EFFECTIVE ASSISTANCE OF COUNSEL AND THE CONSEQUENCES OF GUILTY PLEAS

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Because over ninety percent of criminal convictions result from guilty pleas, perhaps the most important service criminal defense lawyers perform is advising their clients whether to plead guilty and on what terms. Nevertheless, virtually all jurisdictions hold that defense counsel need not discuss with their clients the collateral consequences of a conviction, such as consecutive rather than concurrent sentencing, deportation, or even treatment as an aggravating circumstance in an ongoing capital prosecution. In this Article, Professor Chin and Mr. Holmes argue that this "collateral consequences rule" is inconsistent with the Supreme Court's decision in Strickland v. Washington, *which held that ineffective assistance of counsel consists of performance below a minimum standard of competence and resulting prejudice. The ABA Standards for Criminal Justice and other lawyering guidelines require defense lawyers to consider collateral consequences, and many of the cases espousing the collateral consequences rule rely on pre-*Strickland *case law. However, this Article recognizes that because guilty pleas are indispensable to the criminal justice system, judges justifiably hesitate to destabilize them. In order to prevent a mass exodus from prisons, it recommends modifying the rule to conform with existing Sixth Amendment doctrine.*

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INTRODUCTION

The most important service that criminal defense lawyers perform for their clients is not dramatic cross-examination of prosecution witnesses or persuasive closing arguments to the jury; it is advising clients whether to plead guilty and on what terms.[1] More than ninety percent of dispositions on the merits of criminal prosecutions are convictions, and more than ninety percent of convictions result from guilty pleas.[2] Accordingly, the accuracy and fairness of the criminal justice system depend principally on the actions of defense lawyers, prosecutors, and judges at the guilty plea stage. In *Hill v. Lockhart*,[3] the Supreme Court recognized the significance of counsel at the pleading stage, holding that the Sixth Amendment grants clients the right to effective assistance of counsel when pleading guilty.[4]

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1 ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 201 (4th ed. 1984) ("The decision whether to plead guilty or to contest a criminal charge is ordinarily the most important single decision in any criminal case."); William N. Clark, *Plea Bargaining: A Primer for Defense Counsel*, 9 CUMB. L. REV. 1, 4 (1978).

2 *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999, at 432–33 tbl.5.32 (Ann L. Pastore & Kathleen Maguire eds., 2000) (indicating that for federal district courts in fiscal year 1999, there were 1017 acquittals and 64,815 convictions, 61,239 of which were by guilty plea). Figures from earlier decades are similar. *See, e.g.*, DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 & n.1 (1966) ("Roughly 90 per cent of all criminal convictions are by pleas of guilty . . . .").

3 474 U.S. 52 (1985).

4 *Id.* at 58 (holding that the two-part test for evaluating ineffective assistance of counsel claims developed in *Strickland v. Washington*, 466 U.S. 668 (1984), "applies to challenges to guilty pleas based on ineffective assistance of counsel"). Indeed, *Hill* involved a claim of ineffective assistance flowing from the unexpected imposition of a collateral consequence.

In spite of the importance of counsel, one of the most widely accepted principles of American criminal procedure is that defense lawyers' constitutional duty to advise clients is limited in a particular way: As Part II explains, while lawyers must advise clients of the direct consequences of a guilty plea—such as the period of incarceration and the fine that will be imposed at sentencing[5]—eleven federal circuits, more than thirty states, and the District of Columbia have held that lawyers need not explain collateral consequences, which, although they might follow by operation of law, are not part of the penalty imposed by the particular statute the defendant is accused of violating.[6] Apparently no court rejects the rule.[7]

The idea that collateral consequences are divorced from the criminal process has never really been true; for example, the plea of *nolo contendere* exists solely to avoid collateral consequences of a guilty plea,[8] and courts recognize that collateral consequences can prevent the mootness of a habeas corpus petition filed by a prisoner who is later released.[9] However, the imposition of collateral consequences has become an increasingly central purpose of the modern criminal process. For example, it is fairly typical for an individual pleading guilty for the first time to felony possession or sale of hard drugs to walk out of court, receiving a sentence of time served and probation.[10] The collateral consequences are a far more meaningful result of such a conviction. By virtue of the conviction, the offender may become ineligible for federally funded health care benefits,[11] food stamps and

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But the Court's decision did not dispose of the issue presented here; the case involved incorrect advice about a collateral consequence, rather than a failure to address it at all.

5 *See infra* Part I.A.

6 *See infra* notes 43–114 and accompanying text.

7 *See infra* notes 115–24 and accompanying text.

8 *See, e.g.*, United States v. Jones, 119 F. Supp. 288, 290–91 (S.D. Cal. 1954) ("Defendants often desire to avoid the effect of a plea of Guilty which might be used as an admission generally and be introduced in evidence in a civil case based on the same transaction."); Fortson v. Hopper, 247 S.E.2d 875, 877 (Ga. 1978) ("The privilege of entering a plea of nolo contendere is statutory in origin, and it was designed to cover situations where the side effects of a plea of guilty, in addition to the penalties provided by law, would be too harsh." (citations omitted)); State v. Black, 624 N.W.2d 363, 369 (Wis. 2001) ("A no contest plea . . . differs from a plea of guilty in its collateral effects." (citation omitted)).

9 *See* 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 8.2b (3d ed. 1998).

10 *See, e.g.*, People v. Winston, 737 N.E.2d 304, 305 (Ill. App. Ct. 2000); People v. Dela Cruz, 722 N.Y.S.2d 438 (App. Div. 2001); People v. Francis, 721 N.Y.S.2d 814 (App. Div. 2001); State v. Smith, No. 07-97-0252-CR, 2001 WL 311159, at *1 (Tex. App. Mar. 30, 2001); Pando v. State, No. 08-98-00336-CR, 2000 WL 1207180, at *1 (Tex. App. Aug. 25, 2000).

11 42 U.S.C. § 1320a-7(a) (1994 & Supp. V 1999) ("The Secretary shall exclude . . . from participation in any Federal health care program . . . . (4) . . . . [a]ny individual . . . convicted . . . of a criminal offense consisting of a felony relating to the unlawful . . . distribution . . . of a controlled substance."); *id.* § 1320a-7(b)(3) (permissive disqualification for misdemeanor convictions).

Temporary Assistance for Needy Families,[12] and housing assistance.[13] She is ineligible for federal educational aid.[14] Her driver's license will probably be suspended[15] and she will be ineligible to enlist in the military, receive a security clearance,[16] or possess a firearm.[17] If an alien, she will be deported;[18] if a citizen, she will be ineligible to serve on a federal jury and in some states will lose her right to vote.[19] In cases like these, traditional sanctions such as fine or imprisonment are comparatively insignificant. The real work of the conviction is performed by the collateral consequences.

Collateral consequences can operate as a secret sentence. Regardless of the objective significance of the collateral consequence or its significance to the particular client, and even if the collateral consequences are much more severe than the direct consequences, many courts hold that "neither the trial judge nor defense counsel is required to explain the 'collateral consequences' of a guilty plea to the defendant,"[20] and therefore "counsel's failure to advise the defendant of the collateral consequences of a guilty plea cannot rise to the level of constitutionally ineffective assistance."[21] Thus, some courts hold that counsel has no obligation to advise his client that prison sentences may be served consecutively rather than concurrently, even if that means, for example, that the client will serve forty rather than twenty years.[22] Courts have held counsel effective when they advised clients to plead guilty to trivial offenses, such as stealing cigarettes, without considering that a conviction will result in deportation.[23] A

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12 21 U.S.C. § 862a(a) (Supp. V 1999). States could opt out of this ban. *Id.* § 862(d)(1).

13 42 U.S.C. § 1437f(d)(1)(B)(iii) (Supp. V 1999); *id.* § 13662(a).

14 20 U.S.C. § 1091(r) (Supp. V 1999).

15 23 U.S.C. § 159 (1994 & Supp. V 1999) (denying funds to states that do not impose driver's license suspension on persons convicted of drug offenses). Staes could opt out of this ban. *Id.* § 159(a)(3)(B).

16 10 U.S.C. § 504 (2000); *id.* § 986(c)(1) (deeming felons ineligible for security clearance).

17 18 U.S.C. § 922(g)(1) (1994).

18 8 U.S.C. § 1227(a)(2)(B) (2000).

19 *See* 28 U.S.C. § 1865(b)(5) (1994) (disqualifying from jury service persons convicted of a crime punishable by imprisonment for more than one year). Laws disenfranchising felons are surveyed in Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998), *available at* http://www.sentencingproject.org/pubs/hrwfvr.html, and Patricia Allard & Marc Mauer, *Regarding the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws* (Jan. 2000), *available at* http://www.sentencingproject.org/pubs/regainvote.pdf. The Supreme Court upheld the constitutionality of felon disenfranchisement in *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

20 Goodall v. United States, 759 A.2d 1077, 1081 (D.C. 2000).

21 United States v. Campbell, 778 F.2d 764, 768 (11th Cir. 1985).

22 *See, e.g.*, Ned v. State, No. 09-98-435CR, 1999 WL 388158, at *2 (Tex. App. June 9, 1999) (per curiam).

23 *See, e.g.*, Berkow v. State, 583 N.W.2d 562 (Minn. 1998).

lawyer representing a broker-dealer registered with the Securities and Exchange Commission need not disclose that a misdemeanor guilty plea[24] could put his client out of business.[25] A lawyer need not even disclose to a client facing capital charges that a guilty plea to unrelated charges will be treated as an aggravating circumstance in the capital case; the possibility of execution is a mere collateral consequence.[26]

This wall of precedent is surprising because it seems inconsistent with the framework that the Supreme Court has laid out for analyzing claims of ineffective assistance of counsel.[27] As Part I.B explains, in *Strickland v. Washington*,[28] decided in 1984, the Supreme Court held that a defendant could make out a claim of ineffective assistance of counsel by showing that her lawyer's conduct fell below a minimum standard of competence and that she was prejudiced thereby.[29] In evaluating competence, the Court explained, judges should look at all relevant circumstances and evidence of appropriate measures of professional behavior, such as the ABA Standards for Criminal Justice ("ABA Standards").[30] The ABA Standards require defense lawyers to consider collateral consequences of conviction.[31] In this, the ABA Standards are consistent with other evidence of the norms of competent lawyering, such as legal treatises and practitioners' materials, all of which emphasize the importance of considering collateral consequences in evaluating risks and setting goals for criminal litigation.[32] The collateral consequences rule presents a puzzle that has not been explored by scholars:[33] Why do virtually all jurisdictions apply a rule

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24 15 U.S.C. § 78o(b)(4)(B)(i) (1994).

25 *Cf.* United States v. Casanova's, Inc., 350 F. Supp. 291, 292 (E.D. Wis. 1972) ("Knowledge of collateral consequences of a guilty plea is not necessary to render a guilty plea voluntary. The loss of a license to operate a business falls within this latter category."); State v. Carney, 584 N.W.2d 907, 910 (Iowa 1998) (holding, in a case involving driver's license revocation, that because "the consequence of license revocation is collateral, we find counsel was not ineffective in failing to inform defendant of it" and that "[t]he failure to advise a defendant concerning a collateral consequence, even serious ones, cannot provide a basis for a claim of ineffective assistance of counsel").

26 King v. Dutton, 17 F.3d 151, 154 (6th Cir. 1994); Adkins v. State, 911 S.W.2d 334, 350 (Tenn. Crim. App. 1994); *Ex parte* Morrow, 952 S.W.2d 530, 536–37 (Tex. Crim. App. 1997) (en banc).

27 *See infra* Part I.B.

28 466 U.S. 668 (1984).

29 *See id.*; *infra* notes 143–67 and accompanying text.

30 *Strickland*, 466 U.S. at 687–91.

31 *See infra* notes 180–88 and accompanying text.

32 *See infra* notes 189–217 and accompanying text.

33 There are several student notes on the issue, most focusing on deportation in particular rather than collateral consequences generally. *See* Priscilla Budeiri, Comment, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 HARV. C.R.-C.L. L. REV. 157, 190–99 (1981); 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 (1992–1993).

that seems to be contrary to the result apparently required under the Court's analytical structure?

One set of answers is doctrinal. Very few cases actually apply the *Strickland* standards, evaluating as a matter of professional practice whether competent counsel consider collateral consequences in general or should under the particular facts of the case. Instead, most courts following the rule simply rely on precedent—earlier cases recognizing only a limited role for defense counsel. Part II suggests that almost all of the leading cases, and therefore the decisions that rest on them, are burdened with one or more of several distinct flaws.

First, the collateral consequences rule was created before the decision in *Strickland.* Yet cases decided under earlier formulations of the right to counsel that are inconsistent with *Strickland* are still cited and influential.[34] In addition, many courts define the scope of counsel's duties by using cases that describe the obligations of courts taking guilty pleas.[35] These jurisdictions conclude that when a court has discharged *its* duty of advisement, counsel's duty has also been fulfilled.[36] These cases fail to account for the distinct roles of judge and advocate in the criminal justice system, which necessarily entail different duties.[37] Finally, some cases rely on the idea that counsel have lesser responsibilities in the context of guilty pleas. This notion is inconsistent with the Supreme Court's jurisprudence recognizing the importance of counsel at plea and sentencing as well as at trial.[38]

Doctrinal error cannot be the whole story, however; too many judges in too many jurisdictions over too many years have relied on the collateral consequences rule to chalk up all of these decisions to analytical insufficiency. Part III suggests that another factor which seems to be operative is a judicial reluctance to render guilty pleas vulnerable to attack. Guilty pleas are indispensable to the criminal justice system, and the decision to plead guilty or go to trial is part of every criminal conviction. Accordingly, judges may hesitate to do anything that could potentially invalidate large numbers of convictions. For example, is a person who pleaded guilty to murder in Idaho and received a life sentence entitled to take back her plea because she was not advised that, in the event she was ever pardoned, upon release she would not be able to get a barber's license in Georgia? Existing Sixth Amendment doctrine would likely prevent a mass exodus from prisons on such grounds. Most defendants who plead guilty to serious crimes with significant terms of imprisonment would be unable to

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34 *See infra* Part II.A.

35 *See infra* Part II.B–C.

36 *See infra* Part II.B.

37 *See infra* Part II.C.

38 *See infra* Part II.D.

show that knowledge or ignorance of a collateral consequence would have had any impact on their decision.[39] Moreover, lawyers are charged with a duty of reasonable knowledge and investigation, not perfection or omniscience, and are permitted to choose the most fruitful lines of defense.[40] A reasonable effort to explore collateral consequences would satisfy counsel's obligation.

