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

2. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

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*).

4. *See, e.g.*, Maureen Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. (forthcoming 2011).

5. *See, e.g.*, Hurrell-Harring v. State, 15 N.Y.3d 8 (2010) (challenging adequacy of defense funding even before the obligations clarified in *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.

7. *See* Peter Markowitz, *Deportation Is Different* 5 (Benjamin N. Cardozo Sch. of L. & Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 308, 2010), *available at* www.ssrn.com/abstract=1666788.

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

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-

9. Brief for Respondent, Padilla v. Kentucky, 129 S. Ct. 1317 (2009) (No. 08-651), 2009 WL 2473880, at *1.

10. Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008).

11. *Id.* at 485.

12. *Id.*

13. Padilla v. Kentucky, 129 S. Ct. 1317 (2009) (granting certiorari).

14. *See, e.g.*, Adam Liptak, *Justices Seem Sympathetic to Defendant Given Bad Advice*, N.Y. TIMES, Oct. 14, 2009, at A18, *available at* http://www.nytimes.com/2009/10/14/us/14scotus.html ("The question in the case, Padilla v. Kentucky, No. 08-651, was whether bad legal advice about a collateral consequence of a guilty plea amounted to ineffective assistance of counsel under the Sixth Amendment.").

cific, 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 law[18]—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]

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

16. At five thousand words, the *Padilla* decision of the Court occupied the average position for the steadily-lengthening opinions of the Roberts Court. *See* Adam Liptak, *Justices Are Long on Words But Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1, *available at* http://www.nytimes.com/2010/11/18/us/18rulings.html. By contrast, the Court's landmark decision in Brown v. Board of Education, 347 U.S. 483 (1954), weighed in at fewer than four thousand words. *See id.*

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).

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

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."[22] 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."[23] 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.[24]

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.[25]

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-

22. *Padilla*, 130 S. Ct. at 1481.
23. *Id.*
24. *Id.* at 1482.
25. *See, e.g.*, Pridham v. Commonwealth, No. 2008-CA-002190-MR, 2010 WL 4668961, at *2 (Ky. App. Nov. 19, 2010) (rejecting argument that the unique nature of deportation limits the Padilla decision to only misadvice concerning the risk of deportation, noting that "the Court in *Padilla* repeatedly cited with approval to its decision in *Hill*, a case dealing with the *Strickland* standards in the context of misadvice regarding parole eligibility. Moreover, the factors relied upon in the deportation context apply with equal vigor to the circumstances of gross misadvice about parole eligibility. Parole eligibility involves a foreseeable, material consequence of the guilty plea that is 'intimately related to the criminal process' and is an 'automatic result' following certain criminal convictions. The varying degrees of eligibility enumerated by the General Assembly in KRS 439.3401 are 'succinct, clear and explicit.' " (internal citation omitted)).

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-

26. Strickland v. Washington, 466 U.S. 668 (1984) (finding violation of Sixth Amendment right to counsel where deficient performance by counsel resulted in prejudice).

27. *Padilla*, 130 S. Ct. at 1485; *see also* INS v. St. Cyr, 533 U.S. 289, 323 n.50 (2001).

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.*

29. *Id.* at 1486; *see also* McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 493 (2005) (detailing defense strategies for creative pleas). A forthcoming article will focus on this practical dimension of *Padilla* and its significant benefits for defense counsel and their clients. *See* McGregor Smyth, *"Collateral" No More: The Imperative of Holistic Defense in a Post-*Padilla *World*, 31 ST. LOUIS U. PUB. L. REV. (forthcoming 2011).

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.

31. *See* Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 712-13 (2002) (arguing that while weight of authority adopted the collateral consequences rule, it nevertheless was a clearly erroneous application of the *Strickland* performance prong); Guy Cohen, Note, *Weakness of the Collateral Consequences Doctrine: Counsel's Duty to Inform Aliens of the Deportation Consequences of Guilty Pleas*, 16 FORDHAM INT'L. L.J. 1094, 1111-12 (1993).

32. *See, e.g.*, Chin & Holmes, *supra* note 31, at 702-12; Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 131-40 (2009).

the maximum incarceration and fines.[33] The Supreme Court itself in *Padilla* noted the inconsistency of these definitions.[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"[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.[36]

As argued, quite convincingly, over the past decade by Jack Chin, Richard Holmes, and Jenny Roberts,[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.[38] As the Supreme Court of

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.

