms of Relief from the Collateral Consequences of Conviction: A Survey of State Laws 3-5 (2006) [hereinafter “Certificates of Rehabilitation”], available at http://meetings.abanet.org/webupload/comm.upload/CR209800/sitesofinterest_files/AllStatesBriefing.Sheet10106.pdf.

\(^{98}\) See RELIEF, supra note 49, at 18-38.

\(^{99}\) Id.
in dealing with an individual who has been deemed worthy of this high-level official forgiveness. Some states make pardon the occasion of expunging the record of conviction, so that a pardoned individual can genuinely claim to have a “clean slate.” Federal statutes give effect to state pardons in several important areas, including immigration, firearms privileges, and employment in federally regulated industries like transportation, banking, and real estate lending. A final unquantifiable advantage of pardon is the psychic benefit it bestows on people with a criminal record, who frequently seek pardon as a way of closing the door on a painful chapter of their past.

It is therefore unfortunate that pardon has become all but useless in the internet age, at least where the power is exercised by an elected official. Always considered somewhat haphazard and subject to improper influence, in the past thirty years pardon has become a phantom remedy in most states and in the federal system. With but a few conspicuous exceptions, governors and presidents are reluctant to use their constitutional power while in office while they can still be punished at the polls as “soft on crime,” or, worse, held responsible for some undiscovered vices or subsequent bad behavior of a beneficiary of their forgiveness. Indeed, in many jurisdictions pardon has been relegated to an end-of-term indulgence, and governors excused from their traditional year-round, every-day duties.

In short, pardon has become an anachronism. Even in those states that have a functioning pardon program, the application process can be complex and time-consuming, and its outcome difficult to pre-

100. Id. at 58-60.
101. For example, under regulations issued by the Transportation Safety Administration, conviction-related restrictions on a trucker’s license, an airport security pass, or a job as a longshoreman, do not apply at all to an individual who has been pardoned, no matter what the crime. See Office of Chief Counsel, U.S. Dep’t of Homeland Security, Legal Guidance on Criminal History Records Checks 4 (2004), available at http://www.tsa.gov/assets/pdf/CHRCMay04.pdf. TSA also recognizes state expungements, though only if they meet certain criteria. Id. HUD regulations applicable to mortgage lending licenses give full effect to state pardons, but not to state expungements. See 24 C.F.R. 3400.105(b)(2)(ii), 74 Fed. Reg 66548 (Dec. 15, 2009).
102. For example, the commission responsible for recommending reform of the federal criminal code reported in 1971 that the presidential pardon process “deals with the problem [of collateral consequences] not only haphazardly but also unfavorably to the poor and ignorant.” See Final Report of the National Commission on Reform of Federal Criminal Laws § 3505 cmt. 103. In the thirty-five years between 1945 and 1980, 6259 people were granted a presidential pardon, more than thirty-five of those who applied. In the next thirty years, only 1061 people were pardoned by the president, about eight percent of those who applied. See Presidential Clemency Actions by Administration: 1945 to Present, U.S. Dep’t of Just., http://www.usdoj.gov/pardon/actions_administration.htm (last updated Feb. 4, 2011). Pardoning in the states has experienced a similar decline. See Relief, supra note 49, at 18-38.
dict or understand. Pardon remains a useful relief mechanism only where the governor is supported in the exercise of the pardon power by other high-ranking officials, or is removed from the process entirely.\textsuperscript{104} And, considering the number of people with a felony conviction on their record—more than sixteen million by now\textsuperscript{105}—pardon is suitable for large-scale use only in those very few jurisdictions like Connecticut and Georgia where a pardon granted by the paroling authority is the functional equivalent of an administrative certificate of good conduct.\textsuperscript{106}

Expungement too has fallen victim to modern technology, and to understandable anxiety in the community about a remedy many see as premised on a lie.\textsuperscript{107} About half the states offer some sort of sealing or expungement of a conviction record coupled with restoration of rights, but this relief is usually available only to first felony offenders or misdemeanants.\textsuperscript{108} Moreover, sealed records generally remain available to a long list of public and private end-users deemed to have a special need to know about a person’s criminal history, like agencies and employers working with children, the elderly, and other vulnerable populations.\textsuperscript{109}

104. There are fewer than a dozen states where the pardons granted each year regularly exceed a few dozen. In four of these states, pardons are granted by an administrative board (Alabama, Connecticut, Georgia, South Carolina). In Delaware and Pennsylvania, the governor is supported in pardoning by a clemency board chaired by the lieutenant governor, and in Nebraska, Nevada, Minnesota, and Florida pardons are issued by a board of high officials of which the governor is a member. Other states where pardoning has remained fairly constant over the years are Arkansas, Ohio, and Oklahoma. In many states, however, the regularity and frequency of pardon grants depends entirely on the personal predilections of the incumbent governor. See, e.g., Rachel E. Barkow, The Politics of Forgiveness: Reconceptualizing Clemency, 21 FED. SENT'G REP. 153, 153–55 (2009) (discussing policies of Maryland Governor Robert Ehrlich, and Virginia Governor Tim Kaine). See generally RELIEF, supra note 49, 108-12 tbl.4 (“Characteristics of 13 Most Active Pardon Authorities”). The statistical information in this table has been updated and will be published in the Summer of 2011 on the website of the National Association of Criminal Defense Lawyers: www.nacdl.org.

105. See Uggen et al., supra note 4; see also SCHMITT & WARNER, supra note 4.

106. See CONN. GEN. STAT. §§ 54-130(c) (“absolute pardon”), 54-130(c) (2010) (“provisional pardon”); GA. COMP. R. & REGS. 475-3-.10(3) (pardon) and 6 (restoration of rights). Both the Connecticut and Georgia pardoning programs are discussed in RELIEF, supra note 49 (Connecticut and Georgia profiles).

107. If scholars and practitioners have always questioned as expungement as “too costly in both moral and legal terms,” see Marc A. Franklin & Diane Johnsen, Expunging Criminal Records: Concealment and Dishonesty in an Open Society, 9 HOFSTRA L. REV. 733, 735 (1981), nowadays the greater concern is that remedies premised on concealment ignore the technological advances of the information age. See, e.g., Pierre H. Bergeron & Kimberly A. Eberwine, One Step in the Right Direction: Ohio’s Framework for Sealing Criminal Records, 36 U. TOL. L. REV. 595, 609 (2005) (“[T]he individual may have to live the rest of his life with a cloud over his head and hope that his secret is never revealed.”). See also supra text accompanying note 19.


109. Id. at 113-24 (Table 5).
expanding list of individuals and entities given special access to criminal records has diminished the value of relief mechanisms that depend on concealment. It is at least misleading to encourage people whose convictions have been expunged or sealed to deny that they have ever been convicted, as do many 1970s-era laws that are still on the books.\footnote{New Jersey’s first offender expungement law is typical: if expungement is granted, the conviction or related proceedings are “deemed not to have occurred, and the [person] may answer any questions related to their occurrence accordingly,” except when applying for a job in the judicial branch or in law enforcement. \textit{N.J. STAT. ANN.} § 2C:52-27 (2011). When a Washington court “vacates” a conviction, “the fact that the offender has been convicted of the offense shall not be included in the offender’s criminal history for purposes of determining a sentence in any subsequent conviction, and the offender shall be released from all penalties and disabilities resulting from the offense. For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime.” \textit{WASH. REV. CODE} § 9.94A.640(1), (3) (2011).} If having a criminal record is not disqualifying, being caught in a lie about it probably is. Expungement does remain a desirable feature of diversion and deferred adjudication, dispositions that are aimed at keeping certain types of defendants from incurring a conviction record in the first place.\footnote{See Margaret Colgate Love, \textit{Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences}, 22 \textit{Fed. Sent. Reptr.} 6, 6 (2009) (deferred adjudication has “the additional advantage of allowing a defendant to come away from an adverse encounter with the justice system without any criminal record at all, at least not one that is accessible to the public”).} Such preemptive front-end dispositions hold great promise for ameliorating the situation created by the growing number of people whose criminal records are effectively relegating them to the margins of society.

A few states have attempted to develop alternative schemes to restore rights and certify a person’s rehabilitation.\footnote{See generally \textit{Love & Frazier, Certificates of Rehabilitation}, supra note 97 (reviewing state laws providing for certificates of good conduct).} Most administrative “restoration of rights” schemes do little more than certify to the bearer’s failure to commit more crimes, and so tend not to be accorded the respect and deference that would make them truly useful.\footnote{See Love, \textit{Starting Over with a Clean Slate}, supra note 40, at 104.} Part of the problem lies with inadequate funding to conduct meaningful background investigations, itself a manifestation of the low priority placed on this work by government institutions more invested in front-end investigations and prosecutions than with back-end steps that might prevent crime in the first place. Certification schemes that remove legal barriers and vouch for a person’s rehabilitation, like the Illinois scheme discussed in Part I, are promising but
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have been adopted in only a few jurisdictions. Whether administered by a court or a board, certificate programs are most effective when backstopped by strong nondiscrimination standards to guide decision-makers.

Recently, national law reform organizations have again taken up the work left by the wayside in the early 1980s. The final section of this Article discusses the approach to collateral consequences developed by the American Bar Association (“ABA”) and the Uniform Law Commission, focusing on their proposals for relief that attempt to blend the best features of the certificate laws presently on the books.

III. AN INTEGRATED APPROACH TO RESTORATION OF RIGHTS AND REPUTATION

After three decades of the War on Crime, modern-day law reformers are once again exploring ways that people with a conviction record can overcome the legal barriers facing them in the workplace and in many other areas of their lives. The environment has changed a great deal since the ABA forecast the imminent demise of collateral consequences in 1983. A broad array of collateral sanctions and disqualifications now reaches into almost every aspect of daily life, and a toxic political environment virtually guarantees their continued proliferation. More people have criminal records, and technology that makes it almost impossible for them to escape their past. These developments together require a complete rethinking of the relief mecha-

114. See LOVE & FRAZIER, CERTIFICATES OF REHABILITATION, supra note 97, at 2-5. The New York certificate program has been in existence since the 1940s, and was the model for the Illinois certificate program described in supra Part I and analyzed in infra Part III.C.

115. New York is the only state with a certificate program that also prohibits discrimination based on conviction record. See LOVE & FRAZIER, CERTIFICATES OF REHABILITATION, supra note 97, at 2. New York offers two types of certificates: a certificate of “relief from disabilities” (“CRD”) and a certificate of “good conduct” (“CGC”), which differ primarily in their eligibility requirements. See N.Y. CORRECTIONS LAW §§ 700-705 (Consol. 2011) (describing CRD and CGC). The CRD may be awarded to misdemeanants and first-time felony offenders at any time after sentencing by a court where no prison term is involved, or after release from confinement by the state Board of Parole. The CGC is available to repeat felony offenders only from the Parole Board, and only after a waiting period of one to five years of “good conduct,” depending on the seriousness of the offense. Both certificates have more or less the same legal effect: they relieve an eligible person of “any forfeiture or disability,” and “remove any barrier to . . . employment that is automatically imposed by law by reason of conviction of the crime or the offense.” Id. Certificates also create a “presumption of rehabilitation” that must be given effect by employers and licensing boards, and that is judicially enforceable under the nondiscrimination provisions of N.Y. CORRECTIONS LAW §§ 750-755, which prohibit denial of employment or licensure based on conviction absent a public safety risk or a “direct relationship” between the conviction and the employment sought. Id.

116. See note supra 49.
nisms relied on in the past, and a revisiting of the relative merits of forgiving and forgetting. It is unlikely that legislatures today will repeal collateral penalties or prohibit people from taking a criminal record into account. Thus the goal of a policy-maker must be to devise a strategy to soften their mandatory nature, and assuage the worries of decision-makers.

As noted in the previous section, parts of that strategy are already emerging in laws limiting pre-employment inquiries (including so-called ban-the-box measures), stricter enforcement of laws regulating criminal back-grounding practices, and litigation aimed at the most irrational or discriminatory exclusion policies. But these systemic measures can be effective tools for opening opportunities for people with a conviction only if they are coupled with individualized relief that avoids statutory barriers and establishes a convicted person’s general suitability. Ideally, in order to inspire public confidence, this procedure must be transparent and accountable, administered by a decision-maker who is both respected and insulated from politics, and capable of handling relief requests on a large scale. In many jurisdictions, perhaps in most, the decision-maker who best satisfies these criteria will be a judge, or a panel of judges. While in some jurisdictions an administrative board may also fill this bill, ideally such a board would be located in the judiciary as opposed to the executive branch of government, since judges tend to be less influenced by politics than elected officials and those who work for them.

The following discussion traces the development of the relief mechanisms in the Uniform Collateral Consequences of Conviction Act (“UCCCA”) and examines their particular features, concluding that they provide a balanced and functional way of avoiding collateral sanctions and certifying a person’s good character. Because the UCCCA was self-consciously modeled on standards promulgated by the American Bar Association, the discussion must start with them.

A. The ABA Collateral Sanctions Standards

In 2003, the ABA took the first step since the 1970s to address collateral consequences in a coherent and comprehensive fashion. The ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification built on the normative approach of the

117. See Collateral Sanctions Standards, supra note 8. The Collateral Sanctions Standards are part of the ABA Standards for Criminal Justice, a multi-volume work covering a broad
“Civil Disabilities” provisions of the 1983 Standards on the Legal Status of Prisoners, but their analytical framework and enforcement mechanisms are grounded in criminal sentencing theory and practice. At least where automatic statutory penalties are concerned, the Collateral Standards conceive of collateral consequences as closer to criminal punishment than to civil regulation. Anticipating the Supreme Court’s *Padilla* decision, the Standards seek to ensure that defendants are fully aware, at the time of a guilty plea and sentencing, of all relevant collateral sanctions that will automatically come into play as a result of a conviction; that the sentencing court has authority to consider applicable collateral sanctions in shaping its own sentence; and, that people who are subject to collateral sanctions have an opportunity to obtain relief from a court or an administrative agency.

Standard 19-2.5 (“Waiver, modification, relief”), like Section 306.6 of the Model Penal Code, contemplates a two-tiered form of relief, though designed to deal with the more extensive contemporary array of collateral sanctions affecting jobs and housing and welfare spectrum of practice areas, from policing to corrections. See Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 *Crim. Just.* 10, 14-15 (2009).

118. See LSOP STANDARDS, supra note 49.

119. See COLLABORATIVE SANCTIONS STANDARDS, supra note 8, at 12-16 (making clear the Collateral Sanctions Standards’ reliance on the principles and structure of the Criminal Justice Standards for Sentencing (3d ed. 1993)). In this regard, it is significant that the Collateral Sanctions Standards were removed from the Standards volume dealing with corrections, and relocated to a previously reserved chapter 19 immediately following the Sentencing Standards.

120. *Id.* at Standard 19-2.1 (“Codification of Collateral Sanctions”) requires a jurisdiction to make an inventory of its collateral sanctions and 19-2.3 (“Notification of collateral sanctions before plea of guilty”) requires a court to ensure that a defendant has been notified by counsel of “all applicable collateral sanctions” before accepting a guilty plea. Paragraph (b) of Standard 19-2.4 (“Consideration of collateral sanctions at sentencing”) requires a similar assurance at the time of sentencing. See *ABA Criminal Justice Standards on Pleas of Guilty* Standard 14-3.2(f) (“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.”). Note that these provisions, as well as those dealing with consideration at sentencing and with relief discussed infra, are directed only to “collateral sanctions” and not to “discretionary disqualifications.” See infra note 128. Discretionary collateral penalties, which come into effect only upon some subsequent agency or court action, are dealt with in Standards 19-3.1 through 19-3.3.