Even if reexamining the collateral consequences rule would not throw open the doors to the penitentiary, it would not be cost-free either. Nevertheless, Part III argues that expecting lawyers to explore collateral consequences would have a number of salutary effects on the system. First, in some cases defendants who might be acquitted after trial plead guilty to relatively minor offenses because the cost of defense exceeds seemingly minimal penalties and consequences.[41] Courts in some jurisdictions recognize this by refusing to apply the doctrine of collateral estoppel to certain guilty pleas. Yet those same pleas could have significant collateral consequences. In essence, defendants may be misled into pleading guilty, which is unjust.

Second, most lawyers already take into account collateral consequences in their evaluation of particular pleas; there is no reason why their clients should obtain better results than those clients unlucky enough to be represented by less able counsel. Eliminating the collateral consequences rule would encourage lawyers to represent their clients more effectively. As a result, prosecutors and judges would be presented with additional relevant facts in some cases where they otherwise would not. This would help achieve more consistent and fair results, in which the plea and sentence would be based more on the facts and circumstances and less on the happenstance of which lawyer is representing the defendant.[42]

I
THE COLLATERAL CONSEQUENCES RULE AND EFFECTIVE ASSISTANCE

Borrowing principles applicable to courts accepting guilty pleas, all courts that have considered the issue have held that defense lawyers must explain the direct consequences of a plea, such as length of imprisonment and amount of fine, but need not explain "collateral consequences," such as revocation of probation or parole, that sentences may be served consecutively rather than concurrently, or that the plea may result in deportation. Advising about collateral con-

39 *See infra* notes 297–98 and accompanying text.

40 *See infra* notes 299–303 and accompanying text.

41 *See infra* notes 305–07 and accompanying text.

42 *See infra* note 308 and accompanying text.

sequences, these courts have said, is not part of effective assistance of counsel.

Although this rule is simple and clear, courts applying it have not explained how it fits into the system for evaluating claims of ineffective assistance of counsel, which begins with the question of whether the attorney's conduct was professionally competent. In contrast to courts applying the collateral consequences rule, other sources such as the ABA Standards, legal treatises, and practitioner's materials suggest that lawyers should be concerned about collateral consequences. Because the client is making a decision about whether to admit guilt and be convicted of a crime, these materials say, counsel has an obligation to offer legal advice on all of the legal considerations that might be relevant to the client's decision.

A. The Collateral Consequences Rule

Under various provisions of civil and criminal statutes, a conviction for a crime may result in numerous legal consequences to the defendant.[43] For purposes of determining whether a trial court has complied with its duty under the Due Process Clause to ensure that a guilty plea is knowing, voluntary, and intelligent, the Supreme Court has distinguished between direct consequences, which must be explained to the defendant, and collateral consequences, which the plea court has no duty to explore.[44] Some courts justify the rule on the ground that the trial court is required to explain only consequences that are largely automatic;[45] others hold that the distinction is justified because collateral consequences are beyond the control of the sentencing court.[46] If supervised release and special parole terms served after incarceration are included as collateral consequences,[47] then the Third Circuit's view that "[t]he only consequences considered direct are the maximum prison term and fine for the offense charged"[48] is an accurate rule of thumb, even though, as the District of Columbia

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43 *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE, Standard 23-8.1 & cmt. (1986); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999); Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, FED. PROBATION, Sept. 1996, at 10.

44 *See infra* notes 242–49 and accompanying text.

45 In *United States v. Littlejohn*, 224 F.3d 960, 966–67 (9th Cir. 2000), the court held that denial of social welfare benefits as a result of conviction was a direct consequence because it was "automatic."

46 *See, e.g.*, United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000).

47 United States v. Harris, 534 F.2d 141, 141–42 (9th Cir. 1976); People v. Alcock, 728 N.Y.S.2d 328, 330–31 (Sup. Ct. 2001).

48 United States v. Salmon, 944 F.2d 1106, 1130 (3d Cir. 1991) (citing United States v. Pearson, 910 F.2d 221, 223 (5th Cir. 1990)); *see also* United States v. Parrino, 212 F.2d 919, 921 (2d Cir. 1954) (holding that deportation is a collateral consequence of conviction).

Circuit has stated, "[t]he distinction between a collateral and a direct consequence of a criminal conviction, like many of the lines drawn in legal analysis, is obvious at the extremes and often subtle at the margin."[49]

Consequences of conviction deemed collateral by most courts[50] include: effects on custody such as revocation of parole[51] or probation,[52] ineligibility for parole,[53] civil commitment,[54] civil forfeiture,[55] consecutive rather than concurrent sentencing,[56] higher penalties based on repeat offender laws,[57] and registration requirements.[58] Also usually deemed collateral are effects on civil status such as disenfranchisement,[59] ineligibility to serve on a jury,[60] disqualification from public benefits,[61] and ineligibility to possess firearms.[62] The same is true for deprivations with tremendous practical consequences, such as

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49 United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982).

50 *See generally* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.4(d) (2d ed. 1999) (providing a list of consequences of conviction that courts have deemed direct or collateral).

51 *See, e.g.*, Sanchez v. United States, 572 F.2d 210, 211 (9th Cir. 1977) (per curiam).

52 *See, e.g.*, Parry v. Rosemeyer, 64 F.3d 110, 114–15 (3d Cir. 1995); Weaver v. United States, 454 F.2d 315, 317–18 (7th Cir. 1971).

53 *See, e.g.*, Holmes v. United States, 876 F.2d 1545, 1548–49 (11th Cir. 1989); Trujillo v. United States, 377 F.2d 266, 268–69 (5th Cir. 1967). *But see* State v. Smith, 513 So. 2d 544, 547–51 (La. Ct. App. 1987).

54 *See, e.g.*, Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366–67 (4th Cir. 1973); Martin v. Reinstein, 987 P.2d 779, 805–06 (Ariz. Ct. App. 1999).

55 *See, e.g.*, United States v. United States Currency in the Amount of $228,536.00, 895 F.2d 908, 914–17 (2d Cir. 1990).

56 *See, e.g.*, United States v. Rubalcaba, 811 F.2d 491, 494 (9th Cir. 1987); Paradiso v. United States, 482 F.2d 409, 415 (3d Cir. 1973); United States v. Vermeulen, 436 F.2d 72, 75 (2d Cir. 1970); State v. Johnson, 532 N.E.2d 1295, 1298 (Ohio 1988). *But cf.* People v. Flannigan, 267 N.E.2d 739, 744 (Ill. App. Ct. 1971) (noting court rules requiring advisement of the manner in which the defendant may have to serve imposed sentences); Rosemond v. State, 756 P.2d 1180, 1181 (Nev. 1988) (per curiam) (noting that courts must disclose mandatory consecutive sentences but not discretionary consecutive sentences).

57 *See, e.g.*, Fee v. United States, 207 F. Supp. 674, 676 (W.D. Va. 1962); State v. Barton, 609 P.2d 1353 (Wash. 1980) (en banc). *But cf.* Ashley v. State, 614 So. 2d 486, 490 (Fla. 1993) (noting that a court rule required notice of intent to seek enhanced habitual offender sentencing prior to sentencing).

58 *See, e.g.*, Kaiser v. State, 621 N.W.2d 49, 53–54 (Minn. Ct. App. 2001).

59 *See, e.g.*, Meaton v. United States, 328 F.2d 379 (5th Cir. 1964) (per curiam); United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963).

60 *See, e.g.*, State v. Vasquez, 889 S.W.2d 588, 590 (Tex. App. 1994) (citing United States v. Banda, 1 F.3d 354 (5th Cir. 1993)).

61 *See, e.g.*, United States v. Okelberry, 112 F. Supp. 2d 1246, 1248 (D. Utah 2000) (citing United States v. Morse, 36 F.3d 1070, 1072 (11th Cir. 1994)); United States v. Reed, 54 M.J. 37, 44–45 (C.A.A.F. 2000). *But see* United States v. Littlejohn, 224 F.3d 960, 966–67 (9th Cir. 2000) (finding that defendant's disqualification from public benefits following his conviction is a direct consequence).

62 *See, e.g.*, State v. Ellis, Nos. 0-769, 98-1888, 2001 WL 103530, at *2 (Iowa Ct. App. Feb. 7, 2001).

deportation,[63] dishonorable discharge from the armed services,[64] and loss of business or professional licenses.[65]

The Supreme Court created the rule that the Due Process Clause requires the trial court to explain only the direct consequences of conviction.[66] The extension of this principle to defense counsel's duties under the Sixth Amendment, although never passed upon by the Supreme Court, is nevertheless among the most widely recognized rules of American law. In the federal system, it has been accepted by the Courts of Appeals for the First,[67] Second,[68] Third,[69] Fourth,[70] Fifth,[71] Sixth,[72] Seventh,[73] Ninth,[74] Tenth,[75] Eleventh,[76] and District of Columbia[77] Circuits, and by the Army Court of Military Review.[78] The Court of Appeals for the District of Columbia[79] has accepted the

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63 *See, e.g.*, United States v. Porter, No. 90-5905, 1991 WL 54878, at *4 (6th Cir. Apr. 12, 1991) (per curiam); United States v. Parrino, 212 F.2d 919, 921 (2d Cir. 1954). *But see* United States v. El-Nobani, 145 F. Supp. 2d 906, 916–17 (N.D. Ohio 2001).

64 *See, e.g.*, Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988) (citing Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963) (per curiam)).

65 *See, e.g.*, Landry v. Hoepfner, 840 F.2d 1201, 1217 (5th Cir. 1988) (en banc); United States v. Casanova's, Inc., 350 F. Supp. 291, 292 (E.D. Wis. 1972). *But see* Barkley v. State, 724 A.2d 558 (Del. 1999) (holding that automatic revocation of a driver's license is a direct consequence).

66 *See* Brady v. United States, 397 U.S. 742, 755 (1970).

67 *See, e.g.*, United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000); United States v. Quin, 836 F.2d 654 (1st Cir. 1988).

68 Russo v. United States, No. 97-2891, 1999 WL 164951, at *2 (2d Cir. Mar. 22, 1999); United States v. Santelises, 509 F.2d 703 (2d Cir. 1975) (per curiam).

69 *See, e.g.*, Meyers v. Gillis, 93 F.3d 1147, 1153 (3d Cir. 1996) (holding that neither the court nor counsel is required to inform defendant about parole eligibility); *see also* Gov't of V.I. v. Pamphile, 604 F. Supp. 753, 756–58 (D.V.I. 1985) (holding that counsel's failure to inform the defendant of the possibility of deportation does not constitute ineffective assistance of counsel). *But cf.* Parry v. Rosemeyer, 64 F.3d 110, 118 (3d Cir. 1995) (reserving the question of whether failure to advise defendant about the consequences of a revoked term of probation constitutes ineffective assistance of counsel); United States v. Nino, 878 F.2d 101, 105 (3d Cir. 1989) (same).

70 *See, e.g.*, United States v. DeFreitas, 865 F.2d 80, 82 (4th Cir. 1989); United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988).

71 *See, e.g.*, United States v. Banda, 1 F.3d 354 (5th Cir. 1993); United States v. Gavilan, 761 F.2d 226, 228–29 (5th Cir. 1985).

72 *See, e.g.*, King v. Dutton, 17 F.3d 151, 154 (6th Cir. 1994); United States v. Porter, No. 90-5905, 1991 WL 54878, at *4–*5 (6th Cir. Apr. 12, 1991) (per curiam); United States v. Hall, No. 86-3588, 1987 WL 37001 (6th Cir. Apr. 10, 1987) (per curiam); United States v. Nagaro-Garbin, 653 F. Supp. 586, 589–90 (E.D. Mich.), *aff'd*, No. 87-1148, 1987 WL 44483 (6th Cir. Oct. 20, 1987).

73 *See, e.g.*, Santos v. Kolb, 880 F.2d 941, 944 (7th Cir. 1989); United States v. George, 869 F.2d 333 (7th Cir. 1989).

74 *See, e.g.*, Torrey v. Estelle, 842 F.2d 234, 236–37 (9th Cir. 1988).

75 *See, e.g.*, Varela v. Kaiser, 976 F.2d 1357 (10th Cir. 1992).

76 *See, e.g.*, United States v. Campbell, 778 F.2d 764, 768–69 (11th Cir. 1985).

77 *See, e.g.*, United States v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990).

78 *See, e.g.*, United States v. Berumen, 24 M.J. 737, 739–43 (A.C.M.R. 1987).

79 *See, e.g.*, Matos v. United States, 631 A.2d 28, 31–32 (D.C. 1993).

rule, as have courts in Alabama,[80] Alaska,[81] Arizona,[82] California,[83] Connecticut,[84] Delaware,[85] Florida,[86] Georgia,[87] Idaho,[88] Illinois,[89] Indiana,[90] Iowa,[91] Kansas,[92] Maine,[93] Maryland,[94] Massachusetts,[95] Michigan,[96] Minnesota,[97] Missouri,[98] Nevada,[99] New Hampshire,[100] New Jersey,[101] New Mexico,[102] New York,[103] North Carolina,[104] North Dakota,[105] Pennsylvania,[106] Rhode Island,[107] South Carolina,[108] South

80 *See, e.g.*, Fearson v. State, 662 So. 2d 1225 (Ala. Crim. App. 1995); Oyekoya v. State, 558 So. 2d 990 (Ala. Crim. App. 1989).

81 *See, e.g.*, Tafoya v. State, 500 P.2d 247 (Alaska 1972).

82 *See, e.g.*, State v. Rosas, 904 P.2d 1245 (Ariz. Ct. App. 1995) (citing State v. Vera, 766 P.2d 110, 112 (Ariz. Ct. App. 1988)).

83 *See, e.g.*, People v. Reed, 72 Cal. Rptr. 2d 615 (Ct. App. 1998). *But cf. In re* Resendiz, 19 P.3d 1171, 1179 (Cal. 2001) (concluding that "the 'collateral' nature of immigration consequences does not foreclose" an ineffective assistance of counsel claim); *infra* notes 122–24 and accompanying text.

84 *See, e.g.*, Ferreira v. Comm'r of Corr., No. CV 980002810, 1999 WL 203795 (Conn. Super. Ct. Apr. 1, 1999).

85 *See, e.g.*, State v. Christie, 655 A.2d 836, 841 (Del. Super. Ct.), *aff'd*, No. 252, 1994, 1994 WL 734468 (Del. 1994).

86 *See, e.g.*, State v. Ginebra, 511 So. 2d 960 (Fla. 1987) (disapproving of the holding in Edwards v. State, 393 So. 2d 597, 599–600 (Fla. Dist. Ct. App. 1981)), *superseded by rule as stated in* State v. De Abreu, 613 So. 2d 453 (Fla. 1993).

87 *See, e.g.*, Williams v. Duffy, 513 S.E.2d 212, 214 (Ga. 1999); King v. State, 539 S.E.2d 614, 616–17 (Ga. Ct. App. 2000).