34. *Padilla*, 130 S. Ct. at 1481 n.8.

35. Chin & Holmes, *supra* note 31, at 700.

36. For a critique of the Fifth Amendment justification and an alternative test, see Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670 (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 th[at] consequence, penal or otherwise, to be a significant factor in deciding whether to plead guilty." *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.' " *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." *Id.* My *Padilla* test, outlined below, shares many of these considerations.

37. *See* Chin & Holmes, *supra* note 31, at 702-12; Roberts, *supra* note 32, at 131-40. The Supreme Court in *Padilla* prominently cited both articles in its majority opinion.

38. *See, e.g.*, Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. (forthcoming Aug. 2011) (manuscript at 145) (on file

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."[39] The duties of defense counsel, as minimally defined in *Strickland v. Washington*,[40] are client-driven and context-dependent, and are not amenable to bright-line rules such as the purported "collateral/direct" distinction.[41]

2. The *Padilla* Revolution

At the same time, described as the "most important right to counsel case since *Gideon*,"[42] *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."[43] 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."[44] 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."[45] The more interesting question is why, in the final analysis, most courts before *Padilla* simply got it wrong.[46]

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with author) ("Judges can remain detached precisely because they can rely on defense counsel to do their jobs."); Chin & Holmes, *supra* note 31, at 702, 727; 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, 678-79 (2006); Roberts, *supra* note 32, at 128-29.

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

40. 466 U.S. 668, 688 (1984).

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.*

42. Margaret Colgate Love & Gabriel J. Chin, Padilla v. Kentucky*: The Right to Counsel and the Collateral Consequences of Conviction*, CHAMPION, May 2010, at 19.

43. *Id.* at 18; *see also* Roberts, *supra* note 32, at 132.

44. Chin & Holmes, *supra* note 31, at 706.

45. Padilla v. Kentucky, 130 S. Ct. 1473, 1491-92 (2010) (Alito, J., concurring).

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

Much ink has been spilled by commentators attacking the collateral consequences rule[47] and judges desperately stretching rationality to defend it.[48] *Padilla* stands at the confluence of three warring perspectives. The first—formalism—held traditional sway at the highest appellate (and academic) level.[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,"[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"[51] of considering anything but the penal consequences of convictions, relying on the oft-invoked and rarely seen specter of opened "floodgates"[52] (applications for post-conviction relief) or "logjams"[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,

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the Supreme Court and other authoritative sources. Rather than distinguishing these authorities, most courts following the collateral consequences rule do so simply on the basis of precedent.").

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.

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.

49. *See, e.g.*, Bibas, *supra* note 38, at 154-60.

50. Andrew E. Taslitz, *The Guilty Plea State*, CRIM. JUST., Fall 2008, at 4, *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_23_3_taslitz.authcheckdam.pdf; *see also* Bibas, *supra* note 38, at 103.

51. *See, e.g.*, Smith v. State, 697 S.E.2d 177, 184 (Ga. 2010).

52. *See, e.g.*, Gusow v. State, 6 So. 3d 699, 705-06 (Fla. Dist. Ct. App. 2009); Chin & Holmes, *supra* note 31, at 736-41.

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.[54] 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."[55]

The Court in *Padilla*, at long last, adopted a third perspective rather unusual for the Court—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[56] of Mr. Padilla and ended it with an invocation of the devastating impact of enmeshed penalties on families.[57] 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."[58]

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.[59] 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.

55. The most significant complaints from practitioners, not surprisingly, have arisen in the blogosphere rather than the academy. *See, e.g.*, Scott H. Greenfield, *Clear Here Isn't Clear There*, SIMPLE JUST.: A N.Y. CRIM. DEF. BLOG (Apr. 3, 2010, 6:28 AM), http://blog.simplejustice.us/2010/04/03/clear-here-isnt-clear-there.aspx; Ken Lammers, Padilla *& the Prosecutor*, CRIMLAW (Apr. 8, 2010), http://crimlaw.blogspot.com/2010/04/padilla-prosecutor.html; *see also* Craig M. Bradley, *The Consequences of* Padilla v. Kentucky, 46 TRIAL 50, 51 (2010) (arguing that even requiring advice on deportation risk "places too high a burden on the defense attorney"); Brooks Holland, *Holistic Advocacy: An Important But Limited Institutional Role*, 30 N.Y.U. REV. L. & SOC. CHANGE 627, 644 (2006); Roberts, *supra* note 32, at 142 (citing "enormous pressure to avoid advocacy that might be perceived as thwarting efficiency, which in the overburdened criminal justice system means a severe tilt towards practices resulting in swift, final dispositions").

56. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1477 (2010).

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

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.

63. Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

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.[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[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."[69] Indeed, the dissent immediately accused the majority's rule as having "no logical stopping-point."[70] Legal commentators quickly remarked on the expansive application of the *Padilla* rule as well.[71] Many courts have begun to apply a similar reasoning to recognize the rights of people

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logical advances allowing easy access to criminal records and increased focus among employers, immigration authorities, landlords, and others on even minor convictions) more likely to affect convicted individuals.").

67. *See, e.g.*, Smyth, *Holistic Is Not a Bad Word*, *supra* note 29, at 494-96.

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).

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).

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.

71. *See, e.g.*, Love & Chin, *supra* note 42; Robin Steinberg, *Supreme Court Ruling Speaks of a New Kind of Public Defense*, HUFFINGTON POST (Apr. 5, 2010, 10:37 AM), http://www.huffingtonpost.com/robin-steinberg/supreme-court-ruling-spea_b_522044.html; Padilla v. Kentucky*: If It Is Clear, It Is Clearly Your Duty*, A PUBLIC DEFENDER (Apr. 1, 2010), http://apublicdefender.com/2010/04/01/padilla-v-kentucky-if-it-is-clear-it-is-clearly-your-duty/.

charged with crimes to understand the real penalties resulting from plea decisions.[72]

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 *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.' "[73] The relevant professional norms detail the "critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.' "[74] 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."[75]

In truth, prevailing professional standards have for decades required defense counsel to incorporate all relevant enmeshed penalties

72. *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).

73. Boria v. Keane, 99 F.3d 492, 496-97 (2d Cir. 1996) (quoting ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 201 (1988)).

74. Padilla v. Kentucky, 130 S. Ct. 1473, 1484 (2010) (quoting Libretti v. United States, 516 U.S. 29, 50-51 (1995)).

75. United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992).

into every stage of their representation.[76] 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."[77] Defense counsel's "paramount obligation" is to provide "zealous and quality representation to their clients at all stages of the criminal process."[78]

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.[79] Note that these same items track critical risk-related factors for potential enmeshed penalties.[80] 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."[81] 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."[82]

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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].

78. NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL REPRESENTATION § 1.1(a) (1995) [hereinafter NLADA GUIDELINES], *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

79. *See id.* § 2.2(b)(2).

80. Penalties include deportation or ineligibility for immigration benefits and ineligibility or termination from federally-assisted housing, public employment or licensing, and other government benefits (including cash assistance and student loans). *See, e.g.*, MCGREGOR SMYTH, THE BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE: A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS AND OTHER ADVOCATES FOR PERSONS WITH CRIMINAL RECORDS (2010), *available at* http://www.reentry.net/ny/library/attachment.172234; ABA & PUB. DEFENDER SERV. FOR THE D.C., INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (2009).

81. ABA DEFENSE FUNCTION STANDARDS, *supra* note 77, § 4-3.1.

82. ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY STANDARD § 14-3.2 cmt. at 126-27 (3d ed. 1999) [hereinafter ABA PLEAS OF GUILTY STANDARDS]; *see* MANUEL D. VARGAS, A DEFENDING IMMIGRANTS PARTNERSHIP PRACTICE ADVISORY: DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING AN IMMIGRANT DEFENDANT AFTER *Padilla v. Kentucky* 5 (2010), *available at* http://www.immigrantdefenseproject.org/docs/2010/10Padilla_Practice_Advisory.pdf.

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 penalties[84] 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 § I-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. 1996) (citing ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATIONS 7-7 (1992), *superceded 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(e) (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 mitigation[98] 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)).

101. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS OF CONVICTED PERSONS STANDARD § 19-2.4(a) (3d ed. 2004) [hereinafter COLLATERAL SANCTIONS].

