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## Repository Citation

Hanh H. Le, *The "Padilla Advisory" and its Implications Beyond the Immigration Context*, 20 Wm. & Mary Bill Rts. J. 589 (2011), <https://scholarship.law.wm.edu/wmborj/vol20/iss2/6>

## THE “PADILLA ADVISORY” AND ITS IMPLICATIONS BEYOND THE IMMIGRATION CONTEXT

Hanh H. Le\*

### INTRODUCTION

Imagine Frank Jones, a fifty-year-old disabled man. Frank recently lost his part-time job at the grocery store. Without this additional income, Frank’s social security income and limited savings are not sufficient to cover his monthly bills for food, rent, and medical expenses. Struggling with his living expenses, Frank decides to apply for federal public housing. To his dismay, Frank soon learns he is ineligible for housing benefits. Thirty years ago, as a foolish nineteen-year-old, Frank made some mistakes and ultimately pled guilty to possession of a controlled substance. Since this incident three decades ago, Frank has had no further brushes with the law. And yet, because of his criminal record, he is now ineligible for safe and affordable public housing. With no family or close friends, Frank has nowhere else to turn and may become homeless.

Frank’s dire situation illustrates the problem of “invisible punishments”<sup>1</sup>—the various collateral consequences that attach to criminal convictions.<sup>2</sup> Even though such sanctions can impose much harsher and more longstanding penalties that often outlast formal criminal sentences, they are often known as “secret sentences.”<sup>3</sup> This is because, under current law, neither attorneys,<sup>4</sup> nor the court, and certainly not the prosecutor, are required to advise criminal defendants of collateral sanctions. In fact, not a single actor in the criminal justice system is burdened with this duty. Thus, criminal defendants across the country routinely waive their constitutional rights to trial and enter guilty pleas without realizing all the consequences of their criminal convictions. Fortunately, *Padilla v. Kentucky*<sup>5</sup> may soon change this legal landscape.

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<sup>1</sup> Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT* 15 (Marc Maever & Neda Chesney-Lind eds., 2003); see discussion *infra* Part I.C.3.

<sup>2</sup> See *infra* notes 19–28 and accompanying text.

<sup>3</sup> Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 *CORNELL L. REV.* 697, 700 (2002); see discussion *infra* Part I.C.3.

<sup>4</sup> See discussion *infra* Part I.C.2.

<sup>5</sup> 130 S. Ct. 1473 (2010).

With its 7–2 decision in *Padilla v. Kentucky*, rendered on March 31, 2010, the Supreme Court greatly expanded criminal defendants’ Sixth Amendment rights to effective counsel. In holding that Jose Padilla’s constitutional rights were violated when he was not advised about the deportation-related consequences of his guilty plea, the Court imposed a new duty on defense attorneys, requiring them to warn noncitizen defendants about the deportation consequences of their convictions, even though deportation is a collateral consequence outside of court-imposed punishments.<sup>6</sup> Justice Alito noted that the majority decision would mark “a major upheaval in Sixth Amendment law,”<sup>7</sup> while some scholars have referred to *Padilla* as one of “a handful of Supreme Court decisions in the past [fifty] years that can be said to have transformed the operation of the criminal justice system.”<sup>8</sup> Perhaps this is because the logic of *Padilla* cannot, and should not, be limited to the immigration context. At the core of the *Padilla* decision is the Court’s acknowledgment that “deportation is an integral part” of punishment for noncitizen defendants.<sup>9</sup> However, there are other collateral consequences that are equally important for citizen defendants, and the logic of *Padilla* thus extends beyond the immigration context.

This Note argues that the “*Padilla* advisory”<sup>10</sup> requirement—which imposes on defense attorneys a duty to advise clients about collateral consequences of criminal convictions—should be extended to collateral sanctions that are (1) “integral parts” of punishment; (2) objectively and reasonably important to a group of uniquely positioned defendants; and (3) rooted in clear and unambiguous federal law. Together, these prongs serve a number of important functions. They ensure that the rationale for this proposed expansion is in line with the Court’s reasoning in *Padilla v. Kentucky*. The prongs are also designed to screen out facially frivolous claims and limit additional burdens the *Padilla* advisory might otherwise impose on defense attorneys. Applying the proposed standard to a case study, this Note also advocates for an extension of the *Padilla* advisory to the loss of eligibility for housing benefits, cash assistance, and food stamps as a collateral consequence of criminal conviction.