121. COLLABORATIVE SANCTIONS STANDARDS, supra note 8, at Standard 19-2.4(a) (“Consideration of collateral sanctions at sentencing”).

122. *Id.* at Standard 19-2.5 (“Waiver, modification, relief”). It is significant that the notice provisions of these Standards, as well as those dealing with consideration at sentencing and with relief, are directed only to “collateral sanctions,” defined by Standard 19-1.1(a) as penalties that are imposed “automatically” upon a person’s conviction, and not to “discretionary disqualifications,” defined in Standard 19-1.1(b) as penalties that a court or agency is “authorized but not required” to impose on grounds related to a conviction. These discretionary collateral penalties, which come into effect only upon some subsequent agency or court action, are dealt with in Standards 19-3.1 through 19-3.3.
benefits in addition to the traditional limits on the exercise of civil rights. Thus subsection (a) of Standard 2.5 provides for “timely and effective” relief as early as sentencing itself, through a court order, from any specific collateral sanctions that may unreasonably and inappropriately burden a criminal defendant. The commentary uses deportation of non-citizens to illustrate how this “timely and effective” relief provision might work, though it might as well have used eviction from public housing or loss of a work permit, both situations having some immediacy for someone who will be living and working in the community after conviction. Subsection (b) provides that the jurisdiction whose law imposes a collateral sanction should make a provision for extending relief to someone convicted in another jurisdiction (including the federal system).

In addition to the sanction-specific relief of subsection (a) that is potentially incorporated into the sentencing proceeding itself, subsection (c) of Standard 19-2.5 contemplates a general procedure “by which a convicted person may obtain an order relieving the person of all collateral sanctions imposed by the law of that jurisdiction.” While the commentary makes clear that removal of status-generated legal barriers whenever it occurs does not guarantee access to a benefit or opportunity, the more comprehensive relief specified in sub-

123. Id. at Standard 19-2.5(a).
125. In New York, for example, a person convicted of misdemeanor disorderly conduct is automatically barred from living in public housing for a period of three years, though a sentencing court has the power to relieve that collateral sanction. See N.Y.C. HOUS. AUTH. APPLICATIONS AND TENANCY ADMIN. DEP’T MANUAL, EXHIBIT F—STANDARDS FOR ADMISSION: XG—CONVICTION FACTORS & END OF INELIGIBILITY PERIODS (EIP)—PUBLIC HOUSING PROGRAM, available at http://www.nyc.gov/html/ceo/downloads/pdf/table-nychta_standards_of_admission.pdf. Similarly, a New Yorker convicted of falsifying a loan application will automatically lose his job as a municipal trash collector unless the court steps in to remove that sanction. See N.Y. VEH. & TRAF. LAW § 501 (McKinney 2011) (defining hazardous materials endorsement on commercial license).
126. See COLLATERAL SANCTIONS STANDARDS, supra note 8, at Standard 19-2.5(c).
127. The commentary states that “[w]aiver or modification of a collateral sanction, whether at the time of sentencing or at some later time, would not preclude a court or agency from taking action based on the conduct underlying the conviction, pursuant to Standard 19-3.1.” Id. n.24. Standard 19-3.1 (“Prohibited Discretionary Disqualification”) provides that a benefit or opportunity may be denied on grounds related to a conviction only if “engaging in the conduct under-
section (c) is intended to function as a kind of certification of rehabilitation that addresses issues of stigma and lost status as well as legal barriers. In this sense, the subsection (c) certificate is like a statutory pardon. As to the precise mechanism for delivering this pardon-like relief, the commentary gives a clue: while comprehensive relief “may be accomplished in a number of different ways,” the transparent “vacatur” approach of the Model Penal Code appears to be favored over expungement or sealing:

The Model Penal Code mechanism evidently seeks to accomplish an offender’s reintegration into society not by trying to conceal the fact of conviction, but by advertising the evidence of rehabilitation. In vacating the conviction, the sentencing court is in effect declaring that the offender has that the convicted person has paid the full price for his crime and has earned the right to return to responsible membership in society.128

While Standard 19-2.5 specifies that either a court or administrative agency could administer its waiver/relief scheme, the commentary coyly states that “its use of the word ‘order’ may imply some preference for a judicial procedure,” not just for the “timely and effective” relief under subsection (a) of Standard 19-2.5 but also for the broader “forgiveness” relief under subsection (c).129 That the Standards prefer a judicial decision-maker for dispensing forgiveness is not surprising, given the respectability that the judiciary enjoys in American society. Even if removal of a legal barrier does not guarantee that an agency decision-maker will accept someone with a record, as recognized by the commentary (and as evidenced by the initial agency decision in Darrell Langdon’s case), the fact that a court has considered and reached a conclusion about a person’s character and fitness (“fully rehabilitated” in Darrell Langdon’s case) should be reassuring to any employer or landlord willing in the first place to give a convicted person a chance.

B. The Uniform Collateral Consequences of Conviction Act

The Uniform Law Commission (“ULC”) wasted no time in putting the ABA Standards into language that could be enacted by state
legislatures, with the goal of providing a degree of nationwide uniformity in treating collateral consequences issues.\textsuperscript{130} The problem was not that states had varying approaches to the subject that could usefully be harmonized, as in the ordinary ULC project; the problem was that most states had no approach to the subject at all, only an unknown number of laws and rules imposing collateral consequences scattered--one might say hidden--in disparate areas of their codes and regulations. Richard Cassidy, a delegate from Vermont in the ABA House and a Uniform Law Commissioner, saw the problem of collateral consequences as one that could and should be addressed by the ULC, and he was the moving force in getting the project off the ground.\textsuperscript{131} As authorized by the ULC governing board, the collateral consequences project would attempt to develop a comprehensive framework for dealing with collateral consequences, modeled on the ABA Standards, which might commend itself to adoption by state legislatures. The only caveat was that the project should deal only with procedural issues, as opposed to scope or substantive content.\textsuperscript{132}

Beginning in 2004, the ULC drafting committee under Mr. Cassidy's patient direction worked to give specific legislative form to three key provisions of the ABA Standards: compilation, notification,
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and relief. For a start, the committee adopted the ABA Standards’ distinction between collateral sanctions and discretionary disqualification (referred to collectively as “collateral consequences”), thus setting up the basic approach to relief: first eliminate legal barriers (“sanctions”) and then guide discretion. The drafting committee also developed a more extensive treatment of interstate issues, notably how a jurisdiction should treat convictions from other jurisdictions, including what if any deference should be accorded relief granted by other jurisdictions, both concepts sketched but not elaborated in Standard 19-2.5(b). In accordance with standard ULC practice, a draft was presented to the Annual Meeting of the ULC over several successive years, revised in the interim in accordance with comments received, and finally approved in July 2009 as the Uniform Collateral Consequences of Conviction Act (“UCCCA”).

The relief provisions of the UCCCA follow the basic two-tiered architecture of ABA Standard 19-2.5, providing immediate relief from specific status-generated legal barriers that might impede a convicted person’s ability to live in the community, and more complete relief from all such barriers after a period of law-abiding conduct. Importantly, it also establishes parameters to guide a discretionary decision to disqualify where a collateral sanction either does not apply or has been relieved. The UCCCA does not limit relief to certain types of offenses or offenders, on the theory that categorical legislative judgments about risk and desert are rarely accurate and frequently unfair.

Section 10 (“Order of Limited Relief”) allows an individual to obtain relief as early as sentencing from a specific collateral sanction, if he can show that relief would “materially assist” in obtaining em-

133. Section 4 of the UCCCA, supra note 14, deals with compilation of a jurisdiction’s collateral consequences; § 5 deals with notice of collateral consequences in pre-trial proceedings and at guilty plea; and § 6 deals with notification at sentencing and upon release.

134. See UCCCA, supra note 14, § 2.

135. See id. § 9.

136. The Act was amended in 2010 to add a provision requiring notice of collateral consequences at plea, in recognition of the Supreme Court’s holding in Padilla. See id. § 5, at 14-15. At one point in the enactment process, the project nearly foundered over objections from commissioners that compiling so many laws and regulations would place too great a burden on the states. The day was saved when United States Senator Patrick Leahy, chair of the Senate Judiciary Committee, was persuaded that this was an area where the federal government should provide some assistance to the states. And so it came about that the Court Security Act of 2007 included a provision requiring the National Institute of Justice to undertake a fifty-state survey of all collateral consequences—both sanctions and disqualifications. See § 510 of Pub. L. 110-177. The ABA later won a contract to do the actual compilation work, and that three-year project is currently underway.

137. UCCCA, supra note 14, § 10.
ployment, education, housing, public benefits or occupational licensing, and that he has “substantial need” for the benefit to live a law-abiding life. Application may be made to the sentencing court as part of the guilty plea process or after a jury’s guilty verdict, until the close of the proceeding at which sentencing is imposed. Thereafter, application must be made to an administrative board. In addition to the individual’s need for relief, the court or board must find that “granting the petition would not pose an unreasonable risk to the safety or welfare of the public or any individual.” Section 11 (“Certificate of Restoration of Rights”) involves relief from all collateral sanctions, as is available to an individual after a period of law-abiding conduct (five years is suggested). This more comprehensive relief may only be obtained from a board, which is required to find that the individual is lawfully employed or otherwise has a lawful source of income, has been involved in no subsequent criminal conduct, and poses no danger to the public. No offense or offender is disqualified from seeking relief under either Section 10 or Section 11, and persons convicted in other jurisdictions may also apply.138

Issuance of an Order under Section 10 or a Certificate under Section 11 does not guarantee that an individual will receive the benefit or opportunity sought; it merely sets up an opportunity for case-by-case determination where the facts of an individual’s misconduct may still be considered. In effect, an order or certificate under these sections converts an automatic collateral sanction into a discretionary “disqualification.”139 At that point, the provisions of Section 8 (“Decision to Disqualify”) kick in, to guide any case-specific decision to grant or deny a benefit or opportunity on grounds relating to an individual’s conviction. Section 8 requires an “individualized assessment” before a decision-maker140 may deny a benefit or opportunity, and the “particular facts and circumstances involved in the offense, and the essential elements of the offense” may be considered only if they are

138. See id. § 9(e) (suggesting that a jurisdiction may wish to recognize relief granted by another jurisdiction).
139. See id. § 2(5) (“ ‘Disqualification’ means a penalty, disability, or disadvantage, however denominated, that an administrative agency, governmental official, or court in a civil proceeding is authorized, but not required, to impose on an individual on grounds relating to the individual’s conviction of an offense.”).
140. Id. The definition of “decision-maker” in Section 2(4) of the UCCCA limits the application of Section 8 to opportunities and benefits controlled by state actors, potentially including government contractors. See id. § 2(4). However, Section 10 and 11 are not so limited by their terms, so that any collateral sanction that applied to a private entity (such as a nursing home or school) could be relieved under either of these sections.
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“substantially related to the benefit or opportunity at issue.” The idea is that denial is not based upon the conviction, but rather upon the conduct that led to the conviction—though the conviction conclusively establishes that the conduct took place.

The commentary to Section 10 illustrates how this relief scheme might work in practice, using as an illustration a paramedic licensing scheme:

[A] regulation might prohibit all individuals with felony convictions from being licensed as paramedics. An individual who had been a paramedic before conviction, or completed paramedic training after conviction, might persuade a court or the designated board or agency that it was appropriate for the individual to be licensed and employed as a paramedic, and therefore to issue an Order of Limited Relief. That would lift the absolute bar, but would not restrict the paramedic licensing board from considering whether a license should issue, based on the conduct underlying the conviction, and the board's knowledge of the particular duties and functions of licensees. The decision maker is also entitled to consider the conviction conclusive proof that the individual committed every element of the offense of conviction. Agencies may by rule or policy require applicants to provide or disclose information necessary or helpful to the agency’s decision.

Continuing with this illustration, Section 8 would require the paramedic licensing board to make an individualized assessment as to the applicant’s fitness to be licensed and employed as a paramedic, to determine whether there is a “substantial relationship” between the

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141. The commentary to Section 8 refers to the various factors contained in the non-discrimination provisions of § 4-1005 of the 1979 Model Sentencing and Corrections Act (“MSCA”), as potentially helpful in guiding the “substantial relationship” decision, including the time elapsed since the offense, the individual's subsequent record, and “whether the occupation, profession, or educational endeavor provides an opportunity for the commission of similar offenses.” See id. § 8 cmt.

142. Section 8 provides in full:

In deciding whether to impose a disqualification, a decision-maker shall undertake an individualized assessment to determine whether the benefit or opportunity at issue should be denied the individual. In making that decision, the decision-maker may consider, if substantially related to the benefit or opportunity at issue: the particular facts and circumstances involved in the offense; the essential elements of the offense. A conviction itself may not be considered except as having established the elements of the offense. The decision-maker shall also consider other relevant information, including the effect on third parties of granting the benefit or opportunity and whether the individual has been granted relief such as an order of limited relief or a certificate of restoration of rights.

Id. § 8.

143. See id. § 10 cmt.
offense conduct and the duties and functions of a paramedic. The
commentary to Section 8 provides examples of how this might work:

[I]f the Plumber’s Board grants licenses to those, say, who were
fired from a job or suspended from school for marijuana possession,
then it is likely not unreasonably dangerous or risky to public safety
to license applicants convicted of precisely the same conduct. On
the other hand, if an agency would deny a position to a school bus
driver applicant who had his parental rights terminated in a civil
action based on child abuse, that is strong evidence that a conviction
for child abuse is directly related to fitness for the employment.144

Thus, for example, using the paramedic licensing example, it
might make a difference to the licensing board whether the applicant
had been convicted of falsifying a home mortgage application or at-
tacking a stranger in a bar, possessing a small amount of marijuana or
robbing a bank. The commentary to Section 8 proposes that the “time
elapsed since the misconduct occurred may be relevant,” citing to the
laws of some states that specify a term of years after which rehabilita-
tion is presumed.145 Any decision-maker sincere about complying
with this scheme will be guided away from unfounded categorical as-
sumptions about the effect of a conviction record, and toward more
pertinent considerations of actual risk.

The UCCCA contains another provision that should encourage
public and private entities to give convicted persons a second chance:
Section 14 provides that a certificate issued under either Section 10 or
Section 11 “may be introduced as evidence of a person’s due care” in
any judicial or administrative proceeding alleging negligence or other
fault in connection with a hiring or other decision. The commentary
points out:

Unless persons with criminal records are to be permanently unem-
ployed and homeless, some businesses must transact with them, yet,
they take legal risks if they do. Business owners have limited
sources of objective evidence about the backgrounds of applicants,
and they may reasonably rely on an Order of Limited Relief or Cer-
tificate of Restoration of Rights issued by government authority af-
fer investigation.146

144. Id. § 8 cmt. (citing ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS
AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-3.1 (2004)).

145. See id. (citing N.M. STAT. ANN. § 28-2-4(B) (three years after imprisonment or com-
pletion of parole and probation); N.D. CENT. CODE § 12.1-33-02.1(2)(c) (five years after dis-
charge from parole, probation or imprisonment)); see also Minn. Stat. § 364.01, subdiv. 3 (one
year after release from confinement, or successful completion of probation or parole).

146. See id. § 10 cmt.
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To see how these UCCCA relief provisions might work in a real world setting, the following section applies them to the facts of Darrell Langdon’s case described in Part I of this Article.