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.[104] 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.[105]

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.[106] 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."[107]

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-

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).[108] The Maryland court steadfastly justified the "collateral/direct" distinction and bitterly disputed the language in *Padilla* purporting to apply settled precedent, searching "internally for Freudian clues" to find that *Padilla* announced a new constitutional rule.[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.[110] Other decisions refusing to apply *Padilla* retroactively share a similar recalcitrance. In *People v. Kabre*, for example, a New York trial court refused to apply *Padilla* retroactively to a misdemeanor plea, detailing a litany of pre-*Padilla* federal, New York, and other state cases that had applied the collateral consequences rule.[111] The court further distinguished *Padilla*, writing, "[u]nlike the immigration consequences attendant upon conviction of a felony, the immigration consequences of a misdemeanor conviction are often unclear."[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.[113]

In *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).[114] While the failure to notify did not render the pleas

108. *See* Miller v. State, 11 A.3d 340, 352 (Md. App. 2010).

109. *Id.* at 347. For example, one

> sure-fire tip-off that the Supreme Court was preparing to change the law was its amassing, *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.

Miller, 11 A.3d at 346-47 (internal citations omitted).

110. *See id.* at 347-52.

111. *See* People v. Kabre, 905 N.Y.S.2d 887, 899 (N.Y. Crim. Ct. 2010).

112. *Id.* at 890.

113. *See* 8 U.S.C.A. § 1101(a)(43) (West 2010); *see also* IMMIGRANT DEFENSE PROJECT, AGGRAVATED FELONY PRACTICE AIDS app. C (2003), *available at* http://www.immigrantdefenseproject.org/docs/fileR_03_Final3dEditionManualAppendix_C.pdf.

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 *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."[115] 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."[116]

New York's court, of course, misses the point in a telling manner.[117] 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.[118] 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[119] and a general incom-

ment and Treatment Act ("SOMTA"), N.Y. MENTAL HYG. LAW § 10.03(g) (McKinney 2007), was also merely a "collateral" consequence of the guilty plea; accordingly, the sentencing court's failure to notify Mr. Harnett did not render the plea involuntary. People v. Hartnett, 2011 WL 445643 (N.Y. Feb. 10, 2011).

115. *Gravino*, 928 N.E.2d at 1056. New York's highest court proceeded to slam shut even this small door a few months later in *Harnett*, setting a high, individualized pleading and evidentiary standard and finding that Mr. Harnett had not demonstrated that being subject to lifetime civil commitment as a consequence of his plea was "so important that [its] non-disclosure rendered the plea proceedings fundamentally unfair." *Hartnett*, 2011 WL 445643.

116. *Id.* I have heard the same remark at many defender trainings I have given over the past decade. The incidence increases in direct proportion with the experience of the defender, illustrating the selection bias inherent in the focus on felony representation for more experienced attorneys. Since experienced attorneys populate the management structure of most defender offices, one imagines that this perception bias influences resource and training priority decisions.

117. The claim that the "vast majority" of people pleading guilty care only about jail time has a shaky empirical basis, at best. Statistics readily available to the court show that only a small minority of people convicted are sentenced to any term of incarceration. *See* N.Y. DIV. OF CRIMINAL JUSTICE SERVICES, DISPOSITION OF ADULT ARRESTS (2010), *available at* http://www.criminaljustice.state.ny.us/crimnet/ojsa/dispos/greene.pdf.

118. *See, e.g.*, Julian A. Cook, III, *All Aboard: The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863, 899 (2004) ("[D]efendant ignorance about the realities of the plea process is necessary if the current plea structure is to maintain its vibrancy, for if defendants truly comprehended the process and its attendant consequences, the efficiency of the guilty plea system would likely be compromised.").

119. *See* Taslitz, *supra* note 50, at 6.

prehension of plea bargaining beyond the need to keep the volume flowing.[120] 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.[121] "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.[122] 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,[123] elevating the descriptive to the normative. Instead, it is an embarrassing call to action.

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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,[124] under 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."[125] 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."[126] 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 . . . ."[127]

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.[128] Courts measure performance of counsel against an "objective standard of reasonableness"[129] defined by "prevailing professional norms."[130] 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

sess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses." *Id.* at 1488. Because various legislatures have intimately related these consequences with criminal law, it begs the question of why defense attorneys would not make them part of their "training and experience." *Id.*

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).

128. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

129. *Id.* at 688.

130. *Id.*; Wiggins v. Smith, 539 U.S. 510, 521 (2003).

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

131. Rompilla v. Beard, 545 U.S. 374, 381 (2005) (internal citations to *Strickland*, 466 U.S. at 689, 691 omitted).

132. *Smith*, 539 U.S. at 523.