Part I provides an overview of collateral consequences, their scope, and their effects on the lives of convicted persons. As Part I also explores, the collateral consequence rule, which has been adopted in most jurisdictions, does not require

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<sup>6</sup> *Id.* at 1480–81.

<sup>7</sup> *Id.* at 1491 (Alito, J., concurring).

<sup>8</sup> Gabriel J. Chin & Margaret Colgate Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, CRIM. JUST., Fall 2010, at 21; see also McGregor Smyth, *From “Collateral” to “Integral”: The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 801 (2011) (referring to *Padilla* as “the seismic evolution”).

<sup>9</sup> *Padilla*, 130 S. Ct. at 1480.

<sup>10</sup> Margaret Love & Gabriel J. Chin, *The “Major Upheaval” of Padilla v. Kentucky, Extending the Right to Counsel to the Collateral Consequences of Conviction*, CRIM. JUST., Summer 2010, at 37 (noting that “the ‘*Padilla* advisory’ may become as familiar a fixture of a criminal case as the *Miranda* warning”).

attorneys to advise criminal defendants about potential collateral sanctions attached to criminal convictions. As such, defendants challenging their guilty pleas on the grounds of ineffective assistance of counsel usually face uphill—and often losing—battles in litigating their claims. Part II provides a factual background about *Padilla v. Kentucky*, explains the Court’s rationale in reaching its decision, and ultimately argues for a limited extension of the “*Padilla* advisory.” Part III develops a three-prong test that attempts to distinguish collateral consequences that would warrant a *Padilla* advisory from those that would not. Part IV applies this proposed standard to the loss of eligibility for federal housing benefits, cash assistance, and food stamps, and argues that the *Padilla* advisory should be extended to include these collateral consequences. Finally, Part V discusses some practical considerations and concludes that a limited extension of the “*Padilla* advisory” is an important and much-needed step toward transparency in the collateral consequences context.

### I. OVERVIEW OF COLLATERAL CONSEQUENCES

Criminal convictions carry two types of consequences: direct and collateral. Direct consequences, considered part of the conviction, are “explicit punishment[s] handed down by the court.”<sup>11</sup> Examples of “[d]irect consequences include . . . duration of . . . prison sentence, . . . the defendant’s parole eligibility or imposition of fines,” to name a few.<sup>12</sup> Collateral consequences, considered “legally separate from [a] criminal sentence,”<sup>13</sup> encompass a variety of civil sanctions (often known as “civil disabilities”).<sup>14</sup> Some collateral sanctions are imposed at the discretion of agencies acting independently of the criminal justice system (such as civil courts or administrative agencies),<sup>15</sup> while others “attach automatically upon [a] conviction by operation of law.”<sup>16</sup> Together, these “civil sanctions . . . limit the convicted individuals’ social, economic, and political access,”<sup>17</sup> “chip[ping] away at critical ingredients of [their] support systems” and severely damaging their social safety net.<sup>18</sup>

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<sup>11</sup> Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634 (2006).

<sup>12</sup> *Id.* (citations omitted).

<sup>13</sup> Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1074 (2004).

<sup>14</sup> *Id.*

<sup>15</sup> CRIMINAL JUSTICE SECTION, CRIMINAL JUSTICE STANDARDS COMMITTEE, AMERICAN BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-1.1(b) (2004) [hereinafter ABA STANDARDS] (discussing consequences imposed by a civil court or administrative agency).

<sup>16</sup> Pinard, *supra* note 11, at 635.

<sup>17</sup> *Id.* at 634–35.

<sup>18</sup> Travis, *supra* note 1, at 18.

*A. Scope*

Collateral consequences can impact almost every aspect of convicted felons' lives.<sup>19</sup> Some collateral sanctions have an immediate impact and directly impair felons' abilities to rebuild their lives. For example, convicted felons may become temporarily or permanently ineligible for public housing,<sup>20</sup> welfare assistance,<sup>21</sup> and healthcare benefits.<sup>22</sup> Other collateral sanctions limit the scope of convicted felons' future opportunities. Persons with criminal records are ineligible for various forms of employment, particularly those "that require professional licenses."<sup>23</sup> They may also lose eligibility for federal student loans<sup>24</sup> and never obtain higher education as a result. Other kinds of collateral consequences leave an even more permanent mark and act as exclusion mechanisms, preventing convicted felons from full participation as members of our society long after their sentences are served and their debts to society are repaid. These collateral consequences can include disqualification from service on a federal jury,<sup>25</sup> disqualification from enlistment in the armed forces,<sup>26</sup> or

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<sup>19</sup> For an overview of collateral consequences imposed by federal law, see OFFICE OF THE PARDON ATT'Y, U.S. DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION [hereinafter FEDERAL STATUTES], available at [http://www.justice.gov/pardon/collateral\\_consequences.pdf](http://www.justice.gov/pardon/collateral_consequences.pdf).