C. The Uniform Act Meets Darrell Langdon

Recall that in 2008 Darrell Langdon was stymied in his efforts to return to his old job with the Chicago Public Schools by an Illinois law declaring him ineligible for employment with CPS because of his two-decades-old conviction. He was able to avoid that legal bar through a Certificate of Good Conduct issued by the Circuit Court of Cook County, a certificate that also evidenced the court’s finding that he was “fully rehabilitated.” When CPS rehired him, the certificate afforded it a degree of protection from charges of negligence in hiring a convicted person.

The outcome of Langdon’s bid for his old job in 2008 would have been essentially the same under the UCCCA, though CPS would have been able to reach its decision to rehire him more easily. An order under Section 10 or a certificate under Section 11 of the UCCCA would have had essentially the same effect as the Illinois certificate in relieving the “collateral sanction” that barred Langdon from reemployment at CPS, allowing CPS at least to consider him. (Because the UCCCA order or certificate would have been sought so many years after sentencing, it would have been issued by an administrative entity rather than a court.) And, the UCCCA certificate or order would have provided CPS with the same protection against negligence charges as Illinois law. While the findings required to be made under either section of the UCCCA less clearly certify to a recipient’s “rehabilitation” than does the Illinois certificate, UCCCA Section 8 would have provided better guidance to CPS in exercising its discretion once the legal bar to Langdon’s employment had been lifted: CPS would have been required to conduct an “individualized assessment” to determine whether “the particular facts and circumstances involved in [Langdon’s] offense, and the essential elements of the offense” were “substantially related” to the job opportunity. Given Langdon’s two decades of sobriety following a minor drug possession offense,

147. See supra text accompanying notes 24-34.
148. See 730 ILL. COMP. STAT. ANN. 5/5-5.5-25(a-6) (LexisNexis 2011); Trice, CPS: Good Conduct Certificate Not Good Enough, supra note 22.
149. See 730 ILL. COMP. STAT. ANN. 5/5-5.5-25(c); Trice, CPS Reverses Itself, supra note 32.
150. See UCCCA, supra note 14, § 8.
and his excellent work history with CPS during part of that period, CPS would have been hard pressed to deny him his old job back under the UCCCA Section 8 standard.

In short, in the situation that existed when Langdon applied for employment twenty-three years after his conviction, the outcome would probably have been the same under either the Illinois certificate procedure or the UCCCA: both lift the legal bar to his hire, and both give CPS some protection from a finding of negligence. The UCCCA would have been marginally more helpful to both Langdon and CPS than the Illinois certificate procedure because it directs how a potential employer’s discretion is to be exercised once the legal bar is lifted. Illinois law provides no comparable standards to guide agency decision-makers in considering a conviction once a collateral sanction no longer applies. Moreover, the categorical approach of the hiring policy put in place by CPS as a result of Langdon’s case lacks the “individualized assessment” of UCCCA Section 8, treating the passage of time and receipt of a certificate as a proxy for it. If CPS’s consideration of Langdon’s criminal record had been governed by the “individualized assessment” and “substantial relationship” test of Section 8, CPS might have reached a favorable decision more quickly and easily than it did, since a dated and relatively minor drug conviction would appear to have no relationship at all to tending a boiler. All the same, while the categorical policy developed by CPS as a result of Langdon’s case is probably more restrictive than necessary, it is a start.

If Langdon’s conviction had come to the attention of CPS at the time it occurred in 1985, however, an entirely different picture emerges. CPS would have been required to dismiss him from his job under the Illinois law barring drug offenders from working in the public schools, and Illinois law would have provided him no recourse since the Certificate of Good Conduct requires a three-year eligibility waiting period. Under UCCCA Section 10, however, Langdon could have immediately sought an Order of Limited Relief from the court that sentenced him to relieve the legal bar to his continuing to hold his job in the school system. This would have allowed CPS to decide whether or not it wanted to keep him on, under the discretion—

151. See Trice, CPS Reverses Itself, supra note 32 (new CPS policy permits employment of person with minor felony conviction at least seven years in the past, if person has received a Certificate of Good Conduct from an Illinois court).

152. See supra note 24 and accompanying text; see also supra text accompanying note 34.
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ary standards in UCCCA Section 8. CPS might well have decided, after the required “individualized assessment” of Langdon’s situation, that possession of a small amount of cocaine for personal use was not “substantially related” to his job in the boiler room. The collateral sanction having been removed by the Section 10 Order, CPS could have retained him as an employee. There would then of course have been no barrier to his rehire in 2008 when he applied for his old job back, and his exemplary conduct in the intervening years would have given CPS no occasion to doubt his fitness.

In addition to the immediate relief under Section 10’s Order of Limited Relief and the “substantial relationship” standard that guides discretionary decision-making under Section 8, the UCCCA has another important advantage over Illinois law in potentially applying to any offense and offender. Illinois law restricts eligibility for a Certificate of Good Conduct to certain categories of offenses and offenders, rather than relying on the relief process itself to screen out the undeserving and those who might pose a public safety problem. While the categorical exclusions of Illinois law did not hurt Darrell Langdon’s chances of regaining his old job, they undoubtedly exclude many others unfairly. For example, a person convicted as a teenager of armed robbery (a serious violent offense) would be permanently ineligible for relief, no matter how law-abiding and productive that person had become thirty years later. Similarly, a person convicted of three drug felonies (which might accumulate through separate charges in the same indictment) would be barred indefinitely, without regard to the passage of time and a strong record of rehabilitation. It seems unreasonable to impose categorical restrictions on eligibility where exceptions like these spring so readily to mind.

Consideration of how Illinois law measures up against the UCCCA may give Illinois policy-makers an opportunity to make improvements in several areas: (1) afford some limited relief as early as sentencing; (2) incorporate a standard for discretionary decision-making for public employers and others; and (3) consider whether the categorical exceptions for certain offenses and offenders are fair and

153. New York is the only U.S. jurisdiction that gives sentencing courts the power envisioned by UCCCA Section 10 to relieve collateral sanctions at sentencing, as well as the guidance provided by Section 8. See supra note 114.

154. See 730 ILL. COMP. STAT. 5/5-5.5-5; see also supra note 27. New York imposes no offense-based limitations on eligibility, but distinguishes between first-time offenders and recidivists for purposes of the type of certificate they may obtain and how long they must wait to apply (though both certificates have essentially the same legal effect). See supra note 114.
efficient. But even given these shortcomings in its relief scheme, Illinois is far ahead of most other U.S. jurisdictions.

There is one area in which Illinois law improves upon the UCCCA in this author’s opinion, and that is in preferring a judicial decision-maker to grant relief after sentencing. When Langdon was turned down for employment at CPS in 2008, the UCCCA would not have permitted him to go to court to get relief under either Section 10 or Section 11, but rather would have directed him to an administrative board, since his sentencing was many years in his past. If one conceives of collateral sanctions as part and parcel of the penalty imposed for a crime, as Padilla suggests they are, then it follows that the criminal case continues as long as the penalty applies. Under this theoretical construct, relief from collateral sanctions is very much the business of courts on a continuing basis. Seeing the value in a court’s role in awarding relief, Illinois has opted to make the courts exclusively responsible for certifying a person’s rehabilitation, as the Model Penal Code did. The ABA Collateral Sanctions Standards also regard a court as the “preferred” source of relief. The UCCCA removes the court as the source of relief after sentencing largely as a matter of institutional efficiency. There is no reason why a jurisdiction that is considering enacting the UCCCA could not reach a different conclusion after weighing the value that an employer or other decision-maker might place on having relief granted by a judge or panel of judges, as opposed to an administrative board, against any resulting burden on the courts.

CONCLUSION

Collateral sanctions have been recognized as an impediment to successful reentry and reintegration of persons with a conviction record, but very few jurisdictions have developed an effective way of avoiding or mitigating them. Many years after conviction these legal barriers remain, serving more to punish than to regulate. And, even if

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155. See supra notes 52-53.

156. See supra notes 116-19 and accompanying text.

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a convicted person is not legally barred from eligibility for some benefit or opportunity, decision-makers are frequently reluctant to take a chance on someone with a criminal record, even with evidence that conviction is a poor predictor of future criminality after an extended period of law-abiding conduct.158 The law provides little by way of encouragement or support for those otherwise willing to recognize redemption. While a few jurisdictions have experimented with systemic ways of limiting the stigma of conviction, like ban-the-box schemes and general admonitions against irrational rejection based on past conviction, these approaches only go so far without some official reassurance that a particular person is a good bet. Most jurisdictions still rely on antiquated and unreliable relief mechanisms like pardon and expungement that are unsuited to the challenges presented by modern mass conviction and the proliferation of status-generated penalties in codes and practices.

Unless we as a society are comfortable living with a growing class of “internal exiles” who have no way to pay their debt to society and return to its good graces, with its attendant public safety risks and moral dilemmas, we should be looking for a more effective way of giving convicted individuals a fair chance to become fully integrated and productive members of society. In short, the law must find a way to be forgiving. The relief provisions of the Uniform Collateral Consequences of Conviction Act provide a framework to this end, offering hope to people who have a criminal record, reassurance to decision-makers who want to do the right thing, and a nudge in the right direction to those who are not yet sure what that right thing is.

158. See Blumstein & Nakamura, supra note 18, at 327.
From “Collateral” to “Integral”:
The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation

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INTRODUCTION

From the moment of arrest, people charged with crimes find themselves caught in a web of punitive sanctions, in danger of losing their jobs, homes, children, and right to live in this country. Politicians over the past thirty years, eager to be “tough on crime” at the expense of being smart on crime, have piled layer upon layer of these “collateral” consequences on even a person’s most minor involvement in the criminal justice system.

As this web grew to overshadow the traditional criminal sanctions for most offenses, criminal courts and practitioners struggled to create legal justifications for ignoring it. The “collateral consequences” doctrine resulted. Arising out of Fifth Amendment challenges to convictions on the theory that courts had not adequately notified people of this web at plea or sentencing, this doctrine draws a sharp but false distinction between “direct” consequences of criminal proceedings (such as incarceration) and “collateral” consequences (such as deportation).¹

In a move last Term that shocked commentators and practitioners alike, the Supreme Court ignored decades of lower court case law to effectively repudiate this doctrine—which has been one of the most dominant (and most harmful) legal fictions of the criminal justice system. In Padilla v. Kentucky, the Court held that to provide effective assistance of counsel, a criminal defense attorney has an affirmative

¹. See infra Section I(B)(1).
duty to give specific, accurate advice to noncitizen clients of the deportation risk of potential pleas.\(^2\) The majority’s analysis, however, reaches far beyond advice on immigration penalties, extending to any and all penalties intimately related to criminal charges. The Court’s recasting of Sixth Amendment jurisprudence will have significant ripple effects, leaving a rich set of legal issues for the courts to resolve in the coming years. These issues include those related to post-conviction relief,\(^3\) the Ex Post Facto Clause, Eighth Amendment definitions of punishment,\(^4\) the adequacy of defense funding,\(^5\) the expansion of the right to a jury trial,\(^6\) and the extension of the right to counsel.\(^7\)

This Article examines the practical effect of Padilla for criminal defense attorneys currently working with clients on pending cases. Post hoc analysis of the failure to advise a client on a particular penalty presents doctrinal and factual hurdles (particularly in proving prejudice). But the penalty itself is already identified because it forms the basis for the post-conviction challenge. Defense attorneys face a more significant challenge in the first instance—teasing the threads of relevant penalties and risks from the immense web of “collateral” consequences. This Article uses the legal reasoning of Padilla to outline a structure for approaching the daunting process of identifying and adequately advising clients about the wide range of penalties resulting from criminal justice involvement. The Article focuses not on post-conviction relief, but on productive and proven strategies for improved trial level advocacy going forward. Part I parses the decision


\(^3\) The thicket of issues here include procedural bars, the impact of judicial warnings, and the proper measure of prejudice. See generally Gray Proctor & Nancy King, Post-Padilla: Padilla’s Puzzles for Review in State and Federal Courts, FED. SENT’G REP., Feb. 2011, at 239 (discussing issues and challenges confronting post-conviction relief applicants challenging convictions that pre-date Padilla).


\(^6\) “[T]he Sixth Amendment [of the United States Constitution], as applied to the States through the Fourteenth, requires that defendants accused of serious crimes be afforded the right to trial by jury.” Baldwin v. New York, 399 U.S. 66, 68 (1970). In determining whether an offense is “serious,” courts examine not only incarceration, but also the full range of statutory penalties resulting from a conviction. See, e.g., Lewis v. United States, 518 U.S. 322, 326 (1996). Padilla’s acknowledgment of the full range of enmeshed penalties, beginning with deportation, that can result from a criminal conviction has the potential for significantly expanding the right to a jury trial.


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and describes the peculiar character of Padilla as both a clear application of existing law and a revolutionary shift in perspective and daily practice. Part II details the clearly mandated application of Padilla’s Sixth Amendment advisement duty to a range of penalties beyond deportation. It describes a wide set of professional norms compelling this result, contrasted with the significant institutional incentives to ignore these standards. Part III proposes a new test to make these professional standards meaningful for practitioners in light of Padilla and the vast range of potential penalties for people charged with crimes. Part IV outlines the structure imposing these “enmeshed” penalties and discusses more concrete implications for realistic defense practice, including the benefits of holistic defense.

**I. THE PADILLA EARTHQUAKE**

The majority decision in Padilla masked a revolution in the language of the common law. Doctrinally, a clear application of the existing standard for effective assistance of counsel, Padilla ripped the foundations from the perennially unsound “collateral/direct” consequence distinction. Justice Stevens’ analysis and rhetoric set off a seismic event. In addition to effectively repudiating decades of lower court case law,8 the Padilla decision was most striking in its shift in analytical perspective. Instead of engaging the traditional frames of formalism, the institutional concerns of courts, or the presumed inability of defense counsel to learn anything other than criminal law, the Court embraced Mr. Padilla as a man who faced serious and actual penalties as a result of his conviction. In crediting the actual priorities of people charged with crimes in the context of the actual penalties imposed, the Court effectively undermined any future application of the “collateral/direct” consequences distinction in the Sixth Amendment context.

An examination of the opinion reveals how the Court’s holding quickly expands beyond the required advice on deportation risk. Despite some language denominating deportation as “unique,” the Court’s definition of this term in practical effect applies to a broad

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8. As argued infra in Sections I.B and II.A, any analysis of prevailing professional norms would reveal comprehensive and well-established duties of defense counsel to incorporate so-called “collateral” consequences into every step of their representation of clients. The Supreme Court in Padilla did what many lower courts failed miserably to do—apply these clear professional norms in a Strickland analysis of objective standards of reasonableness related to ineffective assistance of counsel claims.
range of penalties traditionally considered “collateral” and outside the concern of the criminal justice system.

A. The Decision

A long-haul trucker by trade, Jose Padilla served the United States with honor as a member of the Armed Forces during the Vietnam War. Police arrested Mr. Padilla as he drove a tractor-trailer truck containing over one thousand pounds of marijuana through Hardin County, Kentucky.9 A lawful permanent resident for over forty years, Mr. Padilla subsequently pled guilty to various felony drug offenses.