88 *See, e.g.*, Ray v. State, 982 P.2d 931, 937 (Idaho 1999).

89 *See, e.g.*, People v. Huante, 571 N.E.2d 736, 740–42 (Ill. 1991) (disapproving People v. Maranovic, 559 N.E.2d 126 (Ill. App. Ct. 1990); People v. Miranda, 540 N.E.2d 1008 (Ill. App. Ct. 1989); People v. Padilla, 502 N.E.2d 1182 (Ill. App. Ct. 1986)).

90 *See, e.g.*, Stoltz v. State, 657 N.E.2d 188, 192–93 (Ind. Ct. App. 1995).

91 *See, e.g.*, State v. Carney, 584 N.W.2d 907, 910 (Iowa 1998) (en banc) (per curiam); Mott v. State, 407 N.W.2d 581 (Iowa 1987).

92 *See, e.g.*, Bussell v. State, 963 P.2d 1250, 1253–54 (Kan. Ct. App. 1998).

93 *See, e.g.*, Aldus v. State, 748 A.2d 463, 469 n.6 (Me. 2000) ("There is a sound basis for the collateral consequences doctrine. Neither courts nor defense counsel can be expected to be aware of the multitude of potential consequences that may flow from a conviction.").

94 *See, e.g.*, Yoswick v. State, 700 A.2d 251, 258–59 (Md. 1997) (Raker, J.).

95 *See, e.g.*, Commonwealth v. Indelicato, 667 N.E.2d 300 (Mass. App. Ct. 1996).

96 *See, e.g.*, People v. Davidovich, 618 N.W.2d 579 (Mich. 2000) (per curiam) (overruling People v. Kadadu, 425 N.W.2d 784 (Mich. Ct. App. 1988)); *cf.* People v. Osaghae, 596 N.W.2d 911, 914 (Mich. 1999) (per curiam) (holding that counsel has no duty to predict changes in law).

97 *See, e.g.*, Berkow v. State, 583 N.W.2d 562, 563–64 (Minn. 1998) (citing Alanis v. State, 583 N.W.2d 573 (Minn. 1998)).

98 *See, e.g.*, Redeemer v. State, 979 S.W.2d 565, 572–73 (Mo. Ct. App. 1998).

99 *See, e.g.*, Barajas v. State, 991 P.2d 474 (Nev. 1999) (per curiam).

100 *See, e.g.*, State v. Elliott, 574 A.2d 1378 (N.H. 1990) (Souter, J.).

101 *See, e.g.*, State v. Chung, 510 A.2d 72 (N.J. Super. Ct. App. Div. 1986).

102 *See, e.g.*, State v. Miranda, 675 P.2d 422, 424–25 (N.M. Ct. App. 1983).

103 *See, e.g.*, People v. Ford, 657 N.E.2d 265, 267–68 (N.Y. 1995).

104 *See, e.g.*, State v. Goforth, 503 S.E.2d 676, 678 (N.C. Ct. App. 1998).

105 *See, e.g.*, State v. Dalman, 520 N.W.2d 860, 864 (N.D. 1994).

106 *See, e.g.*, Commonwealth v. Frometa, 555 A.2d 92 (Pa. 1989).

107 *See, e.g.*, State v. Alejo, 655 A.2d 692 (R.I. 1995).

108 *See, e.g.*, Smith v. State, 494 S.E.2d 626, 629 (S.C. 1997).

Dakota,[109] Tennessee,[110] Texas,[111] Utah,[112] Washington,[113] and Wisconsin.[114]

With respect to the collateral consequence of deportation in particular, there is some diversity of opinion. Courts in Colorado,[115] Indiana,[116] Ohio,[117] and Oregon[118] have held that aliens may be entitled to advice about deportation from their lawyers, some possibly on state law grounds. A growing number of states require advice about deportation by statute or court rule.[119] Some courts have also held that while counsel generally need not be concerned about collateral consequences, the federal statute which until 1990 authorized state and federal judges to issue a binding "Judicial Recommendation Against Deportation" at sentencing imposed a duty of care on attorneys.[120] Many courts also hold or suggest that misadvice about deportation or other collateral consequences might be treated differently than nonadvice.[121]

One potential outlier is a California Supreme Court decision holding that collateral consequences are not categorically excluded from ineffectiveness analysis.[122] However, the case was a deportation case involving alleged affirmative misrepresentations.[123] Moreover,

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109 *See, e.g.*, State v. Wika, 464 N.W.2d 630, 633–34 (S.D. 1991).

110 *See, e.g.*, Adkins v. State, 911 S.W.2d 334, 350 (Tenn. Crim. App. 1994).

111 *See, e.g.*, *Ex parte* Morrow, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997) (en banc).

112 *See, e.g.*, State v. McFadden, 884 P.2d 1303 (Utah Ct. App. 1994).

113 *See, e.g.*, State v. Martinez-Lazo, 999 P.2d 1275, 1279 (Wash. Ct. App.), *review denied*, 11 P.3d 827 (Wash. 2000).

114 *See, e.g.*, State v. Santos, 401 N.W.2d 856 (Wis. Ct. App. 1987).

115 *See, e.g.*, People v. Pozo, 746 P.2d 523, 527 (Colo. 1987) (en banc).

116 *See, e.g.*, Williams v. State, 641 N.E.2d 44, 49 (Ind. Ct. App. 1994) (holding that state constitution requires advice about deportation).

117 *See, e.g.*, State v. Arvanitis, 522 N.E.2d 1089, 1094–95 (Ohio Ct. App. 1986).

118 *See, e.g.*, Lyons v. Pearce, 694 P.2d 969, 971 n.2, 974–77 (Or. 1985) (en banc).

119 *See, e.g.*, INS v. St. Cyr, 121 S. Ct. 2271, 2291 n.48 (2001) (listing rules and statutes); Christina LaBrie, *Lack of Uniformity in the Deportation of Criminal Aliens*, 25 N.Y.U. REV. L. & SOC. CHANGE 357, 373 & n.93 (1999) (listing state statutes).

120 *See* United States v. Castro, 26 F.3d 557, 560–61 (5th Cir. 1994); Janvier v. United States, 793 F.2d 449, 455 (2d Cir. 1986); United States v. Khalaf, 116 F. Supp. 2d 210, 213–15 (D. Mass. 1999); People v. Barocio, 264 Cal. Rptr. 573, 579 (Ct. App. 1989); People v. Ping Cheung, 718 N.Y.S.2d 578, 582–83 (Sup. Ct. 2000); *cf.* Hameed v. Commonwealth, No. 114207, 1992 WL 884664 (Va. Cir. Ct. May 7, 1992) (no ineffective assistance of counsel on facts).

121 *See, e.g.*, Sandoval v. INS, 240 F.3d 577, 578–79 (7th Cir. 2001); Hill v. Lockhart, 894 F.2d 1009 (8th Cir. 1990) (en banc); Sparks v. Sowders, 852 F.2d 882, 885 (6th Cir. 1988); United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982); Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979); People v. Soriano (*In re* Soriano), 240 Cal. Rptr. 328 (Ct. App. 1987); People v. Garcia, 815 P.2d 937, 942–43 (Colo. 1991) (en banc); Roberti v. State, 782 So. 2d 919 (Fla. Dist. Ct. App. 2001); Smith v. Gaither, 549 S.E.2d 351, 352 (Ga. 2001) (Sears, J., dissenting); People v. Correa, 485 N.E.2d 307, 311 (Ill. 1985); State v. Vieira, 760 A.2d 840, 843 (N.J. Super. Ct. Law Div. 2000).

122 *In re* Resendiz, 19 P.3d 1171, 1179–84 (Cal. 2001).

123 *Id.* at 1184–86. The court's holding was quite narrow: "[W]e conclude that neither [the California statute requiring court advisement of immigration consequences] nor the

the court ultimately denied relief because, even assuming the law and facts were as the defendant alleged, any error was harmless.[124] Accordingly, it may still be accurate to say that no jurisdiction has rejected the general principle that counsel need not consider collateral consequences in advising clients about guilty pleas.

B. Assistance of Counsel

The collateral consequences rule is surprising in light of the Supreme Court's jurisprudence on the right to counsel and effective assistance of counsel. Reversing the English common law practice,[125] the Sixth Amendment guarantees that in "all criminal prosecutions" the accused may have "the Assistance of Counsel for his defence."[126] In addition to protecting the right to hire counsel,[127] the Amendment has been construed to require appointment of counsel in some circumstances for those unable to afford their own lawyers. In *Powell v. Alabama*,[128] a 1932 decision, the Supreme Court held that the right to counsel applied to the states and recognized that it required appointment of counsel, in capital cases, for poor defendants.[129] The right is now recognized in felony prosecutions,[130] misdemeanors where imprisonment is imposed,[131] juvenile prosecutions,[132] and initial appeals from convictions.[133] For purposes of the Sixth Amendment, the Court has held that a "criminal prosecution" begins with the commencement of formal adversary proceedings.[134] Once proceedings

collateral nature of immigration consequences constitutes a per se bar to an ineffective assistance of counsel claim based on counsel's misadvice about the adverse immigration consequences of a guilty plea." *Id.* at 1183.

124 *Id.* at 1187–88.

125 Faretta v. California, 422 U.S. 806, 823–24 (1975) (citing 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 340–41 (London, MacMillian & Co. 1883)).

126 U.S. CONST. amend. VI.

127 *See* Gabriel J. Chin & Scott C. Wells, *Can a Reasonable Doubt Have an Unreasonable Price? Limitations on Attorneys' Fees in Criminal Cases*, 41 B.C. L. REV. 1, 57–65 (1999).

128 287 U.S. 45 (1932).

129 *Id.* at 67–68, 73.

130 Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (holding that counsel is required for all state felony prosecutions, overruling *Betts v. Brady*, 316 U.S. 455 (1942), which had adopted a case-by-case approach for state felony prosecutions); Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938) (requiring counsel for all federal felony prosecutions).

131 Argersinger v. Hamlin, 407 U.S. 25, 36–38 (1972). Counsel need not be appointed in a misdemeanor prosecution if imprisonment is not actually imposed upon conviction. Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

132 *In re* Gault, 387 U.S. 1, 41 (1967).

133 Douglas v. California, 372 U.S. 353 (1963) (citing Griffin v. Illinois, 351 U.S. 12 (1956)). Appointed counsel is not required for discretionary appeals or petitions for certiorari. Ross v. Moffitt, 417 U.S. 600, 610 (1974).

134 *See* Brewer v. Williams, 430 U.S. 387, 398 (1977).

have commenced, counsel must be provided at critical stages,[135] including pleading,[136] trial, and sentencing.[137]

The *Powell* Court implicitly also recognized a right to effective assistance of counsel because in that case attorneys had technically been appointed for the defendants. Because those attorneys apparently did literally nothing in the way of a defense, the Court concluded that the defendants' right to counsel had not been satisfied.[138] However, the Court did not replicate its steady and clear development of rules for when counsel was required in the area of effective assistance. Until 1984, the Court left the development of constitutional competence standards to the states and lower federal courts, resulting, not surprisingly, in a variety of approaches. Courts disagreed on whether violation of the right to effective counsel required automatic reversal, was subject to the rule of *Chapman v. California*[139] (which allowed the prosecution to avoid reversal if a constitutional error could be proved harmless beyond a reasonable doubt),[140] or if the defendant could have a new trial only on a showing of prejudice.[141] In addition, courts disagreed about whether the substantive standard required attorneys to exercise "'reasonable competence'" or "'customary skill,'" or whether they would be deemed effective unless their representation rendered the proceedings a "'farce and mockery of justice.'"[142]

The Supreme Court resolved these questions in *Strickland v. Washington*.[143] The Court explained that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[144] The Court established a two-pronged test to evaluate claims of ineffective counsel: A defendant must show that his lawyer's representation was deficient (the "performance" prong), and that the deficient performance affected the outcome (the "prejudice" prong).[145]

The Court explained that the first prong, effective performance, means performance by counsel that is "reasonable considering all the

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135 Mempa v. Rhay, 389 U.S. 128, 134 (1967).

136 *See* Hill v. Lockhart, 474 U.S. 52, 56 (1985).

137 *See* Williams v. Taylor, 529 U.S. 362 (2000); Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion) ("[S]entencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel.").

138 Powell v. Alabama, 287 U.S. 45, 56–58 (1932).

139 386 U.S. 18 (1967).

140 *Id.* at 24.

141 For a discussion of the various approaches taken by the courts, see Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. Decoster, 93 HARV. L. REV. 752, 756–58 (1980).

142 *Id.* at 757–58 (citations omitted).

143 466 U.S. 668 (1984).

144 *Id.* at 686.

145 *Id.* at 687–96.

circumstances."[146] Counsel is presumed to be competent,[147] and the Court recognized that a lawyer may choose to ignore customary norms for tactical reasons.[148] Each ineffectiveness claim must be judged "on the facts of the particular case."[149]

The Court made unmistakably clear that bright-line rules for representation were not part of the Sixth Amendment. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."[150] The Court noted that "[m]ore specific guidelines are not appropriate" because the Sixth Amendment "relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions."[151] With this in mind, the Court stated that "[f]rom counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution."[152] The Court emphasized that "[t]hese basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance."[153]

In addition to the absence of adequate professional performance, to satisfy the "prejudice" prong "the defendant must show that [the unprofessional errors] actually had an adverse effect on the defense."[154] The defendant need not show that it is more likely than not that she would have been acquitted,[155] but she "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[156] This line of inquiry turns on whether, absent the error, the "factfinder would have had a reasonable doubt respecting guilt."[157]

Strickland involved alleged ineffectiveness in the penalty phase of a capital prosecution and therefore was treated as a trial case,[158] but the Court meant the competence-prejudice framework to apply when

146 *Id.* at 688.
147 *Id.* at 689–91.
148 *Id.* at 688–91.
149 *Id.* at 690.
150 *Id.* at 693.
151 *Id.* at 688.
152 *Id.*
153 *Id.*
154 *Id.* at 693.
155 *Id.*
156 *Id.* at 694.
157 *Id.* at 695.
158 *Id.* at 675–76.