<sup>20</sup> See, e.g., 42 U.S.C. § 1437f(d)(1)(B)(iii) (2006) (providing that "any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, . . . [or] by persons residing in the immediate vicinity of the premises, or any drug-related criminal activity on or near such premises . . . shall be cause for termination of tenancy"); 42 U.S.C. § 1437n(f) (2006) (denying eligibility to persons convicted of illegally manufacturing or producing methamphetamine on the premises of federally assisted housing); 42 U.S.C. § 13663(a) (2006) (denying eligibility to persons "subject to a lifetime registration requirement under a State sex offender registration program").

<sup>21</sup> 21 U.S.C. § 862a(a) (2006) (denying food stamps and cash assistance to anyone convicted of a felony for conduct that involves "the possession, use, or distribution of a controlled substance").

<sup>22</sup> 42 U.S.C. § 1320a-7(a) (2006) (denying participation in Medicare and state health care programs to persons with convictions of program-related crimes, or convictions related to patient abuse, health care fraud, or controlled substances).

<sup>23</sup> See Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 156 (1999) (noting that convicted felons can be ineligible for professional licenses "rang[ing] from lawyer to bartender, from nurse to barber, from plumber to beautician"); see also Clyde Haberman, *Ex-Inmate Denied Chair (and Clippers)*, N.Y. TIMES, Feb. 25, 2003, at B1 (describing the struggle of a returning offender, who was denied a barber's license because of his criminal history).

<sup>24</sup> See 20 U.S.C. § 1091(r) (2006) (persons convicted of drug-related offenses, committed while enrolled at higher education institutions, are ineligible for any grant, loan, or work assistance, including Pell grants and benefits under the federal work-study program; the ineligibility can be temporary or indefinite).

<sup>25</sup> 28 U.S.C. § 1865(b)(5) (2006). This applies to persons who have a charge pending, or have been convicted of a crime punishable by imprisonment of more than one year. See *id.*

<sup>26</sup> 10 U.S.C. § 504 (2006). The Secretary of Defense may, however, grant an exception in meritorious cases. *Id.*

loss of the right to vote.<sup>27</sup> Perhaps the most visible form of social exclusion is the potential deportation of noncitizens, including lawful permanent residents, after a criminal conviction.<sup>28</sup>

As the above examples illustrate, collateral sanctions affect almost every aspect of convicted persons’ lives, and their impact should not be underestimated.<sup>29</sup> Collateral consequences impose significant hurdles on prisoners’ paths to reintegration and prevent them from enjoying the full benefits of citizenship.<sup>30</sup> In many cases, collateral consequences can outlast direct sentences and end up imposing “harsher and more longstanding penalties than . . . formal criminal sentence[s].”<sup>31</sup>

### *B. Invisibility*

Perhaps the most troubling aspect of collateral consequences is their invisibility. Not surprisingly, Jeremy Travis calls collateral consequences “invisible punishment[s].”<sup>32</sup> The invisibility of collateral sanctions has multiple dimensions. First, collateral sanctions are punishments, imposed in addition to formal criminal sentences, “accomplished through the diminution of the rights and privileges of citizenship and legal residency in the United States.”<sup>33</sup> Second, “these punishments

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<sup>27</sup> THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (Mar. 2011), *available at* [http://sentencingproject.org/doc/publications/fd\\_bs\\_fdlawsinusMar11.pdf](http://sentencingproject.org/doc/publications/fd_bs_fdlawsinusMar11.pdf). Voting restrictions are imposed by means of state law. *See id.* (noting that “[forty-eight] states and the District of Columbia prohibit inmates from voting while incarcerated for a felony offense[,] . . . [thirty-five] states prohibit persons on parole from voting,” and “four states deny the right to vote to all persons with felony convictions”). Although states have developed processes of restoring voting rights to convicted felons, restoration processes are rather cumbersome and few convicted felons take advantage of them. *See id.* (discussing policies in each state).