Upon discovery that his conviction virtually mandated his deportation, Mr. Padilla sought to withdraw his guilty plea. He alleged that he only pled guilty in reliance on his court-appointed counsel’s erroneous advice that he “did not have to worry about immigration status since he had been in the country so long.”10 Mr. Padilla argued that this incorrect advice effectively induced him to plead guilty and rendered his plea involuntary. The Kentucky Supreme Court rejected his claim, holding that because deportation was merely a “collateral” consequence of the conviction, it remained entirely outside of the scope of the guarantee of effective assistance of counsel under the Sixth Amendment.11 Even affirmative misadvice on such “collateral” matters, it held, passed constitutional muster.12

The U.S. Supreme Court granted certiorari in February 2009.13 Most commentators assumed that the Court intended to resolve the narrow question of whether affirmative misadvice about immigration consequences could raise an ineffective assistance of counsel claim.14 They were wrong. On March 31, 2010, the U.S. Supreme Court reversed the decision below seven to two, holding in Padilla v. Kentucky that a criminal defense attorney has an affirmative duty to give spe-

11. Id. at 485.
12. Id.
specific, accurate advice to noncitizen clients of the deportation risk of potential pleas.15

1. From “Collateral” to “Integral”

The majority opinion, signed by five justices and authored by Justice Stevens, devoted the entire first section to undermining the foundation of the collateral consequences doctrine in the context of deportation. Rather than directly attacking the doctrine, the Court buried it under the weight of reality until it broke. Justice Stevens expended fifteen hundred words of a five thousand word opinion detailing the process over the last ninety years by which Congress has intimately related deportation with criminal convictions.16 The end result: deportation now forms an “integral part” of the penalty resulting from criminal cases against noncitizens.17

With this conclusion, the Court effectively stripped the legitimacy from any argument that deportation—perhaps the classic “collateral” consequence as detailed in decades of case law18—was “collateral” in any way to a conviction. The rhetorical battle already won, the Court opened Part II with a summary dismissal of the collateral consequences doctrine itself: “[w]e . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance.’”19 With that one sentence, the Court explosively corrected (as is its purview) decades of lower court case law, across multiple jurisdictions,20 with a clear application of its own precedent.21

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15. Padilla, 130 S. Ct. at 1486.
17. Padilla, 130 S. Ct. at 1480.
18. See, e.g., id. at 1487 (Alito, J., concurring) (citing cases). Note, however, that a significant line of cases already recognized that the “collateral/direct” distinction lacked relevance in a Strickland analysis of ineffective assistance of counsel. See, e.g., State v. Paredez, 101 P.3d 799 (N.M. 2004).
20. See, e.g., id. at 1481 n.9.
21. See, e.g., Hill v. Lockhart, 474 U.S. 52, 59 (1985); Strickland v. Washington, 466 U.S. 668 (1984). As noted infra in Section I(B)(1), Padilla applied established Sixth Amendment law, taking into account settled professional standards, in a doctrinally straightforward manner. Section I(B)(2) explores how so many lower courts failed at this same analysis.
2. “Unique Nature” of Deportation?

In any event, the Court continued, it was unnecessary to decide whether the “collateral/direct” distinction would ever be applicable in a Sixth Amendment analysis because of the “unique nature of deportation.” Of course, the Court’s stated reluctance to repudiate fully the Sixth Amendment collateral consequences doctrine arose only after it thoroughly undermined any rationale for the “collateral/direct” label.

While an apparent limiting principle, this invocation of “uniqueness” rings hollow in the context of the Court’s analysis. As a severe penalty, intimately related to the criminal process, and nearly an automatic result of certain convictions, the Court found deportation “‘most difficult’ to divorce . . . from the conviction.” Because the law had enmeshed deportation with the criminal process, the Court found it difficult to label that consequence as either “collateral” or “direct,” concluding that the “collateral/direct” distinction was “ill-suited” to the Sixth Amendment analysis.

Nothing about this explanation of deportation’s “uniqueness” limited the analysis to immigration penalties. Deportation, in this sense, was less *sui generis* than merely distinctive. This definition of the “unique” nature of deportation, applicable to a wide range of other penalties, effectively struck the fatal blow to the collateral consequences doctrine in the Sixth Amendment context.

3. Applying *Strickland*

With this surprising recognition of the harsh real-life penalties imposed on people charged with crimes, the next step came easily. In Part III, the Court turned at last to the legal question at hand – whether Mr. Padilla’s defense attorney had provided ineffective assis-
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tance. The Strickland analysis begins with an assessment of whether the attorney’s advice was unreasonable in light of “prevailing professional norms.”26 The Court explained in Padilla that “[f]or at least the past [fifteen] years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.”27

Only the question of exactly what advice the norms required remained. Part III of this article explores this issue in more detail, but in short, the Court related the specificity of advisement to the clarity of the risk.28 In a final passage that will prove invaluable to practitioners, the Court urged prosecutors and defense attorneys to use knowledge of penalties like deportation to craft creative dispositions that would be more productive for all parties.29

B. The Seismic Evolution

Padilla represents at once both an entirely clear application of the existing standard of ineffective assistance of counsel and a revolutionary shift in analysis with an impact on practice that can hardly be overstated.

As was clear before Padilla, the term “collateral consequences” is woefully inaccurate and misleading. After Padilla, we have the opportunity to propose a new, more realistic terminology and legal analysis for this wide range of penalties. I offer “enmeshed penalties” as a possible term because it evokes the intimate relationship with criminal charges, directly references the opinion, and has the benefit of being short. The idea is to find and use language that reflects the fact that these penalties are intimately related to criminal charges (not just convictions), and are serious, often draconian, and lifelong. Existing terminology has the opposite purpose and effect. By this term, I intend to capture every penalty that requires any level of individualized ad-

28. Padilla, 130 S. Ct. at 1483. In a final section, the Court rejected a rule limiting Sixth Amendment challenges to affirmative misadvice. The Court rightly recognized the perverse incentives resulting from such a rule. See id.

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vice and advocacy by defense counsel, from basic advice that a plea may hold a risk of a particular penalty to individualized, specific advice integrated into defense strategy at every stage of criminal representation.

1. A Common Law Evolution

The Court went to great pains to describe its holding in Padilla—that “counsel must inform her client whether his plea carries a risk of deportation”\(^{30}\)—as an obvious application of the well-worn Strickland test for ineffective assistance of counsel. The Court was right, and it exposed, through an oblique and sustained attack, the intellectual bankruptcy of the collateral consequences rule (at least in the context of the Sixth Amendment).\(^{31}\) The Padilla decision simply recognized that the consequences of various legal proceedings may be intimately intertwined and that effective legal representation must include consultation about those consequences.

Courts created the collateral consequences doctrine to limit Fifth Amendment Due Process challenges to guilty pleas based on court failures to notify the person charged of all penalties resulting from that plea.\(^{32}\) Without proper notice, argued these challenges, decisions to plead guilty could not be knowing, voluntary, or intelligent. Mindful of the incredible volume of pleas and the wide variety of penalties imposed outside of the criminal justice system, courts created the “collateral consequences” doctrine, drawing a line between what judges were required to advise (“direct” consequences) and what they could ignore (“collateral” consequences). A pure legal fiction, this doctrine spawned different definitions in different courts. Some drew the line at penalties over which the sentencing court had control, others focused on automatic penalties, and still others limited notice to merely

\(^{30}\) Padilla, 130 S. Ct. at 1486.


the maximum incarceration and fines.\textsuperscript{33} The Supreme Court itself in \textit{Padilla} noted the inconsistency of these definitions.\textsuperscript{34}

In the context of judicial duties of notice, one easily identifies the institutional concerns driving the collateral consequences doctrine. The practical difficulties of providing notice in court of the vast range of penalties beyond traditional penal consequences loom large. In addition, courts always have powerful structural incentives to limit later challenges to judgments (including guilty pleas). Of course, an explanation does not a justification make. While an exploration of the problematic legal justification of a rule that permits “secret sentences”\textsuperscript{35} by denying proper notice to a person of the severe penalties that often overshadow any potential jail time or fine is beyond the scope of this article, one hopes that the Court’s new focus on people subject to real-life penalties might further blur the “collateral/direct” line in Fifth Amendment jurisprudence.\textsuperscript{36}

As argued, quite convincingly, over the past decade by Jack Chin, Richard Holmes, and Jenny Roberts,\textsuperscript{37} the legal justification and institutional explanations underlying this Fifth Amendment duty of courts have very little application in the context of the Sixth Amendment duties owed by defense counsel to his or her client. These constitutional duties reflect the necessarily distinct roles of judge and advocate in the criminal justice system.\textsuperscript{38} As the Supreme Court of

\textsuperscript{33} See Chin & Holmes, supra note 31, at 705-06 (citing numerous cases to show the variety of treatments different courts give to the collateral consequences doctrine); Roberts, supra note 32, at 124 n.15.

\textsuperscript{34} Padilla, 130 S. Ct. at 1481 n.8.

\textsuperscript{35} Chin & Holmes, supra note 31, at 700.

\textsuperscript{36} For a critique of the Fifth Amendment justification and an alternative test, see Jenny Roberts, \textit{The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”} 93 Minn. L. Rev. 670 (2008). Roberts proposed a reasonableness test to determine when courts should require warnings about a particular consequence: “whenever a reasonable person in the defendant’s situation would deem knowledge of that consequence, penal or otherwise, to be a significant factor in deciding whether to plead guilty.” \textit{Id.} at 674. A two-part test for determining the “significance” of a consequence considered: (1) the severity of the consequence, and (2) the likelihood that the consequence would apply to the defendant. Under the severity analysis, “[i]f reasonable people would treat as significant a severe consequence when making a decision as serious as a guilty plea, courts should require pre-plea warnings before concluding that the plea is ‘knowing.’ ” \textit{Id.} Under the likelihood analysis, even where the “consequence is not at the highest end of the severity scale, warnings would still be mandatory when the mere fact of the criminal conviction makes it certain that the consequence would apply.” \textit{Id.} My \textit{Padilla} test, outlined below, shares many of these considerations.

\textsuperscript{37} See Chin & Holmes, supra note 31, at 702-12; Roberts, supra note 32, at 131-40. The Supreme Court in \textit{Padilla} prominently cited both articles in its majority opinion.

From “Collateral” to “Integral”

Georgia recently noted, “defense counsel may be ineffective in relation to a guilty plea due to professional duties for the representation of their individual clients that set a standard different—and higher—than those traditionally imposed on trial courts conducting plea hearings for defendants about whom the judges often know very little.”

The duties of defense counsel, as minimally defined in Strickland v. Washington, are client-driven and context-dependent, and are not amenable to bright-line rules such as the purported “collateral/direct” distinction.

2. The Padilla Revolution

At the same time, described as the “most important right to counsel case since Gideon,” Padilla represents the first time the Court has applied the Strickland standard directly to “a lawyer’s failure to advise a client about a consequence of conviction that is not part of the sentence imposed by the court.” Until Padilla, the Supreme Court had never ruled on the extension of the Fifth Amendment “collateral consequences” rule to Sixth Amendment effective assistance standards, yet it was “nevertheless among the most widely recognized rules of American law.” The concurrence declared that the Court’s decision “marks a major upheaval in Sixth Amendment law” and “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 more interesting question is why, in the final analysis, most courts before Padilla simply got it wrong.

41. Chin & Holmes note that the collateral consequences doctrine pre-dates Strickland. Chin & Holmes, supra note 31, at 702. Courts examining Strickland challenges, however, have consistently cited and followed cases decided under earlier right-to-counsel standards inconsistent with Strickland to justify a Sixth Amendment collateral consequences rule. Id.
43. Id. at 18; see also Roberts, supra note 32, at 132.
44. Chin & Holmes, supra note 31, at 706.
46. See, e.g., Chin & Holmes, supra note 31, at 723 (“The collateral consequences rule is remarkable because it has apparently been embraced by every jurisdiction that has considered it, yet it is inconsistent with the ABA Standards and the practices of good lawyers as described by...”)

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Much ink has been spilled by commentators attacking the collateral consequences rule\textsuperscript{47} and judges desperately stretching rationality to defend it.\textsuperscript{48} *Padilla* stands at the confluence of three warring perspectives. The first—formalism—held traditional sway at the highest appellate (and academic) level.\textsuperscript{49} I would argue, however, that it otherwise stood primarily as a mask for the second: the pragmatism of institutional actors.

The institutional pragmatists, concerned most with docket pressures and other system costs, use the formalism of the collateral consequences doctrine mainly to protect their own priorities—to the significant detriment of the people actually suffering the consequences. The pragmatists do recognize the addiction to plea bargaining that characterizes the “Guilty Plea State,”\textsuperscript{50} where trials are a rarity. These institutional apologists, however, see this volume as virtually an end in itself, opposing anything (including more accurate information) that could slow the plea process. Invoking structural concerns with “finality” and “efficiency,” courts decried the “slippery slope”\textsuperscript{51} of considering anything but the penal consequences of convictions, relying on the oft-invoked and rarely seen specter of opened “floodgates”\textsuperscript{52} (applications for post-conviction relief) or “logjams”\textsuperscript{53} (in the current “efficient” flow of the guilty plea process) to draw a line that does not exist outside of legal fiction. Purportedly driven by functionalist concerns with “efficiency,” this approach in actuality ignores the real pressures and processes of the plea bargaining system,

\textsuperscript{47} See, e.g., Chin & Holmes, supra note 31; Roberts, supra note 32, at 131-40; Smyth, *Holistic Is Not a Bad Word*, supra note 29, at 490-95.

\textsuperscript{48} See, e.g., People v. Gravino, 928 N.E.2d 1048, 1055-56 (N.Y. 2010). Some of the most perverse decisions define as “collateral” certain penalties, such as consecutive versus concurrent sentences or parole eligibility, indisputably subject to the right to appointed counsel. See Chin & Holmes, supra note 31, at 734.

\textsuperscript{49} See, e.g., Bibas, supra note 38, at 154-60.


\textsuperscript{51} See, e.g., Smith v. State, 697 S.E.2d 177, 184 (Ga. 2010).


\textsuperscript{53} See Roberts, *supra* note 32, at 140-41 (detailing a "strong, systemic desire for, and overvaluing of, two facets of plea bargaining (and the criminal justice system more generally): finality and efficiency. . . . Many criminal-justice-system actors, however, overvalue finality to the detriment of constitutional protection, and stubbornly resist change on the theory that any inroad will threaten to topple our high-volume system.")
trading market efficiency and justice for mere speed. Defense attorneys, despite their role as advocates, sadly do not have immunity from this institutional perspective. Some have cited high caseloads, lack of resources, and the daunting prospect of learning the array of penalties beyond traditional punishments to justify a false tradeoff between “case outcomes” and “life outcomes.”

The Court in Padilla, at long last, adopted a third perspective—a person-centered realism framed by the men, women, and children affected most by the criminal justice system. The Court opened its decision with an unusually personal description of Mr. Padilla and ended it with an invocation of the devastating impact of enmeshed penalties on families. This focus on real people suffering measurable harm holds the key to the impact of Padilla both doctrinally and in practice. It requires sustained attention to ensuring that defense counsel advise their clients of the real penalties attendant to a plea. Without considering all penalties enmeshed with the criminal charges, “lawyers cannot effectively advise their clients about the risks and benefits of pleading guilty, and cannot effectively negotiate the terms of guilty pleas.”

In functionalist terms, this realism sets standards to ensure that the plea “market” does not continue to suffer from serious efficiency problems such as “information deficits” about the real costs (penalties) of a plea. This broader realism goes well beyond the concerns of the institutional pragmatists, recognizing both the functional and personal impact of plea bargaining as the norm.