"judging any claim of ineffectiveness."[159] In *Hill v. Lockhart*,[160] the Court explained how *Strickland* would apply to guilty pleas. Hill pleaded guilty after his attorney advised him that he would be eligible for parole after serving one-third of his sentence,[161] when in fact he had to serve at least one-half.[162] Hill sought habeas corpus, alleging that his plea was involuntary because of counsel's misadvice.[163]

The *Hill* Court explained that a defendant "'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*'";[164] that is, the validity of the defendant's claim depended "on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'"[165] Thus, the Court applied *Strickland*'s competence prong without modification,[166] and explained that to satisfy the prejudice prong, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[167]

C. Scrutinizing the Collateral-Direct Distinction

The distinction between direct and collateral consequences is inconsistent with the approach of the Court in *Strickland* and *Hill* in a number of ways. For example, *Strickland* emphatically rejects the checklist, insisting on case-by-case analysis, an approach at odds with the collateral consequences rule's categorical approach.[168] More fundamentally, the first prong of *Strickland-Hill* analysis requires evaluating attorney competence. The collateral consequences rule does not capture, even as a rule of thumb, anything important about the concerns of competent lawyers or their clients. Because competent counsel will not focus on the distinction, it should be irrelevant to a *Strickland* analysis.

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159 *Id.* at 686–87.
160 474 U.S. 52 (1985).
161 *Id.* at 54–55.
162 *Id.* at 55.
163 *Id.* at 53.
164 *Id.* at 56–57 (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973) (citing McMann v. Richardson, 397 U.S. 759 (1970))).
165 *Id.* at 56 (quoting *McMann*, 397 U.S. at 771).
166 *Id.* at 58–59.
167 *Id.* at 59.
168 *Cf.* Roe v. Flores-Ortega, 528 U.S. 470, 479–81 (2000) (rejecting bright-line rule with respect to counsel's duty to file notice of appeal).

1. *The Supreme Court, ABA Standards, and Other Evidence of Lawyer Norms*

The first prong of the *Strickland* inquiry requires evaluation of the competence of the attorney's performance. In this context, the question is whether competent attorneys would ignore collateral consequences in advising defendants how to proceed. Almost certainly without intending to do so, the Supreme Court seems to have answered this question in a deportation case, *INS v. St. Cyr*.[169]

The issue in *St. Cyr* was whether the repeal of section 212(c) of the Immigration and Nationality Act[170] applied retroactively.[171] Section 212(c) provided for discretionary relief from deportation of aliens convicted of certain crimes.[172] Congress repealed section 212(c) in 1996, but St. Cyr argued that aliens who pleaded guilty before then did so in part because section 212(c) relief was available, and thus that the repeal should apply only to subsequent convictions.[173] The Court held that Congress had not intended the repeal to apply to past convictions.[174] The Court recognized that aliens consider the collateral consequence of deportation in deciding whether to plead guilty, and competent defense counsel take it into account in rendering advice. The Court explained, "[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."[175] Relying on the ABA Standards[176] and other practitioner's materials, the Court observed that "[e]ven if the defendant were not initially aware of § 212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision's importance."[177]

The *St. Cyr* Court's exploration of the duties of competent counsel did not arise in the context of a Sixth Amendment case, but it nevertheless used the appropriate sources. In *Strickland*, the Court mentioned only one source by name as evidence of the nature of competent practice. The Court explained that "[p]revailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice . . . , are guides to deter-

169 121 S. Ct. 2271 (2001).
170 Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187 (1952).
171 *St. Cyr*, 121 S. Ct. at 2275.
172 *Id.* at 2276.
173 *Id.* at 2290–93.
174 *Id.* at 2293.
175 *Id.* at 2291.
176 *Id.* at 2291 n.48 (quoting STANDARDS FOR CRIMINAL JUSTICE, Standard 14-3.2 cmt. at 14-75 (1980)).
177 *Id.* at 2291 n.50.

mining what is reasonable, but they are only guides."[178] The Court has frequently cited the ABA Standards in evaluating attorney performance.[179]

The ABA Standards for Criminal Justice explicitly require defense counsel to explore collateral consequences with the client as part of representation in a guilty plea. Standard 14-3.2(f) explains: "[t]o 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."[180] The comments recognize that because of "the ever-increasing host of collateral consequences that may flow from a plea of guilty or nolo contendere, it may be very difficult for defense counsel to fully brief every client on every likely effect of a plea in all circumstances."[181] However, because the defendant

> will frequently have little appreciation of the full range of consequences that may follow from a guilty, nolo or *Alford* plea[,] . . . . counsel should interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces.[182]

Although Standard 14-3.2(f) was added as part of the 1997 revision of the guilty plea standards, it is consistent with the 1980 version, which imposed similar duties,[183] as well as with other ABA Standards and ethical rules which have been in existence for decades. For example, Standard 4-5.1 provides that "[a]fter informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including a

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178 Strickland v. Washington, 466 U.S. 668, 688 (1984).

179 *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 396 (2000) (citing STANDARDS FOR CRIMINAL JUSTICE, Standard 4-4.1 cmt. at 4-55 (1986)); Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000) (citing STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-8.2(a) (1993)); *see also* Bonin v. California, 494 U.S. 1039, 1041 (1990) (Marshall, J., dissenting from denial of certiorari) (quoting STANDARDS FOR CRIMINAL JUSTICE, Standard 4-3.4 (1986)).

180 STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14-3.2(f) (1999).

181 *Id.* cmt. at 126.

182 *Id.* at 127.

183 The 1980 edition of the ABA Standards provided that counsel should advise "of considerations deemed important by defense counsel or the defendant in reaching a decision." *Id.* Standard 14-3.2(b) (1986). The comments explained: "Where from the nature of the case it is apparent that these consequences may follow . . . or where the defendant raises a specific question concerning collateral consequences . . . counsel should fully advise the defendant of these consequences." *Id.* cmt. at 14-75. A number of cases rely on Standard 14-3.2(b) in finding counsel ineffective for failing to advise of consequences. *See, e.g.*, People v. Barocio, 264 Cal. Rptr. 573, 577–78 (Ct. App. 1989); People v. Soriano (*In re* Soriano), 240 Cal. Rptr. 328, 335–36 (Ct. App. 1987); People v. Garcia, 799 P.2d 413, 415 (Colo. Ct. App. 1990), *aff'd*, 815 P.2d 937 (Colo. 1991).

candid estimate of the probable outcome."[184] Furthermore, Standard 4-8.1 provides that "[t]he consequences of the various dispositions available should be explained fully by defense counsel to the accused."[185] The comment explains that this means "[t]he lawyer should carefully explain to the defendant the sentencing alternatives available to the court and what they will mean for the defendant personally should any of them be selected."[186]

Similarly, the ABA's Model Rules of Professional Conduct, which are applicable to all lawyers, support this result. They place the decision to plead in the client's hands rather than the lawyer's, and impose a duty on the lawyer to discuss with the client aspects of the case which might be relevant to the decision about how to proceed in a particular legal matter.[187] The implication is that the duty also applies to guilty pleas.[188]

The ideas expressed in these materials are consistent with treatises and practitioners' guides, which emphasize the importance of understanding collateral consequences as part of evaluating criminal cases. Professor Anthony Amsterdam's *Trial Manual for the Defense of Criminal Cases* explains:

> No intelligent plea decision can be made by either lawyer or client without full understanding of the possible consequences of a conviction. These consequences describe the defendant's potential exposure if s/he goes to trial and is convicted of the offense

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184 STANDARDS FOR CRIMINAL JUSTICE, Standard 4-5.1 (1986). The commentary to this Standard makes even more apparent the intention of the drafters. It states that "[t]he duty of the lawyer to investigate fully the facts of the case, regardless of the anticipated plea .... [and the] lawyer's duty to be informed on the law [are] equally important . . . [for] the client is not [likely to be] educated in or familiar with the controlling law." *Id.* cmt. at 4-63. Further, "[t]he decision to plead guilty can be an intelligent one only if the defendant has been advised fully as to his or her rights and as to the probable outcome of alternative choices." *Id.*

185 *Id.* Standard 4-8.1(a).

186 *Id.* cmt. at 4-103.

187 MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. [5] (2001) ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners."); *id.* R. 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . ."); *id.* R. 1.2(c) ("A lawyer may limit the objectives of the representation if the client consents after consultation.").

188 *Cf. id.* R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1980) ("A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. . . . A lawyer should advise his client of the possible effect of each legal alternative."); *see also* MODEL RULES OF PROF'L CONDUCT R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

> charged or if s/he pleads guilty to the offense charged with no plea bargain. They are the baseline for measuring the worth of any bargain that can be negotiated; and if the prosecutor will not negotiate they measure the worth of the defendant's chances of acquittal or of conviction only of a lesser included offense . . . at a trial. In some defendant's cases the consequences of conviction may be so devastating that even the faintest ray of hope offered by a trial is magnified in significance.[189]

Professor Arthur Campbell notes in his treatise that "there are collateral effects which extend far beyond the courthouse. Counsel's professional duties include giving sound advice concerning them."[190]

The *BNA Criminal Practice Manual* suggests that "[w]hile minimization of jail time immediately leaps to mind as a primary benefit of plea bargaining and thus a primary goal of the client, there is a myriad of other goals and concerns that may pertain."[191] It recommends investigating a variety of collateral consequences, including alternative sentencing, enhanced sentencing, eligibility for parole or probation, forfeiture, and "[r]amifications of conviction on client's livelihood, e.g., a conviction may prevent renewal of a pharmacist's license or be a bar to holding elective office."[192]

Other general criminal practitioners' materials note the importance of advising clients about the collateral consequences of conviction,[193] as do materials in specialized areas of criminal practice such as

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189 1 AMSTERDAM, *supra* note 1, § 204.

190 ARTHUR W. CAMPBELL, LAW OF SENTENCING § 15:23, at 406 (2d ed. 1991).

191 BNA CRIMINAL PRACTICE MANUAL, at 71:103 (1996).

192 *Id.* at 71:105.

193 Notable among these are attorney performance guidelines promulgated by public defender organizations, which often require consideration of collateral consequences. *See, e.g.*, 2 BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS: STANDARDS FOR ATTORNEY PERFORMANCE, at H11–H15 (2000); *see also, e.g.*, F. LEE BAILEY & KENNETH J. FISHMAN, HANDLING MISDEMEANOR CASES § 3.7, at 5 (2d ed. 1992) ("In misdemeanor cases, the possible consequences of a conviction may be so drastic that the defendant must take his or her chances on a trial."); G. NICHOLAS HERMAN, PLEA BARGAINING § 3.03, at 20–21 (1997) ("Throughout the plea bargaining process, defense counsel should advise the defendant of the following: . . . All of the consequences and ramifications of a particular plea, including possible sentences and effects on probation, parole eligibility, immigration status, and the like." (footnote omitted)); NEWMAN, *supra* note 2, at 209 (arguing that counsel must have "intimate knowledge" of potential collateral consequences in order to be effective); Elkan Abramowitz, *The Hidden Penalties of Conviction*, LITIGATION, Fall 1990, at 34, 34 ("To the defense attorney goes the lonely job of anticipating collateral consequences, weighing them with the client, and ultimately helping the client to decide whether to enter a plea."); Clark, *supra* note 1, at 19–20 (stating that defense counsel "should also advise the defendant of at least some of the collateral effects of a plea of guilty, such as loss of the right to vote or loss of the right to obtain certain types of employment"); Robert L. Segar, *Plea Bargaining Techniques*, 25 AM. JUR. TRIALS 69, § 19, at 103–04 (1978) (noting that understanding potential damage to client as a result of conviction "might bring about a prosecutor's agreement to a dismissal" or, alternatively, "prompt an accused to seriously undertake plea negotiations"); *id.* § 21 (describing possible "adverse consequences" and concluding that "counsel must ensure that all

environmental law,[194] white collar crime,[195] and tax.[196] Even cases that have refused to hold that counsel have the obligation to discuss collateral consequences with clients recognize that it represents better practice.[197]

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possible adverse consequences are explored with the defendant well before entry of a guilty plea"); *id.* § 51, at 141 (including, in a "checklist" for advising a client regarding a guilty plea, an explanation of potential probation and parole consequences of a conviction, as well as the potential for consecutive sentencing); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 100 (1995) ("[I]t is critical that defense counsel inquire about the defendant's personal situation so counsel can advise the client about the collateral consequences of a guilty plea or conviction."); Melinda Smith, Comment, *Criminal Defense Attorneys and Non-Citizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in Those Laws May Affect Your Criminal Cases*, 33 AKRON L. REV. 163, 207 (1999) ("[I]t is imperative that criminal defense attorneys become aware of the immigration status of their clients, and the immigration issues involved in each criminal case."); George Beall, *Negotiating the Disposition of Criminal Charges*, TRIAL, Oct. 1980, at 46, 48 ("If the defendant is about to plead guilty, prepare him or her for the non-criminal consequences of that choice."); Laurie L. Levinson, *Representing Aliens*, N.J. L.J., May 17, 1999, at 37 ("Defense counsel who represent clients who have either violated the immigration laws or whose convictions affect their immigration status have added responsibilities in providing such representation.").

194 *See, e.g.*, David P. Bancroft, *The Collateral Estoppel and Caremark Consequences of Criminal Convictions in Environmental Cases*, *in* CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS 137, 145–46 (ALI-ABA Course of Study, No. SE72, 2000) ("To limit the possible impact on subsequent or parallel civil lawsuits, counsel should . . . negotiate . . . related issues [as part of a plea bargain]."), *available at* Westlaw SE72 ALI-ABA 137; Carol E. Dinkins, *Negotiation and Settlement Issues in Federal Enforcement Actions*, *in* ENVIRONMENTAL LITIGATION 1405, 1420 (ALI-ABA Course of Study, No. C127, 1995) ("Because the collateral consequences of a conviction—such as listing to bar contracting with the federal government—can be more severe punishment than a fine, practitioners must be wary of them."), *available at* Westlaw C127 ALI-ABA 1405; Judson W. Starr & Valerie K. Mann, *Just when You Thought It Was Safe—The Collateral Consequences of an Environmental Violation*, *in* HAZARDOUS WASTES, SUPERFUND, AND TOXIC SUBSTANCES 265, 280 (ALI-ABA Course of Study, No. CA51, 1995) ("A party defending against environmental liability must be on the lookout to avoid being blind-sided by collateral consequences of a conviction."), *available at* Westlaw CA51 ALI-ABA 265.

195 *See, e.g.*, David M. Zornow et al., *Managing the Fallout: The Criminal Investigator's Knock on the Door May Only Be the First of Many*, *in* "CRIMINALIZATION" OF CIVIL LAW CLAIMS 127, 129 (ALI-ABA Course of Study, No. C640, 1991) ("In dealing with a criminal investigation, no tactical or strategic decision should be made by a corporation without careful consideration of its impact on a range of other potential proceedings and collateral issues."), *available at* Westlaw C640 ALI-ABA 127.

196 *See, e.g.*, Robert S. Fink & Martha P. Rogers, *Trial of a Tax Fraud Case*, *in* CRIMINAL TAX FRAUD—1997, at H-11, H-18 (Section of Taxation, Am. Bar Ass'n Ctr. for Continuing Legal Educ., Nat'l Inst., 1997) ("A convicted tax evader faces collateral consequences . . . ."), *available at* Westlaw N97CTFB ABA-LGLED H-11.