133. Williams v. Taylor, 529 U.S. 362, 391 (2000) (citing Wright v. West, 505 U.S. 277, 308 (Kennedy, J., concurring)).

134. Chin & Holmes, *supra* note 31, at 712.

135. *See generally, e.g.*, Robin G. Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123 (2004) (discussing the importance of an integrative approach to counseling clients); *see also* CENTER FOR HOLISTIC DEF., www.holisticdefense.org (last visited Mar. 3, 2011) (for more information about a more holistic approach to defense); *see also* Smyth, *"Collateral" No More*, *supra* note 29.

136. Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1082-83 (2004).

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."[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 *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. *Padilla* provides an additional legal framework to help defenders institutionalize a practice that most of them already followed with many of their clients.[140] To begin this inquiry, we must look to the *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 *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-

139. Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 43 (2002).

140. As acknowledged in the established professional standards outlined *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. *See* CENTER FOR HOLISTIC DEF., 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. *See* REENTRY NET, 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."[141]

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.[142] 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.[143] This standard asks no more than the familiar measure of a good advocate—individualized, zealous representation of each client.[144]

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.[145]

1. Severe (Absolute or Relative)

For a non-criminal penalty to require the advice of counsel, it first must meet the test of severity.[146] 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

141. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010).

142. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 391 (2000).

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.[147] 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.[148]

Deportation illustrates severity on an absolute scale.[149] Described as "the equivalent of banishment or exile,"[150] 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."[151]

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.[152] More

147. *See, e.g.,* Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 345-47 (2004) (discussing consequences of conviction on people charged, their communities, and their families); J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, CRIM. JUST., Fall 2009, at 42, 43.

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

149. *See, e.g.*, *id.* at 1481; *see also* JONATHAN BAUM, ROSHA JONES & CATHERINE BARRY, IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION (2010), *available at* www.law.ucdavis.edu/news/images/childsbestinterest.pdf (outlining the consequences of deportation on children of those deported).

150. Delgadillo v. Carmichael, 332 U.S. 388, 390-91 (1947), *cited in 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, 686 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 DEFENSE 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

ants deciding whether to accept a plea offer or instead to proceed to trial." St. Cyr, 533 U.S. at 323 (quoted in *Padilla*, 130 S. Ct. at 1484).

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) ("[T]hese . . . 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).

157. *See* Section 8 Administrative Plan of the Housing Authority of the City of Milwaukee at § 21.0(V), *available at* http://www.hacm.org/agency%20plan%20and%20annual%20reports/Section%208%20Admin%20Plan%20v9-21-05.pdf.

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.

159. 20 U.S.C. § 1091(r)(1) (Lexis Nexis 2006 & Supp.); N.Y. PENAL LAW § 221.05 (McKinney 2010).

160. *See* 21 U.S.C. 862a (in 2008, Congress renamed Food Stamps the Supplemental Nutrition Assistance Program ("SNAP"), P.L. 110-246). For a survey of states opting out of or modifying the federal ban, see *Advocacy Toolkit: Opting Out of Federal Ban on Food Stamps and TANF*, LEGAL ACTION CENTER, http://www.lac.org/toolkits/TANF/TANF.htm#summary (last visited Apr. 7, 2011).

161. *See, e.g.*, Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 U.S.C. §§ 629 et seq., 671 et seq. (2006)); Tiffany Conway & Rutledge Q. Hutson, *Parental Incarceration: How to Avoid a "Death Sentence" for Families*, 41 CLEARINGHOUSE REV. 212 (July-Aug. 2007); *see also* People v. Gravino, 928 N.E.2d 1048, 1055-56 (N.Y. 2010) (noting prohibition from seeing one's own children after conviction for any registerable sex offense, even those not involving minors).

162. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010).

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.[165] In the end, they all tie a penalty—the loss of a right or opportunity—to a criminal charge or conviction.[166] 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.[167]

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.[168] 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[169] and Uniform Law Commission[170] created these categories to recommend different levels of procedural and substantive limitations on enmeshed penalties.[171] While of some use to a practitioner seeking to avoid, mitigate, or challenge a penalty,[172] this distinction lacks sufficient contextualization to

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

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

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).

170. *See* UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT ("UCCCA") (2010), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010final_amends.htm). The Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510 (2008), adopted these categories when creating funding for a jurisdiction-by-jurisdiction survey of enmeshed penalties. Funded by the National Institutes of Justice, the American Bar Association is currently conducting this survey through its Adult Collateral Consequences Project.