As a result of the focus on personal impact, this realism outlines a broader understanding of the measures of justice and punishment. As

54. See, e.g., Bibas, supra note 38, at 107, 114-17.
57. Id. at 1486.
58. Chin & Holmes, supra note 31, at 736.
59. Bibas, supra note 38, at 117, 137-38.
good practitioners know well, the real calculus of criminal justice entails much more than a binary guilt/innocence equation,\(^{60}\) encompassing many more variables including likely penalties and punishments, the collateral damage on family members, and rehabilitative goals.\(^{61}\) Acknowledging enmeshed penalties can shift this equation at every stage of representation.

As noted by many commentators,\(^{62}\) and now the Supreme Court,\(^{63}\) this revised calculus opens a world of creative opportunities for advocates. The extreme and counter-productive nature of enmeshed penalties undermines stable housing, employment, and family connections.\(^{64}\) These penalties and other reentry barriers, mutually dependent and intertwined, together impose “often impenetrable barriers for individuals leaving correctional facilities.”\(^{65}\) Draconian enmeshed penalties disproportionate to the index offenses only serve to further undermine the legitimacy of the criminal justice system.\(^{66}\) A

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60. See id.

61. See, e.g., N.Y. PENAL LAW § 1.05(6) (McKinney 2006) (including the goal of “the promotion of [the convicted person’s] successful and productive reentry and reintegration into society,” along with the four traditional sentencing goals of deterrence, rehabilitation, retribution and incapacitation). With pleas as the norm, the baseline penalties shift radically from likely sentencing outcomes after trial in the rarified world of determinate sentencing, harsh guidelines, and mandatory minimums. See Bibas, supra note 38, at 137 (“The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain.”). This calculus includes not only incarceratory sentences, but also eligibility for the range of early release and reentry programs. See, e.g., Alan Rosenthal, Marsha Weissman & Elaine Wolf, Unlocking the Potential of Reentry Through Reintegrative Justice, in REENTRY, REINTEGRATION & PUBLIC SAFETY (2011) (forthcoming).

62. See, e.g., Bibas, supra note 38, at 138; Pinard, supra note 38, at 690; Smyth, Holistic Is Not a Bad Word, supra note 29, at 494-96.


64. 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); Nora V. Demleitner, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences, 11 STAN. L. & POL’Y REV. 153, 160 (1999) (arguing that enmeshed penalties achieve no rehabilitative or deterrent goals, instead labeling the person with a criminal record an “‘outcast,’ and frequently mak[ing] it impossible for her ever to regain full societal membership”); Pinard, supra note 38, at 633 (describing collateral consequences and reentry as interwoven and integrated components along the criminal justice continuum).

65. Pinard, supra note 38, at 666; see also Deborah N. Archer & Kele S. Williams, Making America “The Land of Second Chances”: Restoring Socioeconomic Rights for Ex-Offenders, 30 N.Y.U. REV. L. & SOC. CHANGE 527 (2006); Anthony C. Thompson, Navigating the Hidden Obstacles to Ex-Offender Reentry, 45 B.C. L. REV. 255, 273 (2004) (“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.”).

66. See, e.g., Jeffrey Fagan & Tracey L. Meares, Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities, 6 OHIO ST. J. CRIM. L. 173, 181 (2008); Roberts, supra note 32, at 192 (“Public confidence is particularly vulnerable at a time when the collateral consequences of criminal convictions are harsher, more numerous, and (due to techno-
shared understanding of proportionality and rehabilitative goals can form a productive common ground for negotiation in individual cases.\textsuperscript{67}

II. “COLLATERAL” NO MORE: BEYOND DEPORTATION

The decision in Padilla outlines a test for penalties, enmeshed and integral to the criminal process, that can no longer be ignored by courts and practitioners. By shining this light of truth on the shady line\textsuperscript{68} drawn by the collateral consequences rule, the Court has sent a shockwave through criminal courts and defense offices throughout the nation.

Even a cursory reading of Padilla begs an inquiry into its application to other so-called “collateral consequences.”\textsuperscript{69} Indeed, the dissent immediately accused the majority’s rule as having “no logical stopping-point.”\textsuperscript{70} Legal commentators quickly remarked on the expansive application of the Padilla rule as well.\textsuperscript{71} Many courts have begun to apply a similar reasoning to recognize the rights of people

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\textsuperscript{67} See, e.g., Smyth, Holistic Is Not a Bad Word, supra note 29, at 494-96.

\textsuperscript{68} The dark impact of the rule on people charged with crimes and their families combined with the variety of different definitions of “collateral,” see supra note 40, stand in stark contrast to the repeated insistence by courts that the doctrine is a bright-line rule. See, e.g., People v. Harnett, 2011 WL 445643, at *1 (N.Y. Slip Op. Feb. 10, 2011).

\textsuperscript{69} Even the majority decision’s word choice appears to forecast its application to penalties beyond deportation: “It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation . . . .” Padilla v. Kentucky, 130 S. Ct. 1473, 1484 (2010) (emphasis added).

\textsuperscript{70} Id. at 1496 (Scalia, J., dissenting). An amicus brief on behalf of twenty-seven states and the National District Attorneys’ Association warned that weakening the collateral consequences rule “would likely break the back of the plea agreement system.” Brief for the States of Louisiana, Alabama, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington & Wyoming and the National District Attorneys Association as Amici Curiae in Support of Respondent at *1, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 2564713. Specifically, “If the States were required to provide sound legal advice on the full range of potential collateral consequences, the costs associated with plea bargains would certainly double or triple in size.” Id. at *13.

charged with crimes to understand the real penalties resulting from plea decisions.\footnote{See, e.g., Bauder v. Dep't. of Corr., 619 F.3d 1272 (11th Cir. 2010) (ruling that attorney was ineffective for misadvice regarding the possibility of being civilly committed as a result of pleading to a charge of aggravated stalking of a minor); Wilson v. State, 244 P.3d 535 (Alaska Ct. App. 2010) (finding ineffective assistance based on misadvice that a no contest plea to a second-degree assault charge would not prejudice defendant in related civil case); Taylor v. State, 698 S.E.2d 384 (Ga. Ct. App. 2010) (finding deficient performance in counsel's failure to advise defendant that if he pled guilty to child molestation he would be required to register as a sex offender); Pridham v. Commonwealth, No. 2008-CA-002190, 2010 WL 4668961, at *1 (Ky. Ct. App. Nov. 19, 2010) (holding that misadvice concerning parole eligibility can constitute ineffective assistance, and ordering an evidentiary hearing); Commonwealth v. Abraham, 996 A.2d 1090 (Pa. Super. Ct. 2010), petition for appeal granted, 9 A.3d 1133 (Pa. 2010) (holding that counsel was obliged to inform defendant of the loss of his teacher's pension as a consequence of pleading guilty to indecent assault).}

This section lays the groundwork for an expansive yet rational duty of counsel to inquire into, investigate, advise about, and use strategically a wide range of penalties enmeshed with criminal charges. It examines current professional norms related to “collateral” penalties and, more disturbingly, the tremendous institutional incentives to violate them.

A. Prevailing Professional Norms

The very same professional standards the Court cites in \textit{Padilla} also require advice on a wide range of enmeshed penalties beyond deportation. In a system defined by pleas rather than trial, “‘[t]he decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in a criminal case . . . [and] counsel may and must give the client the benefit of counsel’s professional advice on this crucial decision.’ ”\footnote{Boria v. Keane, 99 F.3d 492, 496-97 (2d Cir. 1996) (quoting ANTHONY G. AMSTERDAM, \textit{TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES} § 201 (1988)).}  The relevant professional norms detail the “critical obligation of counsel to advise the client of ‘the advantages and disadvantages of a plea agreement.’ ”\footnote{Padilla v. Kentucky, 130 S. Ct. 1473, 1484 (2010) (quoting Libretti v. United States, 516 U.S. 29, 50-51 (1995)).} Knowledge of the comparative penalty exposure between standing trial and accepting a plea offer “will often be crucial to the decision whether to plead guilty.”\footnote{United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992).}

In truth, prevailing professional standards have for decades required defense counsel to incorporate all relevant enmeshed penalties
Duties of loyalty, investigation, legal research, counseling, and advocacy arise in the context of defense counsel's role to serve as "counselor and advocate with courage and devotion and to render effective, quality representation." Defense counsel's "paramount obligation" is to provide "zealous and quality representation to their clients at all stages of the criminal process."

1. Duty to Inquire

Counsel's duties begin at the first client interview, where he or she must inquire into a host of factors relevant to the criminal charges, pretrial release, and potential penalties, including residence, immigration status, employment, education, and financial condition. Note that these same items track critical risk-related factors for potential enmeshed penalties. Counsel must establish a relationship of "trust and confidence" and should discuss the "objective of the relationship" with the need for full disclosure of all facts for an "effective defense." Counsel should be active rather than passive, taking the initiative rather than waiting for questions from the client, "who will frequently have little appreciation of the full range of consequences that may follow from a . . . plea."

76. For an exhaustive treatment of the professional standards and treatises requiring defense counsel to incorporate enmeshed penalties into representation, see Chin & Holmes, supra note 31, at 713-23.

77. ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-1.2 (3d ed. 1993) [hereinafter ABA DEFENSE FUNCTION STANDARDS].


79. See id. § 2.2(b)(2).


81. ABA DEFENSE FUNCTION STANDARDS, supra note 77, § 4-3.1.

2. Duty to Investigate and Research

Upon learning that a client may not be a United States citizen or may have another risk-related status, counsel should investigate the client’s precise status, prior criminal record, and possible consequences that may follow any particular criminal disposition or defense strategy decision.83 This targeted investigation includes collecting information that may be relevant to sentencing or other penalties84 and contemplates securing the assistance of experts where necessary.85 Client interviews should explore “what collateral consequences are likely to be important to a client given the client’s particular personal circumstances and the charges the client faces.”86 As the investigation and research proceeds, counsel should “develop and continually reassess a theory of the case” and defense strategy in light of these client goals.87

3. Duty to Advise on Consequences of Plea and to Seek Alternatives

A proper inquiry and investigation lays the critical foundation for plea negotiation and the “duty to advise [counsel’s] client fully on whether a particular plea to a charge appears to be desirable.”88 To develop an overall negotiation plan, counsel should be “fully aware of, and make sure the client is fully aware of . . . any mandatory punishment,” “the possibility of forfeiture of assets,” and “other conse-

83. See, e.g., Vargas, supra note 82, at 5-6.
84. See NLADA Guidelines, supra note 78, § 4.1(b)(2); ABA Defense Function Standards, supra note 77, § 4-4.1(a). The New York Bar Association standards “at a minimum” require
[o]btaining all available information concerning the client’s background and circumstances for purposes of (i) obtaining the client’s pretrial release on the most favorable terms possible; (ii) negotiating the most favorable pretrial disposition possible, if such a disposition is in the client’s interests; (iii) presenting character evidence at trial if appropriate; (iv) advocating for the lowest legally permissible sentence, if that becomes necessary; and (v) avoiding, if at all possible, collateral consequences including but not limited to deportation or eviction.

NEW YORK STATE BAR ASS’N, STANDARDS FOR PROVIDING MANDATED REPRESENTATION § 1-7(a) (2005) [hereinafter NYSBA Standards].
85. See NLADA Guidelines, supra note 78, § 4.1(b)(7).
86. ABA Pleas of Guilty Standards, supra note 82, § 14-3.2 cmt. 126-27.
87. NLADA Guidelines, supra note 78, § 4.3.
88. Boria v. Keane, 99 F.3d 492, 496 (2d Cir. 1992) (citing ABA Model Code of Professional Responsibility, Ethical Considerations 7-7 (1992), superseded by ABA Model Rule of Professional Responsibility 1.2(a) (2002)). “[C]ounsel may and must give the client the benefit of counsel’s professional advice on this crucial decision.” Id. at 497 (quoting Anthony G. Amsterdam, Trial Manual for the Defense of Criminal Cases (1988) (internal quotation marks omitted).
quences of conviction such as deportation, and civil disabilities.” 89 A proper negotiation strategy considers all concessions and client benefits a settlement might obtain. 90 In advising the client, defense counsel should explore “considerations deemed important by defense counsel or the defendant in reaching a decision.” 91 Defense counsel should not recommend acceptance of a plea unless “appropriate investigation and study of the case,” as defined by these professional standards, has been completed. 92

To assist the client in his or her decision, counsel should explain all “advantages and disadvantages and the potential consequences of the agreement.” 93 The client must have sufficient time to consider properly these factors: “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.” 94 In addition, the court should ensure that the client has sufficient time for deliberation with adequate assistance and advice of counsel. 95 Before entering the plea, counsel must “make certain” that the client “fully and completely un-

89. NLADA GUIDELINES, supra note 78, § 6.2(a); see also ABA DEFENSE FUNCTION STANDARDS, supra note 77, § 4-5.1(a); NYSBA STANDARDS, supra note 84, at § I-7(c) (requiring “providing the client with full information concerning . . . immigration, motor vehicle licensing and other collateral consequences under all possible eventualities”).

90. See NLADA GUIDELINES, supra note 78, § 6.2(b). Counsel must ensure to negotiate a plea agreement with consideration of the “sentencing, correctional, and financial implications.” Id. § 8.1(a). These considerations include not only traditional sentencing options, but also the full range of alternatives to incarceration, early release programs, and supervised release (such as probation and parole). See, e.g., Rosenthal, Weissman & Wolf, supra note 61. Proactive defender planning for reentry and reintegration from the moment of a client’s arrest can mitigate enmeshed penalties, achieve more productive outcomes, and improve public safety. See id.

91. ABA PLEAS OF GUILTY STANDARDS, supra note 82, § 14-3.2(b).

92. Id.; see also ABA DEFENSE FUNCTION STANDARDS, supra note 77, § 4-6.1(b) (“Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed . . ..”).

93. NLADA GUIDELINES, supra note 78, § 6.3(a).

94. ABA PLEAS OF GUILTY STANDARDS, supra note 82, § 14-3.2(f). Many state standards echo this requirement. A New York State standard provides that “[c]ounsel should be fully aware of, and make sure the client is fully aware of, all . . . potential collateral consequences of a conviction by plea.” N.Y. STATE DEFENDER ASS’N, STANDARDS FOR PROVIDING CONSTITUTIONALLY AND STATUTORILY MANDATED LEGAL REPRESENTATION § VIII(A)(7) (2004) (emphasis added); see also NYSBA STANDARDS, supra note 84, § I-7(a)(v) (2005) (“[N]o attorney shall accept a criminal case unless that attorney is confident that he or she can provide zealous, effective and high quality representation,” which “means, at a minimum . . . avoiding, if at all possible, collateral consequences such as deportation or eviction”) (emphasis added); see generally People v. Becker, 800 N.Y.S.2d 499, 504 (N.Y. Crim. Ct. 2005) (citing the NYSBA Standards and holding that counsel’s failure to advise client on collateral housing consequences could constitute ineffective assistance of counsel).