197 *See, e.g.*, United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993) ("This is not to say that [counsel] should not advise the client on possible deportation—[counsel] should."); United States v. Campbell, 778 F.2d 764, 769 (11th Cir. 1985) ("It is highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty; what is desirable is not the issue before us."). The *Campbell* case is frequently cited. Its refusal to consider "what is desirable" may be an acknowledgement that its holding is based on something other than the actual practices of good lawyers, which should be a necessary part of evaluating lawyer competence. *See* State v. Ramirez, Nos. 109, 00-0393, 2001 WL 1035928, at *5 (Iowa Sept. 6, 2001) ("[F]oreign-

It is not surprising that the ABA materials and other resources should speak with one voice about collateral consequences. The harmful implications for the client's case and the lawyer's reputation for categorically ignoring collateral consequences are readily accessible to any lawyer. Imagine an applicant for a position in a law firm's white collar or regulatory department stating:

> I would advise a client to accept a plea bargain to a count with a $1,000 fine rather than to a count with a $2,000 fine even if it later turned out that conviction on the first count resulted in debarment from participation in federal programs or termination of a license necessary to do business, and the second one would not have. Just as I would not presume to tell the client not to use the $1,000 saved in the first plea to buy fried foods, and instead to invest it in a diversified portfolio of mutual funds to help ensure a secure retirement, evaluation of collateral consequences is simply not part of the responsibilities of a good lawyer.

Consider this hypothetical "war story" of an applicant for a position at a public defender's office:

> I represented someone charged with DUI, and due to my excellent advocacy the prosecutor accepted a guilty plea with a one-day sentence instead of the three days imposed in almost every similar case. As an interesting aside, my client and his family were then deported based on the conviction; I have no idea whether I could have negotiated a deal resulting in conviction of a non-deportable offense; status as an alien does not affect the fine or length of incarceration, so I never considered it. The results of this case demonstrate my remarkable legal abilities.

Obviously, lawyers who ignore collateral consequences of legal actions are, to that extent, bad lawyers. Whether clients are regarded by individual attorneys as sources of fees, as the objects of duty and concern, or both, lawyers whose concept of practice predictably results in serious avoidable harm would and should be unemployable. If this is correct, the model of competence suggested by the collateral consequences rule is inconsistent with what most lawyers and clients would regard as competence.

2. *Collateral Consequences and Plea Negotiations*

Understanding collateral consequences helps lawyers and their clients evaluate the risks and benefits of taking or rejecting a particular plea. A lawyer can also use her knowledge of collateral consequences to change what the risks and benefits are: Identifying and explaining collateral consequences to the prosecutor or court may in-

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national defendants *should* be apprised of all applicable federal laws, especially federal deportation consequences of state guilty pleas.").

fluence the decision to bring charges at all, the particular charges that are brought, the counts to which the court or prosecution accept a plea, and the direct consequences imposed by the court at sentencing. The collateral consequences rule is troubling, then, because it assumes that competent counsel can systematically ignore a significant share of the resources they may be able to deploy on behalf of their clients.

As one practitioners' guide explained:

> Attention should be paid to the collateral effects of a conviction under the prosecutor's theories. The impact of collateral consequences due to a criminal conviction can, on occasion, be used to persuade the prosecutor to prosecute for a lesser charge or to decline a case altogether. During negotiations, defense counsel can cite to the draconian nature of the collateral consequences to show that a conviction would be overly punitive.[198]

Professor Campbell has suggested:

> Before actually starting to bargain, the need for counsel's prior, thorough, and wide ranging investigation into the facts of the case and client's life history cannot be overemphasized. There is much material which, though inadmissible at trial, can be highly significant in persuading a prosecutor to reduce counts or sentence demands—and sometimes drop charges altogether.[199]

Similarly, the *BNA Criminal Practice Manual* suggests:

> In addition to the bargaining chips relating to charges or sentencing, chips of various colors held by either side allow for innovative arrangements . . . that satisfy both sides, even though unconventional. . . . [T]he defendant can offer to do something that the government could not compel and yet which would assuage one of its burning concerns. Thus, if the government's main desire is to get the defendant off the street, a voluntary exile may fill the bill . . . . A concern that the defendant's precarious mental state

198 Judson W. Starr & Valerie K. Mann, *Environmental Crimes: Parallel Proceedings and Beyond, in* ENVIRONMENTAL LITIGATION 1051, 1054 (ALI-ABA Course of Study, No. C921, 1994), *available at* Westlaw C921 ALI-ABA 1051; *see also* Jerrold M. Ladar, *Insult Added to Injury: Extended Fallout from a Federal Conviction, in* CRIMINAL TAX FRAUD—1997, *supra* note 196, at D-25, D-26 ("[Collateral consequences] can affect your negotiations with the prosecutor as to specific charges, charging language and plea agreement conditions."), *available at* Westlaw N97CTFB ABA-LGLED D-25; *see* Judson W. Starr & Valerie K. Mann, *Beware of the Collateral Consequences of an Environmental Violation, in* HAZARDOUS WASTES, SUPERFUND, AND TOXIC SUBSTANCES 753, 755 (ALI-ABA Course of Study, No. C948, 1994) (claiming that "[a]t a minimum, collateral consequences must be included in the calculation of full exposure to liability so the proper level of attention is devoted to the matter [because] [b]road understanding of the consequences collateral to an environmental violation is essential to responsible, effective lawyering" and proposing that "[t]he defending party can affect the likelihood, scope and impact of collateral consequences, and should be proactive in reducing these complicating factors"), *available at* Westlaw C948 ALI-ABA 753.

199 CAMPBELL, *supra* note 190, § 15.4, at 376.

> may lead to further criminal difficulty may be met by a voluntary commitment.[200]

Many other commentators agree.[201]

This advice is more than wishful thinking about the good nature of prosecutors. The National Prosecution Standards promulgated by the National District Attorneys Association, for example, give ample room for consideration of collateral consequences by prosecutors exercising discretion. The standards note that "[u]ndue hardship caused to the accused," the "availability of adequate civil remedies," and the defendant's waiver of his civil claims "against victims, witnesses, law enforcement agencies and their personnel" may be considered in the decision to charge, to pursue pretrial diversion, or to take a plea.[202]

Similarly, the Principles of Federal Prosecution in the *United States Attorney's Manual* ("*Manual*") notes that "[m]erely because the attorney for the government believes that a person's conduct constitutes a Federal offense and that the admissible evidence will be sufficient to obtain and sustain a conviction, does not mean that he/she necessarily should initiate or recommend prosecution . . . ."[203] Instead, the *Manual* suggests that prosecution may be declined if:

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200 BNA CRIMINAL PRACTICE MANUAL, *supra* note 191, at 71:111–12.

201 *See, e.g.*, HERMAN, *supra* note 193, § 6:11, at 71 (suggesting that defense counsel "[p]oint out the special harshness of a particular guilty plea upon the defendant and his family (e.g., loss of employment, license, etc.)," "point out the defendant's exposure to civil liability," and "[p]oint out the defendant's willingness and ability to make restitution"); NEWMAN, *supra* note 2, at 106 (explaining that because "prosecutors and judges" recognize "that being labeled as a certain type of offender may be far more damaging to a defendant than imposition of even the maximum sentence," charges may be reduced "to prevent undue hardship to deserving defendants or to defendants whose actual criminal conduct is less serious than the label of the original charge would indicate"); Segar, *supra* note 193, § 20, at 105 (suggesting that an alternative to pleading guilty may be an agreement for the defendant to "[l]eave the jurisdiction"); *id.* § 36, at 124 ("If the client indicates a desire to make restitution, counsel may be able to use this fact successfully as a bargaining point in his negotiations."); Uphoff, *supra* note 193, at 128 ("Counsel's ability to strike a responsive chord with an innovative or emotional presentation may succeed in moving a cynical prosecutor to offer a more favorable bargain.").

202 NATIONAL PROSECUTION STANDARDS, Standards 43.6, 44.4 (Nat'l Dist. Attorneys Ass'n 1991). The president of the National District Attorneys Association recently wrote to his membership that "[j]udges often consider the collateral consequences of a conviction," and argued that prosecutors also "must consider them if we are to see that justice is done. . . . [P]rosecutors . . . must comprehend [the] full range of consequences that flow from a . . . conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect." Robert M.A. Johnson, *Collateral Consequences*, PROSECUTOR (Nat'l Dist. Attorneys Ass'n, Alexandria, Va.), May/June 2001, at 5. For examples of pleas structured by the prosecutor to avoid the collateral consequence of deportation, see Lorraine Forte, *Chinese Couple Get Deal on Abuse Charge*, CHI. SUN-TIMES, May 12, 1998, at 15; and Jim Kirksey & Pippa Jack, *Rockies' Astacio to Hear Deportation Ruling Today*, DENVER POST, Dec. 5, 2000, at B1.

203 U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.220(B) (2d ed. 1997).

1. No substantial Federal interest would be served by prosecution;
2. The person is subject to effective prosecution in another jurisdiction; or
3. There exists an adequate non-criminal alternative to prosecution.[204]

According to the *Manual*, collateral consequences can be relevant to each of these reasons.

The "adequate non-criminal alternatives" category contemplates classic collateral proceedings; "civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; and reference of complaints to licensing authorities or to professional organizations such as bar associations. Another potentially useful alternative to prosecution in some cases is pretrial diversion."[205] The *Manual* states:

> Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case. Although on some occasions they should be pursued in addition to the criminal law procedures, on other occasions they can be expected to provide an effective substitute for criminal prosecution.[206]

If collateral proceedings are relevant to federal prosecutors, either as add-ons or in lieu of criminal charges, it is hard to see why competent defense lawyers who are negotiating with the government should consider them categorically irrelevant.

The rules for evaluating whether there is a substantial federal interest—another ground for declining to prosecute—also recognize that collateral consequences may be relevant. The *Manual* takes into account "[t]he probable sentence or other consequences if the person is convicted."[207] The comment to that section recognizes that "the personal circumstances of an accused may be relevant in determining whether to prosecute or take other action. Some circumstances peculiar to the accused, such as extreme youth, advanced age, or mental or physical impairment, may suggest that prosecution is not the most appropriate response to his/her offense."[208] In determining whether to defer to prosecution in another jurisdiction, the prosecutor "should . . . be alert to the possibility that a conviction under state law may, in some cases result in collateral consequences for the defendant, such as disbarment, that might not follow upon a conviction under Federal law."[209]

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204 *Id.* § 9-27.220(A).
205 *Id.* § 9-27.250(B).
206 *Id.*
207 *Id.* § 9-27.230(A)(7).
208 *Id.* § 9-27.230(B)(7).
209 *Id.* § 9-27.240(B)(3).

Collateral consequences can also affect the sentence under the United States Sentencing Guidelines. In the federal system, a court is required to impose a fine "in all cases" unless the defendant is and will be unable to pay.[210] In calculating the fine, the court is required to consider "any restitution or reparation that the defendant has made or is obligated to make"[211] and "any collateral consequences of conviction, including civil obligations arising from the defendant's conduct."[212] Deportation is another frequently encountered collateral consequence. Apparently, all of the circuits that have considered the issue have held that consent to deportation can in some circumstances warrant a downward departure from the recommended sentence, permitted under Guideline 5K2.0.[213]

In guideline jurisdictions, the existence of compelling collateral consequences might affect where a sentence falls within the range, or even the range itself. In traditional systems, where "judges have virtually unlimited discretion regarding the information they may consider,"[214] the ability to make a sympathetic argument may be even more important. Thus, courts have taken into account potential or actual loss of employment as a sentencing factor,[215] and have imposed sentences based on consideration of collateral consequences such as deportation.[216]

Sixth Amendment questions are ordinarily raised in the context of specific cases. An individual attorney's failure to consider collateral

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210 U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(a) (2000).

211 *Id.* § 5E1.2(d)(4).

212 *Id.* § 5E1.2(d)(5).

213 *See, e.g.*, United States v. Arefin, No. 99-3448, 2000 WL 977303, at *4 n.3 (6th Cir. July 6, 2000); United States v. Galvez-Falconi, 174 F.3d 255, 256 (2d Cir. 1999); United States v. Marin-Castaneda, 134 F.3d 551, 555–56 (3d Cir. 1998); United States v. Farouil, 124 F.3d 838, 847 (7th Cir. 1997); United States v. Clase-Espinal, 115 F.3d 1054, 1060 (1st Cir. 1997); United States v. Flores-Uribe, 106 F.3d 1485, 1486 (9th Cir. 1997); United States v. Cruz-Ochoa, 85 F.3d 325 (8th Cir. 1996); United States v. Smith, 27 F.3d 649, 655 (D.C. Cir. 1994).

214 CAMPBELL, *supra* note 190, § 10:1, at 306; *see also* 2 AMSTERDAM, *supra* note 1, § 464(F) (noting that preparation for sentencing requires the lawyer to be aware of "[t]he collateral consequences that may follow different sentencing dispositions").

215 *See, e.g.*, People v. White, 442 N.Y.S.2d 186 (App. Div. 1981). In the military justice system, it is well established that it is permissible to take into account the potential loss of a pension when determining a sentence. *See, e.g.*, United States v. Boyd, 52 M.J. 758, 766 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 217 (C.A.A.F. 2001).

216 Mark Bixler, *INS Memo to Prosecutors Called 'Despicable'*, ATLANTA J.-CONST., May 25, 2000, at E3 (noting that "some judges are actually lowering immigrants' sentences from 12 months to 11 months and 29 days—just low enough to avoid deportation"); *Deportation Awaits Man Freed from Jail*, DETROIT FREE PRESS, July 8, 2000, at 11A (reporting that a judge agreed to an eleven-month, twenty-nine-day sentence in plea bargain "because 'she believed that no one should be deported to Kosovo'"); *see also* Rashtabadi v. INS, 23 F.3d 1562, 1568 (9th Cir. 1994) (observing that some courts would vacate sentences and resentence aliens simply so that a Judicial Recommendation Against Deportation could be part of the judgment).

consequences in a particular case may be an appropriate strategic choice or, if inappropriate, nonprejudicial. Accordingly, not every failure to consider collateral consequences will warrant vacating a plea. Nevertheless, there is a tradition of examining systemic practices to determine whether they are consistent with the obligation of effective assistance of counsel.[217] From the perspective of setting standards for cases to come rather than cases already disposed of, the collateral consequences rule is indefensible. It undermines the values underlying the Sixth Amendment because it encourages defense lawyers to disregard what, in a category of cases, will be the most promising source of aid for their clients' position.