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.[174] 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-

173. Some post-*Padilla* analyses miss this important distinction, conflating "likely" with "succinct, clear, and explicit." *See, e.g.*, People v. Kabre, 905 N.Y.S.2d 887, 890 (N.Y. Crim. Ct. 2010).

174. *See, e.g.*, ABA STANDARDS OF CRIMINAL JUSTICE: PLEAS OF GUILTY STANDARD 14-3.2 cmt. 126-27.

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.[177] 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."[178] Professional norms similarly require incorporation of this risk into defense strategy.[179]

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"[180] and "labyrinthine . . . a maze of hyper-technical statutes and regulations"[181] 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. *Padilla* made clear that defense counsel has the duty to learn the laws that impose penalties enmeshed with criminal charges.

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.

181. Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003).

straightforward,"[182] counsel must still advise about the risk.[183] "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."[184]

More important, identifying enmeshed penalties of any stripe constitutes a critical tool for defense advocacy.[185] 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.[186]

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."[187] 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.[188] Indeed, one hopes any standard of lawyering provides that

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.

187. Chin & Holmes, *supra* note 31, at 735.

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.[189] 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.[190] For a "strategic" decision to be reasonable, it must be based upon information the attorney has made after conducting a reasonable investigation.[191] 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.[192] 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."[193]

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."[194] 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.[195] 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.

191. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 522 (2003); Williams v. Taylor, 529 U.S. 362, 396 (2000).

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.

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

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-

196. *See, e.g.*, Bauder v. Dep't of Corrections State of Florida, 619 F.3d 1272, 1275 (11th Cir. 2010) (finding ineffective assistance for misadvice on risk of civil commitment); Wilson v. State, 244 P.3d 535, 539-40 (Alaska Ct. App. 2010) (finding ineffective assistance for misadvice on civil liability for assault); People v. Becker, 800 N.Y.S.2d 499, 504 (N.Y. Crim. Ct. 2005) (holding that where client specifically asked defense counsel, incorrect advice regarding the housing consequences of a guilty plea constitutes deficient performance).

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)).

199. Strickland v. Washington, 466 U.S. 668, 694 (1984).

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."[200]

Of course, attorney errors "come in an infinite variety,"[201] 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.[202] Courts measure the effect of these errors on a decision to plead by evaluating the probability of success of the omitted defense or evidence.[203] 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.[204]

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.[205] 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.[206]

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

200. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

201. *Strickland*, 466 U.S. at 693.

202. *See, e.g.*, *Hill*, 474 U.S. at 59.

203. *See, e.g.*, Segura v. State, 749 N.E.2d 496, 503 (Ind. 2001).

204. *Id.* at 504.

205. *See* Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1369 (2004) (arguing that *Hill*'s prejudice standard is underinclusive); Emily Rubin, *Ineffective Assistance of Counsel and Guilty Pleas: Toward a Paradigm of Informed Consent*, 80 VA. L. REV. 1699, 1705 (1994) (arguing that *Hill*'s prejudice standard is underinclusive).

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.[207]

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."[208]

The Supreme Court recognized that enmeshed penalties can be "the most important part" of the penalty imposed on people convicted of crimes.[209] 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."[210] 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.[211]

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207. *Hill*, 474 U.S. at 60.

208. 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).

209. *Padilla*, 130 S. Ct. at 1480.

210. 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).

211. *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 catego-

tion, 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.

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.[213]

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,[214] it will use the lessons and leverage of *Padilla* as a part of a robust vision of holistic defense practice.

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.[215] These penalties, once officially ignored as "collateral," often result from an arrest alone (regardless of conviction).[216] These in-

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).

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).

215. *See generally* Smyth, *Holistic Is Not a Bad Word*, *supra* note 29, at 481-82 (exploring collateral consequences of petty convictions).

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

creasingly 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.[217] 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.[218] 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.

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such activity and without satisfying the standard of proof used for a criminal conviction."). The Supreme Court's decision in *Department of Housing & Urban Development v. Rucker*, 535 U.S. 125, 136 (2002), permits public housing authorities to evict entire families for criminal activity even if the tenant did not know of, could not foresee, or could not control the behavior of other occupants or guests. *See also*, Smyth, *From Arrest to Reintegration*, *supra* note 147, at 44.

217. *See, e.g.*, Smyth, *From Arrest to Reintegration*, *supra* note 147, at 44.

218. *See, e.g.*, Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551 (2003); Smyth, *From Arrest to Reintegration*, *supra* note 147, at 44.

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