95. See ABA PLEAS OF GUILTY STANDARDS, supra note 82, § 14-1.3(a).
derstands” the maximum “punishment, sanctions and other consequences” resulting from the plea.96

4. Duty to Advise on Consequences of Sentencing and to Seek Alternatives

In sentencing advocacy, counsel must be familiar with all “direct and collateral consequences of the sentence and judgment,” including deportation, loss of civil rights, and restrictions on or loss of license.97 To prepare for sentencing, counsel must obtain from the client a range of information related to these consequences and mitigation98 and inform the client of the “likely and possible consequences of the sentencing alternatives.”99 With these considerations, counsel must develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant’s background, the applicable sentencing provisions, and other information pertinent to the sentencing decision.100

Moreover, the ABA Standards state that a sentencing court should consider “collateral” sanctions in determining the overall sentence.101 Counsel must ensure that all available mitigating and favorable information, if likely to benefit the client, is presented to the court,102 while also ensuring that the client is not harmed by information not properly before the court.103 In plea negotiations and sentencing advocacy, counsel should be mindful that enmeshed penalties often adversely affect family members (if identified as a client prior-

96. NLADA GUIDELINES, supra note 78, § 6.4(a)(2).
97. Id. § 8.2(b); see also ABA DEFENSE FUNCTION STANDARDS, supra note 77, § 4-8.1(a) (requiring defense counsel to analyze the “practical consequences of different sentences”).
98. See NLADA GUIDELINES, supra note 78, at § 8.3(a)(3).
99. Id. § 8.3(a)(1); see also ABA DEFENSE FUNCTION STANDARDS, supra note 77, § 4-8.1(a).
100. NLADA GUIDELINES, supra note 78, § 8.1(a)(4). Vargas notes that “some immigration consequences are triggered by the length of any prison sentence. In some cases, a variation in prison sentence of one day can make a huge difference in the immigration consequences triggered.” VARGAS, supra note 82, at 6 (citing 8 U.S.C. § 1101(a)(43) and noting that a prison sentence of one year for theft offense results in “aggravated felony” mandatory deportation for many noncitizens while a 364-day sentence may avoid deportability or preserve relief from deportation).
102. See NLADA GUIDELINES, supra note 78, § 8.1(a)(3); see also ABA DEFENSE FUNCTION STANDARDS, supra note 77, § 4-8.1(b) (“Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused.”).
103. See NLADA GUIDELINES, supra note 78, § 8.1(a)(2).
ity) and serve as counter-productive barriers to a client’s successful and productive reentry and reintegration into society. Depending on the circumstances of the case and the judge, counsel may make reasonable strategic choices about presenting information about certain status-related penalties, such as deportation, eviction from public housing, or loss of a professional license.

Significantly, the foregoing standards do not make any distinction between advice regarding immigration consequences and other enmeshed penalties, such as loss of housing. Numerous other legal treatises and practice guides for criminal law practitioners instruct attorneys to advise their clients regarding possible “collateral” consequences of their guilty pleas. From the client’s perspective, one wonders why the point is ever debated: lawyers whose practice “predictably results in serious avoidable harm would and should be unemployable.”

B. Floodgates & Logjams: Institutional Incentives to Backslide

Although Padilla was a clear application of an old constitutional rule that embraced reality from a client’s perspective, one should never discount the abiding inertial and quotidian power of courts’ and practitioners’ functionalist fears. The complexity of immigration law inspires its own strong reaction from many judges and defense attorneys, and the expansive duty to advise clients on the full range of enmeshed penalties beyond immigration can elicit protestations of the “impossibility” of compliance.

An acknowledgement of enmeshed penalties should radically shift the criminal justice calculus, but a number of recent decisions illustrate the ways in which the perspectives and priorities of institutional actors can bolster resistance and warp reality. The derogatory tone of the Court of Special Appeals of Maryland in its long decision in Miller v. State, holding that Padilla did not apply retroactively, illustrates the deep commitment of many courts to the collateral conse-

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104. See, e.g., id. § 8.6(a)(5). On June 7, 2006, New York Penal Law § 1.05(6) was amended to add a new goal, “the promotion of [the convicted person’s] successful and productive reentry and reintegration into society,” to the four traditional sentencing goals of deterrence, rehabilitation, retribution and incapacitation. N.Y. PENAL LAW § 1.05(6) (McKinney 2006).

105. Strategic choices such as these only highlight the significantly different roles (and constitutional duties) of defense counsel and the court. See supra at Section I(A)(1).

106. See Chin & Holmes, supra note 31, at 713-18 (citing authorities).

107. Id. at 718.
quences doctrine (and defensiveness at being effectively reversed).\textsuperscript{108} The Maryland court steadfastly justified the “collateral/direct” distinction and bitterly disputed the language in \textit{Padilla} purporting to apply settled precedent, searching “internally for Freudian clues” to find that \textit{Padilla} announced a new constitutional rule.\textsuperscript{109} It then went on to cite large portions of Justice Alito’s concurrence and to detail dozens of federal and Maryland cases that the Supreme Court had effectively abrogated.\textsuperscript{110} Other decisions refusing to apply \textit{Padilla} retroactively share a similar recalcitrance. In \textit{People v. Kabre}, for example, a New York trial court refused to apply \textit{Padilla} retroactively to a misdemeanor plea, detailing a litany of pre-\textit{Padilla} federal, New York, and other state cases that had applied the collateral consequences rule.\textsuperscript{111} The court further distinguished \textit{Padilla}, writing, “[u]nlike the immigration consequences attendant upon conviction of a felony, the immigration consequences of a misdemeanor conviction are often unclear.”\textsuperscript{112} Thoroughly confused, the court did not understand that the Immigration and Nationality Act (“INA”) definition of an “aggravated felony” includes crimes that are neither “aggravated” nor “felonies” under state criminal law.\textsuperscript{113}

In \textit{People v. Gravino}, New York’s highest court rejected in a split decision a Fifth Amendment challenge to two separate sex offense pleas, holding that the trial court was not required to advise about Sex Offender Registration Act (“SORA”) registration or probation conditions (including a prohibition against ever seeing one’s own children).\textsuperscript{114} While the failure to notify did not render the pleas

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\textit{Miller}, 11 A.3d at 346-47 (internal citations omitted).
\textsuperscript{109} Id. at 347. For example, one sure-fire tip-off that the Supreme Court was preparing to change the law was its amassing, \textit{Padilla} of “prevailing professional norms [to] support the view that counsel must advise her client regarding the risk of deportation.” The Court cited a host of professional ethical standards and academic authorities. That is a classic argumentative technique when making a case not for recognizing what the law already is but in building persuasive support for what the law, in the Court’s judgment, ought to be. The Supreme Court was unquestionably justifying the change it was about to make. That, by definition, is making new law. That much is clear from within the four corners of the majority opinion itself.
\textsuperscript{110} See id. at 347-52.
\textsuperscript{111} See People v. Kabre, 905 N.Y.S.2d 887, 899 (N.Y. Crim. Ct. 2010).
\textsuperscript{112} Id. at 890.
\textsuperscript{114} See People v. Gravino, 928 N.E.2d 1048, 1055-56 (N.Y. 2010) (holding that an ineffective assistance claim was not properly before the court). In \textit{People v. Harnett}, the court held that being subject to potential lifetime civil commitment under New York’s Sex Offender Manage-
involuntary, the court appeased itself by noting that trial courts had discretion to grant a motion to withdraw a plea where “a defendant can show that he pleaded guilty in ignorance of a consequence that, although collateral for purposes of due process, was of such great importance to him that he would have made a different decision had that consequence been disclosed.” Then, illustrating the powerful and warping pressure of the floodgates fear, the court remarked, “Undoubtedly, in the vast majority of plea bargains the overwhelming consideration for the defendant is whether he will be imprisoned and for how long.”

New York’s court, of course, misses the point in a telling manner. In light of the court’s own holding, the claim of jail preeminence in decision-making is perversely circular: since neither defense counsel nor courts notify people of any penalties other than incarceration and fines, people pleading guilty only prioritize incarceration in their plea decisions. The professional standards exist to break this circular reasoning, recognizing that when properly counseled or notified about real, lifetime penalties, clients’ calculus of a plea would radically change.

These decisions demonstrate a deep ignorance of many realities of a system defined by pleas rather than trials and a general incom-
prehension of plea bargaining beyond the need to keep the volume flowing. They share with Justice Alito’s Padilla concurrence, however, a starkly honest assessment of the vast disjunction between the professional standards and daily practice by some defense attorneys that the Padilla majority elided. Quite simply, many attorneys and judges remain unaware of the majority of enmeshed penalties. “Many,” however, does not mean “most.” A tremendous number of private practitioners and defender offices already use these strategies, incorporating enmeshed penalties into their regular practice with proven results. An honest assessment recognizes that the ignorance described by Justice Alito predominates in the representation of poor, largely minority people charged with crimes. Those able to afford counsel would never accept a standard of representation that simply ignored real-life penalties because of some legal fiction.

This remaining chasm between Padilla’s constitutional minimum and actual practice, combined with institutional pressures from courts concerned with system costs, will continue to motivate a return to the limiting principle of the collateral consequences rule. The concurrence in Padilla offered this perceived reality as an excuse for bad practice, elevating the descriptive to the normative. Instead, it is an embarrassing call to action.

120. See, e.g., Bibas, supra note 38, at 126, 130.
121. See, e.g., Padilla v. Kentucky, 130 S. Ct. 1473, 1487-88 (2010) (Alito, J., concurring); Miller v. State, 11 A.3d 340 (Md. App. 2010); Gabriel J. Chin, Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction, 6 J. GENDER, RACE & JUST. 253, 254 (2002) (“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.”); Pinard, supra note 38, at 630 (“[D]efendants often plead guilty to crimes completely unaware of the network of consequences that both can and will attach to their convictions.”); Roberts, supra note 32, at 182; Smyth, Holistic Is Not a Bad Word, supra note 29, at 486 (noting fragmentation of services and lack of knowledge).
122. For example, for over a decade The Bronx Defenders has integrated civil legal services into its holistic defense work, advising thousands of clients on the full range of enmeshed penalties and working to mitigate these punishments through criminal case strategies or related civil representation. See Pinard, supra note 38, at 1067-68 (describing the work of other defender offices); 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, 429-38 (2001).
123. In justifying the “collateral-consequences rule,” Justice Alito offered a tautology: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience. Padilla, 130 S. Ct. at 1487-88 (Alito, J., concurring). Justice Alito also acknowledged that criminal convictions result in a wide variety of other penalties, including “civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to pos-
C. Constitutional Minimums and Aspirational Standards

While the Padilla holding applies specifically to advice on deportation risk, the Court’s clear reasoning, this duty also extends to any other serious penalty similarly enmeshed with criminal charges or convictions, where in practical effect it is difficult to “divorce the penalty from the conviction.” In this way, defense counsel must now provide affirmative, competent advice to clients of the risk of all penalties sufficiently “enmeshed” with their criminal charges or potential pleas.

This duty comports with the professional standards outlined above and with the “natural assumption” of people charged with crimes that their defense attorneys would tell them about “all of the serious consequences of the plea when they discussed its pros and cons.” Silence, in this context, can be affirmatively misleading. The concurrence in Padilla recognized this concept, albeit with a different motivation: “[I]f defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. . .Incomplete legal advice may be worse than no advice at all . . .”

In this context of silence as deficient performance, best practices for advocates actually overlap substantially with minimum Strickland performance standards. In its simplest construction, ineffective assistance under Strickland is deficient performance by counsel resulting in prejudice. Courts measure performance of counsel against an “objective standard of reasonableness” defined by “prevailing professional norms.” In judging counsel’s performance, “hindsight is discounted by pegging adequacy to ‘counsel’s perspective at the time’ investigative decisions are made, and by giving a ‘heavy measure of

124. See id. at 1486.
125. Id. at 1481.
126. Roberts, supra note 32, at 179.
127. Padilla, 130 S. Ct. at 1491 (Alito, J., concurring); see also Love & Chin, supra note 42, at 22 (noting that limiting the advisement duty to deportation could result in affirmatively misleading advice since a client would reasonably assume those are the only important consequences).
129. Id. at 688.
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deference to counsel’s judgments.’”131 While objective, this test necessitates a “context-dependent,”132 “case-by-case examination of the evidence.”133 As Padilla illustrates, this case-by-case analysis does not permit any categorical approach, including that of the “collateral consequences” doctrine.134

The duties to inquire into, investigate, advise about, and tactically leverage likely “collateral” consequences to criminal charges set a relatively high minimum standard. Issues of judgment and strategy arise in tactical negotiation decisions and sentencing advocacy, but the basic duties of inquiry, investigation, and advisement have less play. Counsel cannot simply ignore penalties like deportation, and the failure to fulfill these three duties can never be strategic. While best advocacy practices certainly urge broader, holistic skills and services than may be required under Strickland’s performance prong,135 both best practices and constitutional standards compel a full assessment of any relevant enmeshed penalty.

The Sixth Amendment standard of effective assistance, ostensibly a constitutional minimum,136 in practice (and frighteningly) operates as the only enforceable measure of quality. The civil system is “essentially unavailable as a means of monitoring—and thereby improving—criminal defense lawyering . . . . In fact, criminal malpractice actions are so difficult to win that, for the most part, criminal defense attorneys enjoy special protection from civil liability for substandard conduct.”137 For example, to state a claim for malpractice in a criminal case, a plaintiff must prove actual innocence or obtain post-conviction relief to prove the causation element, that “but for his counsel’s negligence, he would have been acquitted of the offense.”138 Finally, the

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132. Smith, 539 U.S. at 523.
134. Chin & Holmes, supra note 31, at 712.
137. See Meredith J. Duncan, Criminal Malpractice: A Lawyer's Holiday, 37 GA. L. REV. 1251, 1255 (2003) (arguing that that criminal defense attorneys practice largely without accountability, leaving the criminal defense bar with little incentive to improve its lawyering).
138. Id. at 1279.
ethics rules provide little protection, as “not one jurisdiction seems actively to use the disciplinary process to protect criminal defendants from incompetent criminal defense representation.”\textsuperscript{139} Perhaps more important, neither a professional malpractice action nor an attorney disciplinary proceeding can achieve actual relief from the consequences of the ineffective assistance (the conviction or enmeshed penalty).

III. ENMESHED PENALTIES: THE \textit{PADILLA} STANDARD

With “collateral consequences” no longer categorically excluded from Sixth Amendment analysis, counsel and courts must now determine which consequences and penalties properly require an individualized risk assessment and advisement, and under what circumstances. \textit{Padilla} provides an additional legal framework to help defenders institutionalize a practice that most of them already followed with many of their clients.\textsuperscript{140} To begin this inquiry, we must look to the \textit{Strickland} standards and the Court’s parsing of the “unique” nature of deportation.

Determining the scope of these duties for any particular client requires two levels of analysis: (1) what (which penalties), for whom (which clients), and when; and (2) what level of advice. The \textit{Padilla} standard described in this article sets forth factors necessary to invoke a spectrum of reasonable advice, including the highest standard of care from defense counsel—affirmative, individualized advice and ad-

\textsuperscript{139} Meredith J. Duncan, \textit{The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform}, 2002 BYU L. REV. 1, 43 (2002).

\textsuperscript{140} As acknowledged in the established professional standards outlined \textit{supra} in Section II(A), all good defense counsel recognize the importance of real-life penalties to their clients and incorporate them to a significant extent in their representation of many (or at least some) clients. The challenge is to take this practice to scale with all clients in a high-volume system. Resources exist to assist in this endeavor: Through a grant from the U.S. Department of Justice, Bureau of Justice Assistance, The Center for Holistic Defense at The Bronx Defenders provides in-depth assistance to defender organizations seeking to adopt a more holistic model of representation. \textit{See Center for Holistic Def.,} \texttt{www.holisticdefense.org} (last visited Mar. 3, 2011) (“Holistic defense is an innovative, client-centered and interdisciplinary model of public defense that addresses both the circumstances driving poor people into the criminal justice system as well as the devastating consequences of criminal justice involvement by offering criminal and related civil legal representation, social work support and advocacy in the client community.”). On the level of individual advocacy, Reentry Net’s online resource center hosts extensive free resources, including a clearinghouse of materials for legal aid, criminal defense, social services, courts, policymakers, and probation and parole agencies on the consequences of criminal proceedings, providing proven solutions to reentry problems. \textit{See Reentry Net,} \texttt{www.reentry.net} (last visited Mar. 3, 2011).
vocacy regarding the specific risk of an enmeshed penalty that “is not, in a strict sense, a criminal sanction.”