II
THE DOCTRINAL BASIS OF THE COLLATERAL CONSEQUENCES RULE

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 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. The typical decision following or adopting the distinction cites a number of cases holding that counsel need not discuss collateral consequences with their clients, but does not analyze either the lawyer's conduct or the rule independently to determine if it is consistent with *Strickland* and *Hill.* The problem with an approach relying primarily on precedent is that most of the leading cases are inapposite.

This Part describes four categories of cases that are influential but unsound. The first category applies the "farce and mockery of justice" standard for ineffective assistance of counsel which the *Strickland* Court rejected. On occasion, the cases in this category even question whether ineffective assistance can ever invalidate a plea. A second category of cases holds that because a plea is knowing, voluntary, and intelligent (in the sense that the plea court has complied with its duties), any dereliction of counsel's duty is irrelevant. A third category, related to the second, relies on cases holding that the *plea court* need only explain direct consequences, but without explaining why the du-

217 *See, e.g.*, State v. Smith 681 P.2d 1374 (Ariz. 1984) (en banc) (finding an indigent defense system unconstitutional); State v. Peart, 621 So. 2d 780 (La. 1993) (same). *See generally* Rodger Citron, Note, *(Un)*Luckey v. Miller*: The Case for a Structural Injunction to Improve Indigent Defense Services,* 101 YALE L.J. 481, 493–94 (1991) (discussing the justiciability of systemic claims); Note, Gideon*'s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense,* 113 HARV. L. REV. 2062 (2000).

ties of counsel and the court should be identical. Finally, some cases rest on the idea that counsel's responsibility in connection with guilty pleas is different from and lesser than the obligation owed to a client in a case that goes to trial. Very few cases analyze the primary question of whether non-exploration of collateral consequences is consistent with the duties of competent counsel as required by *Strickland* and *Hill.*

A. Cases Applying Pre-*Strickland* Standards

One line of decisions holds that ineffective assistance of counsel can never invalidate a plea, or that it can do so only if counsel's advice rendered the proceeding "a farce and mockery of justice." These cases continue to be widely cited even though they turn on a legal standard that the Supreme Court rejected in *Strickland.* Before *Strickland,* most defendants attacking guilty pleas claimed that they were invalid under the Due Process Clause,[218] that manifest injustice warranted withdrawal of their pleas under the rules of criminal procedure,[219] or that the judge who accepted the guilty plea failed to follow Federal Rule of Criminal Procedure 11 or the equivalent state procedural rule designed to ensure the voluntariness of a plea.[220] Claims of ineffective assistance were usually advanced through these vehicles rather than as independent Sixth Amendment arguments.

Before *Strickland,* ineffective assistance of counsel was an unpromising basis upon which to attack a plea. In *Edwards v. United States,*[221] for example, then-Judge Warren Burger upheld a guilty plea, noting that even in the trial context "[m]ere improvident strategy, bad tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel, unless taken as a whole the trial was a 'mockery of justice.'"[222] In the context of a guilty plea, according to the court, lawyer incompetence would be even less likely to invalidate a proceeding, because defendants are capable of analyzing

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218 *See* Brady v. United States, 397 U.S. 742, 744 (1970); Boykin v. Alabama, 395 U.S. 238, 241 (1969).

219 Federal Rule of Criminal Procedure 32(d) provided, in pertinent part, that "[i]f a motion for withdrawal of a plea of guilty . . . is made before sentence is imposed, . . . the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason" and that "[a]t any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255 [federal habeas corpus]." FED. R. CRIM. P. 32(d) (1987) (current version at FED. R. CRIM. P. 32(e)). In this context, Rule 32 here means both the former (Rule 32(d)) and present (Rule 32(e)) version of the rule in concert.

220 *See Brady,* 397 U.S. at 744; McCarthy v. United States, 394 U.S. 459 (1969). Rule 11 is basically a legislative enactment of existing practices in the courts. *See* FED. R. CRIM. P. 11 advisory committee's notes.

221 256 F.2d 707 (D.C. Cir. 1958).

222 *Id.* at 708.

the situation on their own and thus have a reduced need for the assistance of counsel.[223] In a guilty plea:

> [T]he deed is his own; here there are not the baffling complexities which require a lawyer for illumination; if voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defenses known and unknown. And such is the law. A plea of guilty may not be withdrawn after sentence except to correct a 'manifest injustice,' and we find it difficult to imagine how 'manifest injustice' could be shown except by proof that the plea was not voluntarily or understandingly made, or a showing that defendant was ignorant of his right to counsel. Certainly ineffective assistance of counsel, as opposed to ignorance of the right to counsel, is immaterial in an attempt to impeach a plea of guilty, except perhaps to the extent that it bears on the issues of voluntariness and understanding.[224]

In spite of a vehement dissent by Judge Bazelon, the *Edwards* decision represented the baseline before *Strickland*.[225]

United States v. Parrino,[226] decided by the Second Circuit in 1954, is another early leading case.[227] Remarkably, although Parrino's lawyer was a former U.S. Commissioner of Immigration, the lawyer incorrectly advised Parrino that he could not be deported following a guilty plea.[228] The court held that this mistake did not justify withdrawal of the plea under Federal Rule of Criminal Procedure 32.[229] The court explained that "surprise, as in the instant case, which results from erroneous information received from the defendant's own attorney, at least without a clear showing of unprofessional conduct, is not enough."[230] Judge Frank dissented vigorously but in vain.[231] *Parrino* did not purport to interpret the Sixth Amendment right to counsel,

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223 *Id.* at 709.

224 *Id.* at 709–10 (footnotes omitted).

225 Indeed, *Edwards* continues to be cited in Sixth Amendment cases. *See, e.g.*, United States v. Brooks, No. CRIM.A. 97-228 GK, 2000 WL 1013574, at *3 (D.D.C. July 13, 2000); United States v. Board, No. 91-559-11 (TFH), 2000 WL 12891, at *4 (D.D.C. Jan. 6, 2000); Gov't of V.I. v. Pamphile, 604 F. Supp. 753, 756 (D.V.I. 1985); Corona v. State, No. A-5928, 3528, 1996 WL 740930 (Alaska Ct. App. Dec. 26, 1996).

226 212 F.2d 919 (2d Cir. 1954).

227 *See* Tafoya v. State, 500 P.2d 247, 250 (Alaska 1972); Budeiri, *supra* note 33, at 171.

228 *Parrino*, 212 F.2d at 921.

229 *Id.* at 921–22.

230 *Id.* at 921.

231 *Id.* at 925–26 (Frank, J., dissenting).

> To be sure, as my colleagues say, a court does not represent "that the members of its bar are infallible." But it does, I think, represent that they will not recklessly fail to read a statute before answering a single simple legal question. What is the sense of the constitutional requirement that defendant have counsel before pleading guilty, if the counsel be utterly without legal competence to guide his client?

Id. (Frank, J., dissenting) (footnote omitted).

and in any event, it is inconsistent with the contemporary standard.[232] Under the rule in *Brady v. United States*, the *Parrino* court's statement would seem to be incorrect, because it holds a plea voluntary even though the defendant was denied the benefit of "'the actual value of any commitments made to him by . . . his own counsel.'"[233]

In another leading pre-*Strickland* decision, *Tafoya v. State*,[234] the Alaska Supreme Court refused to allow withdrawal of a guilty plea in the face of a claim that defense counsel failed to inform the defendant that he was subject to deportation.[235] *Tafoya* is widely cited even though it was decided under the "farce and mockery" standard of competence rejected by the Supreme Court in *Strickland*.[236]

B. *Brady* Voluntariness Cases as the Standard for Effective Assistance

The collateral consequences rule is based in large part on the *Brady* Court's implication that a trial court need advise a defendant only of direct consequences to render a plea voluntary under the Due Process Clause. If a plea is voluntary under *Brady* because the plea court has explained the direct consequences, courts reason that defense counsel's failure to do more cannot render the plea involuntary. For example, Judge Edith Jones wrote for the Fifth Circuit that the collateral consequences rule "squares with the Supreme Court's observation that the accused must be 'fully aware of the *direct* consequences' of a guilty plea."[237] The Seventh Circuit was equally explicit in arguing that the identical voluntariness analysis applied to both court and counsel:

> Since the doctrine provides a test for determining the voluntary and intelligent character of the plea, it is applied both to the trial court—as a measure of its performance in establishing the voluntary and intelligent character of the plea before accepting it—and to defense counsel—as a measure of his performance in providing a defendant with the information necessary to render the plea voluntary and intelligent.[238]

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232 Judge Frank interpreted the majority's reference to "'unprofessional conduct'" as meaning "conduct justifying disbarment." *Id.* at 925 (Frank, J., dissenting).

233 Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc)).

234 500 P.2d 247 (Alaska 1972).

235 *Id.* at 251–52.

236 *Id.* For examples of post-*Strickland* cases that cite to *Tafoya*, see People v. Davidovich, 618 N.W.2d 579, 582 n.8 (Mich. 2000); and Commonwealth v. Frometa, 555 A.2d 92, 94 n.2 (Pa. 1989).

237 Banda v. United States, 1 F.3d 354, 356 (5th Cir. 1993) (emphasis in original) (quoting *Brady*, 397 U.S. at 755).

238 Santos v. Kolb, 880 F.2d 941, 944 (7th Cir. 1989).

In *United States v. Campbell*, the Eleventh Circuit noted that "actual knowledge of the collateral consequences of a guilty plea is not a prerequisite to the entry of a knowing and intelligent plea. Therefore, a defendant's lack of knowledge of those collateral consequences cannot affect the voluntariness of the plea."[239] Other courts have also found effective assistance of counsel because *Brady* voluntariness was achieved.[240]

But just as defense counsel and the court have different duties of loyalty, investigation, and legal research as a result of their distinct roles as advocate and decisionmaker, there is no reason to assume that their obligations of advising the accused of the risks and benefits of pleading guilty should be identical. The judge is charged with ensuring that the plea is knowing, voluntary, and intelligent; counsel's job is to assist with the determination that a plea is a good idea, which encompasses a broader range of considerations. The Court's decisions contemplate independent responsibilities of counsel and court, each of which must be satisfied to render a plea voluntary: A plea is invalid if the trial court fails to conduct a plea colloquy establishing that the plea is knowing, voluntary, and intelligent, or if the plea was involuntary because it was induced by ineffective assistance of counsel.

The Court's *Brady* decision and its progeny make clear that simply because the plea court did its job does not mean that defense counsel did, and vice versa.[241] A guilty plea is valid under the Due Process Clause only if it is knowing, voluntary, and intelligent.[242] To assist the trial court's evaluation of the voluntariness of an attempted guilty plea, and in order to facilitate any review, the Court held in *Boykin v. Alabama* that facts establishing voluntariness had to appear on the record.[243] In *Brady*, the Court accepted the collateral-direct

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239 United States v. Campbell, 778 F.2d 764, 768 (11th Cir. 1985) (citing Edwards v. State, 393 So. 2d 597, 601 (Fla. Dist. Ct. App. 1981) (Hubbart, J., dissenting)).

240 Thus, the Nevada Supreme Court has held that knowledge of "a collateral consequence . . . does not affect the voluntariness of the plea," and therefore "trial counsel's failure to provide such information does not fall below an objective standard of reasonableness." Barajas v. State, 991 P.2d 474, 475–76 (Nev. 1999); *see also, e.g.*, People v. Huante, 571 N.E.2d 736, 740 (Ill. 1991) (inquiring whether counsel's performance fell below an objective standard of reasonableness).

241 *See, e.g., In re* Resendiz, 19 P.3d 1171, 1181 (Cal. 2001) (noting that "*Brady* . . . was *not* an ineffective assistance [of counsel] case").

242 *See* North Carolina v. Alford, 400 U.S. 25, 37 (1970); Boykin v. Alabama, 395 U.S. 238, 243–44 & n.5 (1969).

243 *See Boykin*, 395 U.S. at 243–44.

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought, and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

distinction in the context of what consequences the trial judge was required to explain to ensure voluntariness.[244] The Court concluded that a guilty plea entered to avoid exposure to a capital sentence was not involuntary even though eight years later, in an unrelated case, the Court held that the death penalty could not have been imposed for that offense.[245] The Court cited *Shelton v. United States*[246] for the "standard as to the voluntariness of guilty pleas":[247]

> "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes)."[248]

Courts have construed this language to mean, by negative implication, that some consequences need not be made known to a defendant; these are termed "collateral."[249]

However, it is clear that this portion of *Brady* was concerned with the plea court's obligations, not the complete catalog of the ingredients of a valid plea. *Brady* did not say that simply because the trial court had done its duty the plea was *ipso facto* valid, regardless of independent constitutional violations that may have rendered the plea invalid, such as, for example, the complete denial of counsel. To the contrary, *Brady* assumed that there was effective assistance of counsel, explaining that "an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney."[250] The Court observed that defendant Brady had been "represented by competent counsel throughout."[251]

Professor Albert Alschuler has written that the cases can be understood as shifting the "central issue in guilty-plea litigation from vol-

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Id. (citation and footnotes omitted); *see also* McCarthy v. United States, 394 U.S. 459, 465 (1969) (noting the need "to produce a complete record at the time the plea is entered of the factors relevant to [a] voluntariness determination").

244 *See* Brady v. United States, 397 U.S. 742, 755 (1970).

245 *See id.* at 756–57.

246 246 F.2d 571 (5th Cir. 1957), *rev'd*, 356 U.S. 26 (1958). The Supreme Court vacated the defendant's conviction on "confession of error by the Solicitor General that the plea of guilty may have been improperly obtained." Shelton v. United States, 356 U.S. 26 (1958).

247 *Brady*, 397 U.S. at 755.

248 *Id.* (quoting *Shelton*, 246 F.2d at 572 n.2) (internal citation omitted).

249 *See* United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971) (per curiam) ("We presume that the Supreme Court meant what it said when it used the word '*direct*'; by doing so, it excluded *collateral* consequences.").

250 *Brady*, 397 U.S. at 748 n.6.

251 *Id.* at 743.

untariness to the effective assistance of counsel."[252] Assuming the presence of competent counsel, the *Brady* Court noted:

> A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.[253]

The Court's other decisions regarding guilty pleas also make clear that counsel's duty of adequate representation is independent of the trial court's duty to make sure that the plea is voluntary. The Court in *McMann v. Richardson*[254] rejected the argument that the guilty pleas were invalid, notwithstanding strong arguments that the underlying confessions should have been suppressed, and assumed the existence of competent counsel,[255] noting that in the plea context:

> In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. . . . Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.
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> . . . That this Court might hold a defendant's confession inadmissible in evidence, possibly by a divided vote, hardly justifies a conclusion that the defendant's attorney was incompetent or ineffective when he thought the admissibility of the confession sufficiently probable to advise a plea of guilty.[256]

Similarly, in *Tollett v. Henderson*,[257] the Court suggested that simply because the indictment to which the defendant pled was issued by an unconstitutionally constituted grand jury did not invalidate the conviction; instead, the question was "whether the guilty plea had been made intelligently and voluntarily with the advice of competent

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252 Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975).