A penalty need not meet every factor of this test to require this level of counsel. While objective, the Strickland analysis must be contextualized and applied case-by-case. Any reasonable analysis of deficient performance considers the totality of the circumstances: a client’s individual status, situation, and priorities; the evidence underlying the charges; and the risk and legal factors implicated by the enmeshed penalty. This standard asks no more than the familiar measure of a good advocate—individualized, zealous representation of each client.

A. Penalties That Require Advice and Advocacy

Under Padilla and prevailing professional standards, a defense counsel has a specific duty to advise and advocate when a penalty is severe, enmeshed with the criminal charges, and likely to occur.

1. Severe (Absolute or Relative)

For a non-criminal penalty to require the advice of counsel, it first must meet the test of severity. At least two measures of severity—absolute and relative—can make a penalty serious enough to incorporate into defense advocacy and counseling. While the attorney often takes the spotlight in post hoc Sixth Amendment analysis, never forget that the client holds the constitutional right. His or her goals, priorities, and judgment critically factor into the contextual nature of the Sixth Amendment duty of counsel. People charged with crimes do not live in a vacuum—their families often suffer the consequences of

143. See, e.g., Segura v. State, 749 N.E.2d 496, 500 (Ind. 2001) (“[W]e cannot say that this failure to advise of deportation consequences of a plea as a matter of law never constitutes deficient performance. Whether it is deficient in a given case is fact sensitive and turns on a number of factors. These presumably include the knowledge of the lawyer of the client’s status as an alien, the client’s familiarity with the consequences of conviction, the severity of criminal penal consequences, and the likely subsequent effects of deportation.”).
144. See, e.g., NLADA GUIDELINES, supra note 78, § 1.1(a).
145. See, e.g., Roberts, supra note 32 at 129-30 (describing two-factor test of significance: severity and likelihood); Bibas, supra note 38, at 153 (asking whether the penalty is severe enough or certain enough to be a significant factor in the person’s bargaining calculus).
146. See Padilla, 130 S. Ct. at 1481. The concurrence described its touchstone for the duty (there, a prohibition from affirmative misadvice and a requirement of some warning of risk) as “exceptionally important collateral matters.” Id. at 1493 (Alito, J., concurring).
criminal charges with as much or more hardship. The reality of this impact factors into client decisions every day in criminal court. Any analysis of the severity of a penalty, therefore, properly encompasses the impact both on clients and their families. Indeed, the Court in Padilla considered the “impact of deportation on families living lawfully in this country” as important to its analysis that deportation risk required specific advice of counsel.

Deportation illustrates severity on an absolute scale. Described as “the equivalent of banishment or exile,” deportation constitutes an unmistakably harsh penalty for those deported and their families. Central to its holding that counsel must inform her client whether his plea carries a risk of deportation, the Court in Padilla found, “[o]ur longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”

With the client as the focus of the analysis, a penalty can also be serious or severe on a relative scale. “Relative,” here, does not mean subjective; instead, it entails an analysis of the severity of the enmeshed penalty to the person relative to the offense and its traditional criminal penalties. The Court in Padilla alluded to this approach by repeatedly referencing the client’s reasonable priorities in weighing a plea against all relevant penalties, enmeshed and traditional.

148. Padilla, 130 S.Ct. at 1486.  
151. Padilla, 130 S. Ct. at 1486. The severity of deportation, to the Court, “only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.” Id.
152. The Court recognized that enmeshed sanctions are “an integral part - indeed, sometimes the most important part—of the penalty that may be imposed . . . .” Padilla, 130 S. Ct. at 1480. “We find it ‘most difficult’ to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.” Id. at 1481 (quoting United States v. Russell, 666 F.2d 35, 38 (C.A.D.C. 1982)). “‘Preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.’” INS v. St. Cyr, 533 U.S. 298, 323 (quoting 3 MATTHEW BENDER, CRIMINAL DEFE NSE TECHNIQUES § 60A.01(1999)) (quoted in Padilla, 130 S. Ct. at 1484). “[P]reserving the possibility of” discretionary relief from deportation “would have been one of the principal benefits sought by defend-
simply, the measure of relative severity assesses whether the enmeshed penalty overshadows the traditional criminal penalty. 153

This factor recognizes what has become a defining feature of our criminal justice system: the wide range of serious penalties that attach to minor offenses with non-incarceratory sentences. 154 These serious penalties obtained in a system that values guilty pleas and quick adjudications over all else, where defendants often enter guilty pleas to minor offenses with little time to consult defense counsel, sometimes after only a few minutes of consultation at the first court appearance, or even without an attorney at all. All parties might assure the defendant that he will be released from jail with only a misdemeanor conviction, yet never mention (or even know) that the particular conviction will lead to [serious enmeshed consequences]. 155

The list of severe penalties resulting from criminal charges reaches into every area of law and life. Ineligibility for or exclusion from affordable housing programs on the basis of a criminal conviction is commonplace; 156 a plea to any crime, for example, makes a person ineligible for a Section 8 housing subsidy in Milwaukee for five years. 157 A conviction for any misdemeanor can result in the revocation of a New York barber license, 158 and conviction of simple possession of a marijuana cigarette makes a person ineligible for federal

153. See, e.g., Roberts, supra note 32, at 129, 188; Pinard, supra note 136, at 1077 (discussing how even misdemeanor offenses can carry severe collateral penalties); Chin, supra note 121, at 253 (noting that “collateral consequences may be the most significant penalties resulting from a criminal conviction”); Rodney J. Uphoff, The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach, 2 CLINICAL L. REV. 73, 100-01 (1995) (“These . . . collateral consequences may be considerably more important to the defendant than the punishment meted out by the judge at sentencing.”).

154. See, e.g., Roberts, supra note 32 and accompanying text.

155. Id. at 181-82 (internal citations omitted); see also Chin, supra note 121 and accompanying text.

156. See, e.g., People v. Becker, 800 N.Y.S.2d 499, 502 (N.Y. Crim. Ct. 2005) (finding ineffective assistance due to failure to adequately advise on housing consequences associated with a plea); CATHERINE BISHOP, NAT’L HOUSING LAW PROJECT, AN AFFORDABLE HOME ON REENTRY: FEDERALLY ASSISTED HOUSING AND PREVIOUSLY INCARCERATED INDIVIDUALS 1 (2009) [hereinafter NAT’L HOUSING LAW PROJECT] (outlining challenges to securing housing once one has a conviction on their record).


158. N.Y. GEN. BUS. LAW § 441 (McKinney 2010).
student loans for a year.159 Eleven states permanently bar anyone with a drug-related felony conviction from receiving federally-funded cash assistance or food stamps during his or her lifetime.160 Certain charges and convictions result in the loss of custody of a child or irrevocable termination of parental rights.161

2. Enmeshed

Second, any penalty sufficiently enmeshed with the criminal charges will require advocacy and advice by defense counsel. With this formulation, the Court repudiated the fiction of the collateral consequences doctrine with a simple truth: so-called “collateral” consequences are anything but collateral. In reality, they are “enmeshed,” “intimately related” to the criminal charges such that it is “difficult to divorce the penalty from the conviction.”162

The Court’s analysis in Padilla began with a lesson in legal history, charting the course of federal immigration law related to criminal conduct over the past ninety years.163 It described the steady expansion of deportable offenses and the erosion of any discretionary relief mechanisms. The Court’s conclusion was telling:

These changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part — indeed, sometimes the most important part — of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.164

Statutes, regulations, and administrative policies provide common sources of law that enmesh criminal convictions with other penalties.

163. See id. at 1478-80.
164. Id. at 1480 (internal citation omitted).
They reside at every level of government and legal hierarchy, across topic areas and with myriad justifications. In the end, they all tie a penalty—the loss of a right or opportunity—to a criminal charge or conviction. This link creates a corresponding duty of counsel to incorporate relevant penalties into criminal defense representation. 

3. Likely

Finally, to create a duty to advise, a penalty must meet a threshold of likelihood given the circumstances of the case and the person charged with the crime. In *Padilla*, the Court found it important that the law made removal a nearly automatic result for a “broad class” of noncitizens. Importantly, the Court did not invoke a legally mandatory penalty, but rather focused on the realistic impact of a conviction on a noncitizen, recognizing that some would be eligible for discretionary relief while others faced automatic deportation. This test therefore differs in important ways from a distinction in the literature drawn between “collateral sanctions” (imposed automatically by law upon conviction) and “discretionary disqualifications” (authorized but not required by law). The American Bar Association and Uniform Law Commission created these categories to recommend different levels of procedural and substantive limitations on enmeshed penalties. While of some use to a practitioner seeking to avoid, mitigate, or challenge a penalty, this distinction lacks sufficient contextualization to

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165. See, e.g., ABA & PUB. DEFENDER SERV. FOR THE D.C., INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (2009); NAT’L HOUSING LAW PROJECT, supra note 156; Smyth, supra note 80.

166. Many significant and predictable consequences of criminal proceedings are nevertheless not legally enmeshed with the criminal charges. See, e.g., Smyth, *Holistic Is Not a Bad Word*, supra note 29, at 481-82


168. Id. at 1480, 1483 (discussing the preservation of the possibility of discretionary relief from deportation).

169. COLLATERAL SANCTIONS, supra note 101, 19-1.1(a)-(b).


171. For an analysis and critique of this distinction related to policy limitations on enmeshed penalties, see Smyth, *Holistic Is Not a Bad Word*, supra note 29, at 491; see also Roberts, supra note 32, at 155-60 (outlining various adoptions of standards addressing collateral consequences).

172. See generally, e.g., Smyth, *From Arrest to Reintegration*, supra note 147 (giving a practitioner’s guide to procedural and substantive issues pertaining to collateral consequences).
map onto the *Padilla* enmeshed penalties test. As a short rule of decision, however, meeting the definition of “collateral sanction” is a sufficient, but not necessary, condition to trigger the duty to advise. In addition, many “discretionary disqualifications,” although technically requiring the action of an intervening decision-maker, are sufficiently likely to satisfy this part of the enmeshed penalty test.173

Another important facet of likelihood stands as critical limiting principle for daily practice. The specific duty owed to an individual client always depends on the likelihood viewed in context—the client’s status, residence, family background, employment history, short- and long-term goals, and stated priorities. Many penalties stand out as severe, enmeshed, and legally likely, but still miss the final, individualized mark of likelihood for a particular client. In the most obvious example, an attorney need not advise a U.S. citizen (assuming that counsel has adequately investigated this fact) that the plea he plans to take would render a non-citizen deportable. A person who is neither a recipient nor an applicant for public housing need not receive advice on the public housing consequences of a plea.175 In the same way, thousands of severe and enmeshed penalties remain irrelevant at any particular time to particular clients.

B. The Level of Advocacy and Advice Required

Once counsel determines that a specific client runs a risk of a particular enmeshed penalty that meets the test above, he or she must advise the client accordingly and incorporate it into defense strategy. Neither misadvice nor the failure to warn about these severe, enmeshed, and likely penalties “can ever be strategic, and thus neither are ever reasonable.”176 Padilla made clear that silence is no longer an option—seven justices agreed that in the face of enmeshed penal-

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175. While an apparently obvious point, this limiting principle undercuts the objections invoking the impossibility of providing clients with “laundry lists” of theoretically possible penalties.

176. Roberts, supra note 32, at 175 (discussing State v. Paredez, 101 P.3d 799 (N.M. 2004)). While the Supreme Court has disfavored per se rules in assessing counsel’s performance under the Sixth Amendment, the “rule” above concerning enmeshed penalties remains context-dependent because it first measures a penalty against the multi-factor test.
ties, silence is per se ineffective. The particularity of advice and advocacy regarding the risk of an enmeshed penalty, however, depends on the character of the penalty and the priorities of the client.

1. “Succinct, clear, and explicit”

The Court in Padilla tied the requisite specificity of advice and advocacy to the specificity of the enmeshed penalty. At the highest level, a “succinct, clear, and explicit” penalty mandates specific, individualized advice to a person charged with a crime about the risk of its imposition. When the enmeshed consequence is “truly clear, . . . the duty to give correct advice is equally clear,” Professional norms similarly require incorporation of this risk into defense strategy.

Advocates and courts should not make the mistake of confusing complexity with a lack of clarity. The Court applied the highest standard of advisement and advocacy to the intersection of immigration and criminal law, a body of law and practice variously described as “complex” and “labyrinthine . . . a maze of hyper-technical statutes and regulations.” To the uninitiated, this complexity appears daunting and confusing. Of course, the same holds true for any significant body of law. Proper training and familiarity can reveal significant clarity in the application of complex laws to specific facts. Congress has decided to intertwine criminal and immigration law, and defense attorneys can no more ignore these real penalties than they can a complex new sentencing guidelines regime.

At the other end of the spectrum, if the penalty is severe and enmeshed but also is “unclear or uncertain” or “not succinct and

177. “[T]here is no relevant difference ‘between an act of commission and an act of omission’ in this context.” Padilla v. Kentucky, 130 S. Ct. 1473, 1484 (2010) (internal citations omitted). In their concurrence, Justice Alito and C.J. Roberts emphasized that “silence alone is not enough to satisfy counsel’s duty to assist the client.”

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 . . . putting the client on notice of the danger of removal . . . .

Id. at 1494 (Alito, J., concurring); see also Strickland v. Washington, 466 U.S. 668, 690-91 (1984) (discussing another omission—the failure to investigate).

178. Padilla, 130 S. Ct. at 1483.
179. See, e.g., id. at 1486; NLADA GUIDELINES, supra note 78, § 6.2(b).
180. Padilla, 130 S. Ct. at 1483.
straightforward,” counsel must still advise about the risk. “Lack of clarity of the law . . . does not obviate the need for counsel to say something about the possibility of [an enmeshed penalty], even though it will affect the scope and nature of counsel’s advice.”

More important, identifying enmeshed penalties of any stripe constitutes a critical tool for defense advocacy. Indeed, the real power of Padilla flows not from its application to post-conviction relief but from the leverage to achieve better results (for clients and their communities) in pending and future criminal cases provided by the imprimatur of the Supreme Court.