253 *Brady*, 397 U.S. at 757; *see also id.* at 758 (stating the Court's expectation that "courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel").

254 397 U.S. 759 (1970).

255 *See id.* at 768–75.

256 *Id.* at 769–70; *see also id.* at 769 (determining that whether a guilty plea "was an intelligent act depends on whether [the defendant] was so incompetently advised by counsel . . . that the Constitution will afford him another chance to plead"); Parker v. North Carolina, 397 U.S. 790, 797–98 (1970) (rejecting a challenge to a guilty plea because the Court "th[ought] the advice [the defendant] received was well within the range of competence required of attorneys representing defendants in criminal cases").

257 411 U.S. 258 (1973).

counsel."[258] The Eighth Circuit in *Hill v. Lockhart* maintained this distinction, noting that the state need not inform a defendant of parole consequences of a guilty plea, but leaving open the possibility that under *Tollett* and *McMann*, counsel's advice about parole might be inadequate.[259] More recent expressions of the idea that "'a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked'"[260] make clear that a plea colloquy by the trial court establishing voluntariness and effective assistance of counsel are independent requirements for a valid plea.[261]

C. Decisions Citing Cases Regarding the Court's Duty of Advisement

In theory, that the duties of the court and counsel are analytically distinct does not foreclose the possibility that their separate roles could impose the same substantive obligations. Many opinions adopting the collateral-direct distinction with respect to the duties of counsel cite cases that explore the duties of courts taking guilty pleas without explaining why these latter duties are applicable.[262] There is good reason to doubt that the duties and conduct of courts and defense lawyers should be regarded as identical in this context.

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258 *Id.* at 265. The Court explained:

> If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not "within the range of competence demanded of attorneys in criminal cases." Counsel's failure to evaluate properly facts giving rise to a constitutional claim, or his failure to properly inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations meet this standard of proof.

Id. at 266–67 (citation omitted).

259 *See* Hill v. Lockhart, 877 F.2d 698, 703 (8th Cir.), *vacated*, 883 F.2d 53 (8th Cir. 1989), *reinstated en banc*, 894 F.2d 1009 (8th Cir. 1990).

260 Bousley v. United States, 523 U.S. 614, 621 (1998) (quoting Mabry v. Johnson, 467 U.S. 504, 508 (1984)); *see also* Kercheval v. United States, 274 U.S. 220, 223 (1927) ("Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.").

261 *See, e.g.*, Santobello v. New York, 404 U.S. 257, 261–62 (1971) (holding that a valid plea requires: "that the accused pleading guilty must be counseled"; if in federal court, that "the sentencing judge must develop, *on the record*, the factual basis for the plea"; and that "[t]he plea must, of course, be voluntary").

262 *See, e.g.*, United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990) (citing United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971) (per curiam)); United States v. Quin, 836 F.2d 654, 655 (1st Cir. 1988) (citing Fruchtman v. Kenton, 531 F.2d 946 (9th Cir. 1976)); State v. Ginebra, 511 So. 2d 960, 961 (Fla. 1987) (citing *Fruchtman*, 531 F.2d at 946; *Sambro*, 454 F.2d at 918 (per curiam)); State v. Miranda, 675 P.2d 422, 425 (N.M. Ct. App. 1983) (citing Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364 (4th Cir. 1973); *Sambro*, 454 F.2d at 918 (per curiam)).

Lord Coke justified the denial of defense counsel at common law on the ground that the court would represent defendants,[263] but presumably most modern trial judges would disclaim this role. Even if they wanted to, as the Court in *Powell v. Alabama* explained, trial judges are not in a position to do it: "[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused?"[264] A trial judge "cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."[265] As Professors LaFave, Israel, and King have explained, given that the judge is an impartial arbiter and defense counsel is an advocate, "it is not apparent, to say the least, why a defense attorney's responsibilities in advising his client on such matters should be deemed to be no more extensive than the judge's."[266]

Another problem arises because the court's warning comes during the plea colloquy itself, after the decision to plead guilty has been made. "If the objective is to give fair warning of consequences to the defendant and if implicit in this is a desire to have the consequences carefully considered, a last-minute warning hardly gives time for mature reflection."[267]

More fundamentally, a common justification for the limited role of the court is that detailed exploration of collateral consequences is defense counsel's job. The Supreme Court confirmed this allocation of duties in *Libretti v. United States*,[268] explaining that a plea was valid even though certain waivers with respect to criminal forfeiture were not made on the record by the trial court accepting a guilty plea:

> Libretti was represented by counsel at all stages of trial and sentencing. Apart from the small class of rights that require specific advice from the court under [Federal Rule of Criminal Procedure] 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo. Libretti has made no claim of ineffectiveness of counsel before this Court. As we noted in *Broce*, "[a] failure by counsel to provide advice may form the basis of a claim of ineffective assistance of counsel, but absent such a claim it cannot serve as the predicate for setting aside a valid plea."[269]

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263 *See* Powell v. Alabama, 287 U.S. 45, 61 (1932).

264 *Id.*

265 *Id.*

266 5 LAFAVE ET AL., *supra* note 50, § 21.3(b), at 119.

267 NEWMAN, *supra* note 2, at 208.

268 516 U.S. 29 (1995).

269 *Id.* at 50–51 (quoting United States v. Broce, 488 U.S. 563, 574 (1989)).

The well-known criminal procedure treatise written by Professors LaFave, Israel, and King likewise explains that it is unnecessary for a judge to inform a defendant about collateral consequences because "defense counsel should be expected to discuss with his client the range of risks attendant his plea."[270] Similarly, in a leading pre-*Strickland* case, the Second Circuit explained that the judge had no obligation to explore collateral consequences because counsel would do so:

> To require that [the judge] anticipate the multifarious peripheral contingencies which may affect the defendant's civil liabilities, his eligibility for a variety of societal benefits, his civil rights or his right to remain in this country, all of which might give rise to later claims that the plea was not voluntary in the absence of an informed consent, has not been required in our jurisprudence, constitutionally or otherwise. Defense counsel is in a much better position to ascertain the personal circumstances of his client so as to determine what indirect consequences the guilty plea may trigger. [Federal Rule of Criminal Procedure] 11, in our view, was not intended to relieve counsel of his responsibilities to his client.[271]

Counsel, and not the court, has the obligation of advising a defendant of her particular position as a consequence of her plea.[272] Notably, none of the decisions or commentators suggest that collateral consequences are not relevant to the defendant's decision to plead guilty, they merely suggest that bringing collateral consequences to the defendant's attention is counsel's job, not the court's. They illustrate not only that cases dealing with the limited scope of the court's duties are inapposite, but also that counsel's job includes consideration of collateral consequences.

D. Cases Questioning the Importance of Counsel in Pleas of Guilty

The most influential post-*Strickland* case, *United States v. Campbell*,[273] has been cited in dozens of opinions in support of the collateral consequences rule.[274] Like the D.C. Circuit in *Edwards*, the

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270 5 LAFAVE ET AL., *supra* note 50, § 21.4(d), at 173; 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 20.4, at 649 (1984).

271 Michel v. United States, 507 F.2d 461, 466 (2d Cir. 1974).

272 *Id.* at 465; *see also In re* Resendiz, 19 P.3d 1171, 1181 (Cal. 2001) ("Defense counsel clearly has far greater duties toward the defendant than has the court taking a plea.").

273 778 F.2d 764 (11th Cir. 1985).

274 *See, e.g.*, United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000); Varela v. Kaiser, 976 F.2d 1357, 1358 (10th Cir. 1992); Ogunbase v. United States, No. 90-1781, 1991 WL 11619 (6th Cir. Feb. 5, 1991); United States v. Del Rosario, 902 F.2d 55, 59 (D.C. Cir. 1990); Santos v. Kolb, 880 F.2d 941, 944 (7th Cir. 1989); United States v. Yearwood, 863 F.2d 6, 7–8 (4th Cir. 1988); Clark v. United States, No. 87-1603, 1988 WL 17114 (9th Cir. Feb. 25, 1988); People v. Ford, 657 N.E.2d 265, 269 (N.Y. 1995); *Ex parte* Morrow, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997) (en banc).

Eleventh Circuit in *Campbell* reasoned that counsel has a diminished role in guilty pleas, and used that conclusion as a basis for upholding the collateral consequences rule:

> "[C]ounsel owes a lesser duty to a client who pleads guilty than to one who decides to go to trial, and in the former case, counsel need only provide his client with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecutor's offer and going to trial."[275]

The *Campbell* court relied primarily on a dissenting opinion from *Edwards v. State*,[276] a Florida case that, in turn, relied on cases using the "farce and mockery" standard[277] and the related idea that retained counsel as an agent of the defendant could not be ineffective.[278] Both of these principles were later rejected by the Supreme Court in *Strickland*.[279] However, *Campbell* purports to be decided under *Strickland*, so its central importance is the implication that defense counsel's role in a guilty plea is less significant than in the context of a trial.

The *Hill v. Lockhart* decision, however, contains no suggestion that counsel's duty is less in the context of a plea.[280] Earlier Supreme Court decisions recognize that a defendant's decision to plead guilty is based on at least some of the same kind of evaluation and investigation that is necessary to go to trial. In *Williams v. Kaiser*,[281] for example, the Court held that the considerations that led the Court in *Powell v. Alabama* to require appointment of counsel for defendants going to trial applied with equal force to defendants pleading guilty.[282] In *Von Moltke v. Gillies*,[283] a plurality of the Court explained:

> Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty

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275 *Campbell*, 778 F.2d at 768 (quoting Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984)) (alteration in original).

276 *Id.* (citing Edwards v. State, 393 So. 2d 597, 601 (Fla. Dist. Ct. App. 1981) (Hubbart, J., dissenting), *disapproved by* State v. Ginebra, 511 So. 2d 960 (Fla. 1987)).

277 *Edwards*, 393 So. 2d at 601 (Hubbart, J., dissenting) (citing United States v. Parrino, 212 F.2d 919 (2d Cir. 1954)). Although *Parrino* is not explicit on this point, the Second Circuit at the time applied the "farce and mockery" test for ineffective assistance of counsel. *See* United States v. Pisciotta, 199 F.2d 603, 607 (2d Cir. 1952) (Swan, J., joined by Learned Hand & Frank, JJ.) (citing United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949)).

278 *See Edwards*, 393 So. 2d at 602 (Hubbart, J., dissenting).

279 *See* Strickland v. Washington, 466 U.S. 668, 685–86 (1984).

280 Hill v. Lockhart, 877 F.2d 698 (8th Cir.), *vacated*, 883 F.2d 53 (8th Cir. 1989), *reinstated en banc*, 894 F.2d 1009 (8th Cir. 1990).

281 323 U.S. 471 (1945).

282 *Id.* at 475–76.

283 332 U.S. 708 (1948).

> or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent.[284]

Professor Newman's book on guilty pleas, part of the mid-1960s American Bar Foundation study, makes a similar point:[285]

> A charge reduction or sentence promise is not ordinarily a result of personal influence of the lawyer with the prosecutor or judge. The strength of a lawyer's argument for a charge reduction depends in good part on how strong a professional case he can make for the appropriateness of the lesser charge and doubtful convictability on the higher count. This requires no less skillful legal ability to evaluate alternatives than is required for other decisions where evidence and convictability are involved. . . . In short, the full-blown negotiated plea is not merely an appeal for mercy; it is an adversary process and the lawyer serves the function of the guilty defendant's advocate.[286]

The idea that counsel's role in the guilty plea process is somehow a reduced one is not supported by doctrinal or policy justifications. To the extent that the collateral consequences rule is informed by this notion, it is unsound.

E. Counsel Not Appointed for Purposes of Collateral Matters

Another argument occasionally made is that the lawyer is representing the defendant in connection with the criminal prosecution, not the collateral issues.[287] In many cases, this argument is not correct, because the collateral consequence at issue is whether a sentence is to be served consecutively or concurrently, or whether a sentence is to be subject to a period of parole ineligibility. In other words, some collateral circumstances involve aspects of the prosecution that are indisputably subject to the right to counsel.

In any event, even though defendants may not be entitled to free advice about employment, immigration, or other civil matters, that is not the nature of their claim. A defendant's claim in such a case con-

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284 *Id.* at 721.

285 NEWMAN, *supra* note 2, at 201.

> The traditional and important pretrial function of a defense lawyer is to assess the convictability of his client and to advise him as to the type of plea he should enter at arraignment. Except for the conclusion as to plea, this service is supposedly much the same whether the case goes to trial or terminates by a guilty plea. On the surface the pretrial problems which counsel confront in guilty plea cases are very little different from those in cases which go to trial.

Id.

286 *Id.* at 216.

287 *See, e.g.*, United States v. George, 869 F.2d 333, 337 (7th Cir. 1989) ("While the Sixth Amendment assures an accused of effective assistance of counsel in '*criminal prosecutions*,' this assurance does not extend to collateral aspects of the prosecution.").

cerns the competent nature of her representation in a criminal case, and trustworthy advice about whether to plead guilty. The Constitution assigns the decision whether to plead to defendants, which necessarily means that they are entitled to make their decision based on considerations that they deem important.[288] 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.

F. The Misadvice Line of Cases

A final category of evidence suggesting that the collateral consequence rule is invalid is the exception for claims based on misadvice rather than nonadvice. Many jurisdictions following the collateral consequences rule hold that affirmative misadvice may be the foundation of an ineffectiveness claim.[289]

These cases are problematic because the Supreme Court has ruled that ineffective assistance of counsel claims cannot be brought with respect to proceedings that are not covered by the right to counsel.[290] Thus, when an attorney makes a mistake in connection with a discretionary appeal or a post-appeal collateral attack, such as a state or federal habeas corpus petition, the Court has held that the ineffective assistance analysis is inapplicable because there is no right to appointed counsel for those proceedings under the Sixth Amendment or other constitutional provisions.[291] If collateral consequences are outside the scope of the lawyer's duties under the Sixth Amendment, it would seem to be irrelevant whether counsel failed to advise the defendant or advised her incorrectly.[292] If an issue is not covered by the Sixth Amendment, it should not matter why an attorney's error occurred or how bad the error was. By treating misadvice as a potential Sixth Amendment violation, courts imply that giving advice about collateral consequences is part of the lawyer's constitutional duty. There also seems to be no reason to distinguish between a situation in

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288 While lawyers are not haberdashers, for example, if clothing is relevant to something that the lawyer is responsible for, such as a jury trial at which jurors might see the defendant in jail clothes, it becomes the lawyer's responsibility to offer advice. *Cf.* Estelle v. Williams, 425 U.S. 501, 512 (1976) (holding that "although the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes," the possibility that the defendant wore such attire as a result of counsel's tactical decision in an effort to gain sympathy led the Court to require a contemporaneous objection before the claim would be considered).