2. Importance to Person Charged

In accordance with the case-specific character of legal representation and effective assistance measures, the stated importance of the penalty to the person charged should impose a duty to provide more specific advice than ordinarily required. The Constitution, of course, assigns the choice to plead to the people charged with crimes, “which necessarily means that they are entitled to make their decision based on considerations that they deem important. A defendant is not asking too much in expecting that her legal counsel will give her reasonable advice about the legal consequences of her decisions.” An individual client who communicates to counsel specific priorities or fears related to a particular penalty or consequence should reasonably expect specific advice related to the risk attendant to a potential plea. Indeed, one hopes any standard of lawyering provides that

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182. Padilla, 130 S. Ct. at 1483.
183. “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.” Id. at 1483 (citations omitted).
184. Id. at 1483 n.10.
185. See, e.g., Pinard, supra note 38, at 680-81, 685; Smyth, Holistic Is Not a Bad Word, supra note 29, at 496.
186. The Court explicitly encouraged the defense and prosecution to reach creative resolutions during the plea bargaining process, noting that “informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.” The Court noted approvingly that counsel could “plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation.” Padilla, 130 S.Ct. at 1486; see Smyth, “Collateral” No More, supra note 29.
188. See, e.g., People v. Becker, 800 N.Y.S.2d 499, 504 (N.Y. Crim. Ct. 2005) (“An attorney’s performance is particularly deficient when the incorrect advice is offered to a defendant in response to his or her expressed concerns and pointed questions regarding the potential collateral consequence.”).
client priorities significantly shape the scope and specificity of legal advice and advocacy.

The client’s expressed goals and concerns can augment the duty to investigate and advise, but it can never be an excuse not to inquire. The fact that a client does not ask about a given consequence does not alter counsel’s duty to bring any sufficiently serious enmeshed penalty to the client’s attention, whether or not they subjectively know to care about it. For a “strategic” decision to be reasonable, it must be based upon information the attorney has made after conducting a reasonable investigation. Counsel must exercise due diligence to investigate facts relevant both to the offense and to the potential penalties sufficient to make a “fully informed and deliberate decision” about litigation and plea bargaining strategy. As the Court established in *Strickland*, “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”

3. Affirmative Misadvice

As the Court noted, *Padilla* was not a difficult case in which to find deficiency: “The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.” A more interesting analysis applies to cases where the sanction may fall short of the full “enmeshed penalty” test, but counsel gives affirmative misadvice on a penalty that nonetheless was enmeshed or serious. In *Padilla*, seven justices agreed that affirmative misadvice “regarding exceptionally important collateral matters” is ineffective. These cir-

189. In *People v. Wong*, a New York trial court denied a *pro se* ineffective assistance claim, holding that defense counsel had “no reason to think” the client was a non-citizen solely because the client told the police that he was a citizen when he was arrested. *People v. Wong*, 2006QN025879, NYLJ 1202475679478, at *1 (N.Y. Crim. Ct., 2010). The court got the analysis shockingly wrong—second- or third-hand information on police paperwork does not vitiate the basic duty to inquire into status relevant to enmeshed penalties.
190. *See supra* note 128 and accompanying text.
192. *See, e.g.*, *Wiggins*, 539 U.S. at 522, 527 (*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.”); ABA DEFENSE FUNCTION STANDARDS, supra note 77, 4-4.1.
193. 466 U.S. at 690-91; *see also* *Wiggins v. Smith*, 539 U.S. at 527.
195. *Id.* at 1493 (Alito, J., concurring).
cumstances present a much clearer case of defective performance where the misadvice relates to a matter important to the client—indeed, that is the very essence of deficient performance.196

Of course, a post-conviction challenge in this scenario must still meet the prejudice prong. When a person can prove reasonable reliance on the bad advice, and that but for that advice he would not have pled guilty, courts have proven willing to vacate the pleas as involuntary.197 In the context of an enmeshed penalty, affirmative misadvice can have the practical effect of a promise of leniency to induce a plea. In vacating the plea on remand in *Hill v. Lockhart*, for example, the Eighth Circuit found ineffective assistance where counsel gave incorrect advice on parole eligibility despite specific knowledge of its importance to his client.198

C. A Note on Prejudice: Redefining Rational Choice

While beyond the scope of this Article, the person-centered realism of *Padilla* should have significant impact on assessments of prejudice in the context of ineffective assistance claims for failure to advise on enmeshed penalties. Prejudice resulting from deficient performance occurs when “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”199 In the context of a plea, prejudice requires an assessment of whether counsel’s constitutionally ineffective perform-

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197. See, e.g., Segura v. State, 749 N.E.2d 496, 504 (Ind. 2001) (“Some petitions allege in substance a promise of leniency in sentencing. In other words, the claim is that a different result was predicted or guaranteed to result from a plea. . . . We agree that, if a petition cites independent evidence controverting the record of the plea proceedings and supporting a claim of intimidation by an exaggerated penalty or enticement by an understated maximum exposure, it may state a claim.”).

198. *Hill v. Lockhart*, 894 F.2d 1009, 1010 (8th Cir. 1990) (en banc) (“Not only had Hill explicitly asked his counsel about the parole system in Arkansas, Tr. 23, but he had made clear that the timing of eligibility was the dispositive issue for him in accepting or rejecting a plea bargain. He told his attorney that he considered it no bargain to forego a trial unless his eligibility would be sooner than seven years, which he understood to be the time he could serve with commutation of a life sentence. The Plea Statement bears the signature of Hill’s counsel, immediately below the words: ‘His plea of guilty is consistent with the facts he has related to me and with my own investigation of the case.’ Given the attorney’s knowledge of his client’s particular concern, a failure to check the applicable law was especially incompatible with the objective standard of reasonable representation in *Strickland*.” (internal citations omitted)).

ance affected the outcome of the plea process. To satisfy the prejudice requirement, the client must show that there is a “reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”

Of course, attorney errors “come in an infinite variety,” and different types of errors can lead to different types of prejudice. Errors or omissions of counsel that overlook or impair a defense often require a similar analysis as a trial IAC claim—the likelihood of that defense to succeed at trial. Courts measure the effect of these errors on a decision to plead by evaluating the probability of success of the omitted defense or evidence. Similarly, if the error or omission overlooked evidence or circumstances that affect the penalty imposed, prejudice should be evaluated by the reasonable probability that it had that effect.

Where, however, counsel’s advice omits or fails to properly describe penalties (as is most relevant for enmeshed penalties), the prejudice analysis properly focuses on the plea decision itself rather than the outcome of a hypothetical trial. Here, the “result of the proceeding” becomes the “result of the plea,” and prejudice involves proof that counsel’s errors in advice as to penalties were material to the decision to plead.

In *Hill v. Lockhart*, the convicted Hill sought to withdraw his plea because his attorney gave him erroneous advice as to his eligibility for parole under the sentence agreed to in the plea bargain. After holding that *Strickland* applied to plea bargaining, the Court found Hill could not meet the prejudice standard. The *Hill* Court’s findings

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201. *Strickland*, 466 U.S. at 693.
204. *Id.* at 504.
206. Cases that pre-date *Padilla* set forth a similar if more onerous test. See, e.g., *Segura*, 749 N.E.2d at 507 ("[F]or claims relating to penal consequences, a petitioner must establish, by objective facts, circumstances that support the conclusion that counsel’s errors in advice as to penal consequences were material to the decision to plead. Merely alleging that the petitioner would not have pleaded is insufficient."); see also United States v. Gordon, 156 F.3d 376, 380-81 (2d Cir. 1998) (affirming the finding that the disparity between the sentence exposure represented by the attorney and the actual maximum sentence was objective evidence of prejudice, i.e., that defendant had rejected a beneficial plea agreement based on the erroneous advice).
stand as a roadmap for post-*Padilla* assessments of plea bargaining rationality in the face of ineffective advice about enmeshed penalties:

Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty.\footnote{Hill, 474 U.S. at 60.}

On remand (and after Hill amended these pleading defects), the Eighth Circuit vacated the plea:

Hill need not show prejudice in the sense that he probably would have been acquitted or given a shorter sentence at trial, but for his attorney’s error. All we must find here is a reasonable probability that the result of the plea process would have been different—that Hill “would not have pleaded guilty and would have insisted on going to trial.”\footnote{Hill v. Lockhart, 877 F.2d 698, 704 (8th Cir. 1989) (quoting Hill, 474 U.S. at 59), aff’d Hill v. Lockhart, 894 F.2d 1009 (8th Cir. 1990) (en banc). But see United States v. Parker, 609 F.3d 891 (7th Cir. 2010). There, defense counsel misadvised on sentencing exposure, and client pled guilty, admitting specific facts as to drug weight; the court found that the specific admissions were the proximate cause of the sentence rather than the misadvice, and that he could not establish prejudice by illegal means, such as perjury. Id. at 896-97 (rejecting prejudice analysis of different plea options); see also Short v. United States, 471 F.3d 686, 696-97 (6th Cir. 2006) (finding no prejudice even if the petitioner could have received a better sentence by entering an unconditional plea rather than taking counsel’s advice and accepting a plea agreement).}

The Supreme Court recognized that enmeshed penalties can be “the most important part” of the penalty imposed on people convicted of crimes.\footnote{Padilla, 130 S. Ct. at 1480.} For some people charged with crimes, “the consequences of conviction may be so devastating that even the faintest ray of hope offered by a trial is magnified in significance.”\footnote{Anthony G. Amsterdam, *Trial Manual for the Defense of Criminal Cases* § 204 (4th ed. 1984). Conversely, “[i]t can readily be imagined that some resident aliens might prefer to avoid even the risk of deportation rather than stand trial for crimes of which they believed themselves innocent.” United States v. Russell, 686 F.2d 35, 41 (D.C. Cir. 1982).} Other clients can and should expect better outcomes from readily-available plea or sentence alternatives. Again, *Padilla’s* new realism, by focusing on the full range of penalties from the perspective of the person charged, shifts the calculus of criminal justice and redefines rational choice in a more realistic way, acknowledging that clients weigh the relative risk of various penalties, not just strength of the evidence.\footnote{See United States v. Chaidez, 730 F.Supp. 2d 896, 905 (N.D. Ill. 2010) (finding defendant eligible for coram nobis; “Taking Chaidez’s testimony as the only evidence, and crediting in particular her testimony that the risk of some jail time was worth the chance to avoid deporta-}
IV. A REALISTIC STANDARD OF CARE – FROM THEORY TO PRACTICE

Under Padilla, the client takes his or her rightful place of authority in the attorney-client relationship and as the holder of the right to effective assistance of counsel. It should not have taken a Supreme Court decision to remind defense lawyers about a significant set of minimum professional standards that they consistently failed to meet. While rational and critically necessary from the client’s perspective, these duties entail a significant level of work that cannot be ignored. Attorneys should approach enmeshed penalties like a complex new sentencing guidelines regime, taking the necessary time to understand the legal and practical implications for clients and daily practice.

For defense attorneys struggling with compliance, meeting the appropriate standard of care for clients requires a focus on at least two dimensions – the personal and the operational. Although this Article touches briefly on these issues, a future article will explore these dimensions in greater detail. Attorneys must build relationships with their clients to discover clients’ risk-related statuses, priorities, and goals and empower them to make informed decisions. To do this intelligently and consistently requires operationalizing a certain due diligence—what counsel has to know about their clients and their goals, and what they have to know about enmeshed penalties.

To adequately screen for risk, attorneys must understand the ontology of penalties enmeshed with criminal charges. At least four interrelated variables define the network structure and control the imposition of the penalties. First, practitioners must understand the various sources of law behind the penalties. Enmeshed penalties arise from every level of the legal hierarchy, statutory and regulatory, federal, state, and local.212 Second, many penalties trigger because of specific offense classes (felony, misdemeanor, or petty offense). Similarly, other penalties depend on charges or convictions for special offense categories, such as “serious offense,” sex offense, violent offense, “aggravated felony,” “crime involving moral turpitude,” or drug offense. Just to make things more interesting, most jurisdictions have their own definitions of these categories. Special offense categorization, the court finds that it would have been rational under the circumstances for Chaidez to insist on trial.”). But see Bibas, supra note 38, at 140 (“The Court has never expressly recognized that a defendant can suffer prejudice if his lawyer’s error causes him to strike a worse plea bargain or go to trial.”).

212. See, e.g., Smyth, From Arrest to Reintegration, supra note 147, at 44, 50.

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ries should raise red flags for risk in daily practice. Finally, practitioners must be familiar with the full range of penalty categories, including immigration and foreign travel; federally-assisted housing; employment, licensing, and military service; parental rights; government benefits; civic participation; forfeiture and financial consequences; student financial aid; and firearms.\footnote{213}{For samples of categorical analyses of penalties in various jurisdictions, see ABA & PUB. DEFENDER SERV. FOR THE D.C., supra note 166; WASHINGTON 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 (2007); PUB. DEFENDER SERV. FOR THE D.C., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN THE DISTRICT OF COLUMBIA: A GUIDE FOR CRIMINAL DEFENSE LAWYERS (2004; McGregor Smyth, The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records (Feb. 2010 ed.). For more compilations, see Collateral Sanctions Around the United States, REENTRY.NET, http://www.reentry.net/library/attachment.172244 (last visited Mar. 21, 2011).}

No one can know all of these penalties, but we can understand their structure and engage in one of the first lawyering skills attorneys learn—issue-spotting. Dealing with this complexity presents a classic management problem: applying a vast set of legal knowledge consistently and correctly, and within time to do any good. A forthcoming article will explore the process for and benefits of integrating this knowledge into the major steps of criminal practice. From building client relationships to developing checklists,\footnote{214}{See generally Atul Gawande, The Checklist Manifesto: How to Get Things Right (2010) (describing how advances in professional fields have overburdened practitioners while at the same time aided in developing advanced solutions, and arguing that using simple methods and tools can help make major improvements in different fields).} it will use the lessons and leverage of Padilla as a part of a robust vision of holistic defense practice.

\section*{CONCLUSION}

The shockwave of the Court’s seminal decision in Padilla has only begun to hit daily practice. The Court’s prominent acknowledgment of the personal impact of the criminal justice system highlights the challenges of a heavy systemic reliance on guilty pleas where minor offenses predominate and lead to severe, draconian, and lifelong penalties.\footnote{215}{See generally Smyth, Holistic Is Not a Bad Word, supra note 29, at 481-82 (exploring collateral consequences of petty convictions).} These penalties, once officially ignored as “collateral,” often result from an arrest alone (regardless of conviction).\footnote{216}{See, e.g., 24 CFR § 966.4(l)(5)(iii)(A) (2010) (“The PHA may evict the tenant by judicial action for criminal activity . . . if the PHA determines that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for

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Increasingly high stakes for people charged with crimes and their families stand in stark contrast to the inordinate docket pressures to achieve fast dispositions. Moreover, felony charges traditionally draw the most intense individual focus from practitioners and judges because of the severity of potential (traditional) penalties and the length of individual representation. The Court’s new realism demands that defense counsel should devote more attention to “minor” cases, with an augmentation of significant institutional resources to support it.

The decision in Padilla went beyond simply rejecting the formalist approach of the collateral consequences rule and demanded that the criminal justice system no longer operate in ignorance of its own actions. An honest assessment of the collateral consequences doctrine unmasks it as a base rule of convenience for courts and practitioners that has directly caused severe damage to clients, their families, and their communities. The collateral consequences doctrine has brought untold suffering to millions touched by the United States criminal justice system by permitting the imposition of hidden and often disproportionate penalties on people charged with crimes and their families, without notice, retroactively, and without the assistance of counsel. A legal fiction that actively does harm and undermines any concept of justice, its theoretical constructs have begun to buckle under the weight of reality. It has resulted in lost homes, lost careers, lost children, and all on a scale too frightening for most judges, prosecutors, defenders, and policy makers to acknowledge. By highlighting the critical role that defenders can and must take in avoiding or mitigating these penalties, and indeed by even recognizing that they are actual penalties at all, Padilla lays the foundation for more productive outcomes for people charged with crimes and for a significant reassessment of the policies behind the penalties.

217. See, e.g., Smyth, From Arrest to Reintegration, supra note 147, at 44.

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