289 *See supra* note 121 and accompanying text.

290 *See* Wainwright v. Torna, 455 U.S. 586, 587–88 (1982) (per curiam).

291 *See id.*

292 *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 752–54 (1991); *Wainwright*, 455 U.S. at 587–88 ("Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application [for discretionary appellate review] timely.").

which an attorney affirmatively misstates the law, and one in which he fails to make a statement when a reasonable attorney would have done so.

The misadvice/nonadvice distinction may be justified by some courts by a practical consideration: It may be easier to prove that misadvice, rather than nonadvice, caused a particular result because the fact that a lawyer addressed a particular issue with his client helps demonstrate that the issue was important to the defendant at the time of the plea as opposed to being conveniently advanced if a defendant develops "buyer's remorse" about a plea. But even if true, in effective assistance of counsel terms, this point goes to the prejudice prong (whether it caused the result to be what it was) rather than to the performance prong (whether the attorney's conduct was within professional limits).

III
THE "FLOODGATES" OBJECTION

Without considering collateral consequences, lawyers cannot effectively advise their clients about the risks and benefits of pleading guilty, and cannot effectively negotiate the terms of guilty pleas. There are no persuasive doctrinal justifications for excluding this critical aspect of competent representation from *Strickland* scrutiny. Yet, in the context of a system that recognizes the right to effective assistance of counsel at the plea stage, the courts have refused to recognize, even in principle, that counsel should meet a standard of competence with respect to a tremendously important decision.

The real problem may not be that courts believe counsel is unimportant, but rather that counsel is too important. Because a decision to plead guilty or go to trial takes place in the course of each and every conviction, applying the *Strickland-Hill* competence standard would affect every criminal case. Courts are justifiably reluctant to consider implementing a change that could render uncertain large numbers of convictions. As the Supreme Court explained in *United States v. Timmreck*,[293] "'[t]he impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas.'"[294] The Illinois Supreme Court's explanation for its refusal to require trial courts to explore collateral consequences reflects its concern that a contrary rule would impose duties that are not only broad, but possibly unsatisfiable:

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293 441 U.S. 780 (1979).

294 *Id.* at 784 (quoting United States v. Smith, 440 F.2d 521, 528–29 (7th Cir. 1971) (Stevens, J., dissenting)).

> Future or contemplated, but uncertain, consequences are irrelevant to the validity of the guilty plea. "Manifestly, a criminal court is in no position to advise on all the ramifications of a guilty plea personal to a defendant." Because the consequences of committing an offense "are so numerous and logically unforeseeable, to require more would be an absurdity and would impose upon the trial court an impossible, unwarranted and unnecessary burden." . . . . "We will not require our trial courts to consult astrologers or invoke psychic powers to comply with [. . . disclosure responsibilities in accepting guilty pleas]."[295]

Although this rationale is persuasive in the context of the duties of trial courts, it is much less so with respect to the duties of defense lawyers. This is true because the primary job of lawyers is to look out for the interests of their clients, and because there is little likelihood that recognizing lawyers' duties would result in "a mass exodus from the federal penitentiaries."[296]

The prejudice prong of ineffective assistance analysis would simplify resolution of many claims. Many collateral consequences are so unimportant that it will be clear they do not cause prejudice.[297] More fundamentally, the greater the direct consequences, the less likely it is that collateral consequences would make a difference. It is difficult for an individual who has pled guilty to a serious felony to claim that she would not have accepted a long prison sentence except on the assumption that the collateral consequences would have been different.[298] It will be a rare case when someone who pled guilty to homicide, rape, robbery, or kidnapping will have a plausible claim of ineffective assistance of counsel on this ground.

The competence prong of the *Strickland* test will also smoke out meritless claims. Most guilty pleas would be unaffected because lawyers often do discuss collateral consequences with their clients or there are no significant collateral consequences.[299] In addition, well-

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295 People v. Williams, 721 N.E.2d 539, 544 (Ill. 1999) (alteration in original) (citations omitted); *see also In re* Resendiz, 19 P.3d 1171, 1191 (Cal. 2001) (Brown, J., concurring and dissenting) (claiming that majority opinion may "cast a cloud on the validity of hundreds—perhaps thousands—of guilty pleas").

296 United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963); *see also* Budeiri, *supra* note 33, at 191–94 (examining this and other arguments against requiring lawyers to warn defendants about collateral consequences).

297 *Cf.* United States v. Raineri, 42 F.3d 36, 42 (1st Cir. 1994) (holding that an error in explaining direct consequences could not have influenced decision to plead guilty); People v. Goodrum, 279 Cal. Rptr. 120, 123 (Ct. App. 1991) (holding that withdrawal of a plea made after erroneous advice will be allowed only if it was significant enough to "cause a reasonable person not to enter the plea").

298 For example, the Delaware Supreme Court had little difficulty finding that a person subject to a fifteen-year imprisonment was not prejudiced by his ignorance of a two-year driver's license suspension. *See* Blackwell v. State, 736 A.2d 971, 973 (Del. 1999).

299 Moreover, there is no Sixth Amendment right to appointed counsel to pursue claims in collateral proceedings, such as ineffective assistance of counsel. *See* Murray v.

established Sixth Amendment doctrines would likely limit the effect of changing the rule. For example, counsel's duties of "investigation" and "legal research," like a duty to understand collateral consequences, are potentially boundless because there is always more investigation or research that could be done. However, the "reasonableness" limitation on the scope of counsel's obligations has made these duties quite manageable. There is no reason to think that this aspect of counsel's duty to understand the law would be any different.[300]

Indeed, a defense lawyer could consider a very limited number of issues that will cover the vast majority of collateral consequences. The client could be asked three questions:

Are you an alien or a United States Citizen?
Do you have any prior convictions or pending charges?
Do you have any government licenses, permits, employment, or benefits?

The lawyer would also want to know two other things: What are the collateral consequences applicable to felonies in the jurisdiction? And, if the case involves a drug- or sex-related offense, what are the special collateral consequences applicable to them? The answers to these questions would arm the lawyer with information necessary to understand and explore virtually all of the collateral consequences that the client will face.

This manageable amount of basic spadework would enable a lawyer to advise and assist his client, and ensure the stability of a resulting conviction. Under general principles of Sixth Amendment law, courts would reject ineffectiveness claims when a reasonable lawyer would not have known of the potential collateral consequence, because the consequence was so obscure that reasonable lawyers would not have discovered it, because the facts upon which the collateral consequence rested were not known to counsel in spite of reasonable diligence, or because the possibility of the collateral consequence materializing was so remote, or the consequence so trivial, that it was unnecessary to consider it. Counsel are also not deemed ineffective for failing to predict changes in the law, or changes in the factual situation. If a lawyer's advice was reasonable given the situation at the

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Giarratano, 492 U.S. 1, 12–13 (1989); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). *But see* Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393 (1999) (arguing that capital defendants should be afforded appointed counsel for pursuing state collateral relief). Thus, clients would have to decide to spend money to pursue these claims, or lawyers would have to be persuaded to take them for free. This would help ensure that only meritorious cases were pursued.

300 *Cf.* Nagi v. United States, 90 F.3d 130, 135 (6th Cir. 1996) (declining to find ineffectiveness where counsel's decision and conduct were reasonable).

time, a court will not deem it ineffective even if, in retrospect, it turned out to be regrettable.[301]

Lawyers are also not faulted for discretionary judgment calls, even if they do not work out. A lawyer's reasoned decision about a tactical choice which goes awry, or a lawyer's reasonable prediction about anything, including a collateral consequence, which does not materialize, does not constitute ineffective assistance.[302]

Another limiting factor is information provided by the client. As the Court said in *Strickland*:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.[303]

Thus, lawyers are not accountable for information that was concealed from them by their client or that they failed to discover in good faith. Therefore, if a client does not disclose that she is an alien, a lawyer does nothing wrong by omitting to take that into account when negotiating a plea.

In sum, it would be an unusual case that would satisfy these stringent requirements. The kind of case that might be compelling in the face of these limitations deserves to succeed. The most promising case is one in which the collateral consequence is well-known and accounted for by most competent practitioners, and therefore the failure of counsel to address it is a blunder. Furthermore, to raise a plausible claim of prejudice, the direct consequences accepted in the guilty plea must be sufficiently low compared to the collateral conse-

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301 *Cf.* Lema v. United States, 987 F.2d 48, 51 (1st Cir. 1993) (evaluating competence from contemporaneous lawyer's perspective).

302 *See, e.g.*, Braun v. Ward, 190 F.3d 1181, 1189 (10th Cir. 1999) (holding that the decision to be sentenced by judge rather than jury in capital case was not ineffective because the defendant "'relied on his attorney's knowledge of the law, and . . . instincts,' rather than any misleading guarantees, in entering his plea" (quoting Braun v. State, 909 P.2d 783, 795 (Okla. Crim. App. 1995))), *cert. denied*, 529 U.S. 1114 (2000).

303 Strickland v. Washington, 466 U.S. 668, 691 (1984).

quences so that knowledge of the collateral consequences might have made a difference.

These characteristics may explain why even some courts that accept the collateral consequences rule have nevertheless found counsel ineffective for failing to request a Judicial Recommendation Against Deportation for an alien client at sentencing.[304] All competent lawyers should have been aware of such recommendations as they were part of a federal statute that applied to most state and federal sentencing hearings. Requesting such a recommendation required no risks, concessions, or tradeoffs on other issues, and could be sought after either a plea or trial. Therefore, absent a bargained-for agreement to leave the country or some other unusual circumstance, counsel's failure to request a Judicial Recommendation Against Deportation would typically be unexplainable on any ground other than error.

In criminal cases with minimal direct consequences, the possibility of innocent defendants pleading guilty also warrants a requirement that lawyers take reasonable steps to ensure that their clients understand collateral consequences. In this context, another rule about collateral effects, the collateral estoppel doctrine, is instructive. Many courts refuse to give collateral estoppel effect to relatively minor convictions such as traffic offenses or misdemeanors because of the limited incentive even innocent defendants have to contest them.[305] Thus, the Maine Supreme Judicial Court has refused to give collateral estoppel effect to a misdemeanor assault conviction, in part because the defendant "may . . . have lacked the incentive to fully and vigor-

304 *See supra* note 120 and accompanying text.

305 *See* Uphoff, *supra* note 193, at 81–82. Scholars have argued that innocent people sometimes plead guilty to avoid the death penalty, *see* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2097 & n.165 (2000), but presumably this is not the result of a failure to understand the collateral consequences of the prosecution. For other explorations of the coercive effect of plea negotiations on the innocent and guilty, see Alschuler, *supra* note 252, at 1278–1306; Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 59–65 (1968) (suggesting that prosecutors offer the best bargains in weak cases, including ones in which defendant may be innocent); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1978) (arguing that through the plea bargaining process "[w]e coerce the accused against whom we find probable cause to confess his guilt"); and john a. powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 568 n.31 (1991) ("The high volume of arrests contributes to the criminal justice system's systematic coercion of innocent defendants to plead guilty by threatening extremely heavy drug offense sentences should they be convicted at trial. Without pushing for pleas in a majority of cases, the system would grind to a halt."); Samuel H. Pillsbury, *Even the Innocent Can Be Coerced into Pleading Guilty*, L.A. TIMES, Nov. 28, 1999, at M5 (suggesting that "the state can make even the innocent plead guilty" by making "offers that defendants cannot refuse"); see also Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1949–68 (1992) (discussing plea bargaining and "the innocence problem"); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1981–87 (1992); and Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011 (1992).

ously litigate because of the likelihood of only a small fine being imposed."[306] The New York Court of Appeals has refused to give collateral estoppel effect to a harassment conviction because "[t]he brisk, often informal, way in which these matters must be tried, as well as the relative insignificance of the outcome, afford the party neither opportunity nor incentive to litigate thoroughly or as thoroughly as he might if more were at stake."[307]

Finally, encouraging counsel to consider collateral consequences would help make sentences more consistent and fair.[308] There is no reason for similarly situated defendants to receive grossly different penalties simply because of the abilities of their lawyers. Of course, because lawyers are human, some variation is inevitable. However, it would further the principle of treating like defendants alike if all defendants accused of committing crimes that carry collateral consequences, not just those with able counsel, had the opportunity to consider those consequences when making a plea decision. Similarly, defense counsel should always inform prosecutors considering criminal charges and sentencing judges of relevant collateral consequences, so that they can employ this factor in their decisionmaking.

CONCLUSION

The Supreme Court has stated that ineffective assistance of counsel claims are not the proper vehicle for maintaining the standards of the legal profession.[309] However, it may be inevitable that the norms of representation expressed in the Court's decisions inform the actions of lawyers. Indeed, at least one court has used the collateral consequences rule in a legal malpractice case,[310] suggesting not only that a lawyer ignoring collateral consequences did not violate his client's Sixth Amendment rights, but also that failing to apprise his clients of these consequences was consistent with the exercise of due care by an attorney. Courts are reluctant to expand the rights of those

306 Pattershall v. Jenness, 485 A.2d 980, 984 (Me. 1984).

307 Gilberg v. Barbieri, 423 N.E.2d 807, 810 (N.Y. 1981); *see also, e.g.*, O'Neal v. Joy Dependent Sch. Dist., No. 1, 820 P.2d 1334, 1336 (Okla. 1991) (holding that a "prior conviction for a minor offense may not be admitted into evidence in a subsequent civil action arising from the same facts"). *But cf.* Aetna Cas. & Sur. Co. v. Jones, 596 A.2d 414, 426 (Conn. 1991) (finding that conviction of murder after trial warranted collateral estoppel).

308 *See* NEWMAN, *supra* note 2, at 213 ("In practice the attorney who bargains for a charge reduction for his client commonly rests his argument on precedent, on the pattern of charge reduction which has developed in the jurisdiction . . . not inappropriate leniency.").

309 Strickland v. Washington, 466 U.S. 668, 689 (1984) ("[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . .").

310 Rogers v. Williams, 616 A.2d 1031, 1034–35 (Pa. Super. Ct. 1992).

who have pleaded guilty to crimes. However, this issue also affects the representation, and hence quality of decisionmaking, of future clients who have not yet faced the decision to plead guilty or go to trial. Few would object in principle to these future defendants receiving reasonably competent advice about considerations that they deem important. Accordingly, the collateral consequences rule should be abandoned to improve the quality of dispositions in this important group of cases.