<sup>28</sup> *See* 8 U.S.C. § 1227(a)(1)–(2) (2006) (listing grounds on which an alien may be removed from the United States, such as conviction of a crime involving moral turpitude, an aggravated felony, and other offenses related to controlled substances, trafficking, firearms, national security, and domestic violence). The Supreme Court acknowledged that deportation was an “integral part . . . of the penalty” imposed on noncitizen criminal defendants in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010); *see also* discussion *infra* Parts II.A–B.

<sup>29</sup> Many collateral sanctions were introduced during the “tough on crime” and “war on drugs” movements in the 1980s and 1990s, when Congress dramatically expanded the scope of these sanctions. For further discussions on this point, see Travis, *supra* note 1, at 22–25.

<sup>30</sup> Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 273 (2004) (noting that collateral consequences are effectively “social exclusions . . . [that] relegate ex-offenders to the margins of legitimate society, stigmatizing them and further highlighting their separation from law-abiding members of society”).

<sup>31</sup> Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 590 (2006).

<sup>32</sup> Travis, *supra* note 1, at 15.

<sup>33</sup> *Id.* at 15–16 (noting that it is difficult to “adequately measure the reach of these expressions of the social inclination to punish,” as these laws “operate largely beyond public view”).

. . . take effect outside of the traditional sentencing framework” and thus, are not “incorporate[d] . . . into the debates over sentencing polic[ies] . . . .”<sup>34</sup> Third, and perhaps most importantly, there is no comprehensive collection of all collateral sanctions. Instead, collateral consequences are scattered throughout federal and state statutes and local regulations.<sup>35</sup> Without a comprehensive summary of all collateral sanctions, it is difficult to quantify the effect of these consequences or analyze their scope.<sup>36</sup> Further, without a summary, any attempts by defense attorneys to advise their clients of potential collateral consequences are almost futile.<sup>37</sup> In fact, most participants in the criminal justice system, including judges, defense lawyers, and prosecutors, do not fully appreciate “the existence and scope of collateral consequences,”<sup>38</sup> and as a result, defendants are not informed about collateral consequences when they enter guilty pleas.<sup>39</sup> Moreover, defendants who want to challenge their guilty pleas post-conviction face an uphill battle in attempting to satisfy the elements of a successful Sixth Amendment ineffective counsel claim.<sup>40</sup>

### C. Legal Treatment

#### 1. Ineffective Assistance of Counsel Claims

The Supreme Court has interpreted criminal defendants’ Sixth Amendment right to assistance of counsel<sup>41</sup> as the right to *effective* assistance of counsel.<sup>42</sup> In *Strickland v. Washington*,<sup>43</sup> the Court developed a two-prong test for evaluating claims of ineffective assistance of counsel.<sup>44</sup> The first prong—also known as the “performance” or “constitutional deficiency” prong—assesses whether an attorney’s representation was below an objective standard of “reasonableness under prevailing professional

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<sup>34</sup> *Id.* at 16.

<sup>35</sup> Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 489–90 (2010).

<sup>36</sup> *Id.*

<sup>37</sup> Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002) (noting that “a central problem with collateral consequences is the unstructured and ad hoc manner in which they are identified and imposed”).

<sup>38</sup> Pinard, *supra* note 13, at 1080.

<sup>39</sup> Defendants’ unawareness of collateral consequences is also due to the collateral consequence rule, which deems advice regarding collateral matters outside the scope of an attorney’s duty. *See* discussion *infra* Part I.C.2.

<sup>40</sup> *See* discussion *infra* Parts I.C.1–2.

<sup>41</sup> *See* U.S. CONST. amend. VI (providing that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence”).

<sup>42</sup> *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (noting that “the right to counsel is the right to the *effective* assistance of counsel” (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added))).

<sup>43</sup> 466 U.S. 668 (1984).

<sup>44</sup> *Id.* at 687.

norms.”<sup>45</sup> The second prong—also known as the prejudice prong—requires a showing that an attorney’s deficient performance prejudiced the defendant’s defense and that “there is a reasonable probability that, but for counsel’s unprofessional errors, *the result of the proceeding* would have been different.”<sup>46</sup>

The right to effective assistance of counsel extends to all stages of prosecution, including the plea-bargaining stage.<sup>47</sup> *Hill v. Lockhart* was the first Supreme Court case that applied the *Strickland* two-prong test in the guilty plea context.<sup>48</sup> Defendants who believed they would not have pled guilty had they been aware of a particular collateral consequence were allowed to challenge the voluntary and intelligent character of their guilty pleas if they could satisfy both prongs of the *Strickland* test.<sup>49</sup> To bring a successful claim, defendants must show that the advice they received was not “within the range of competence demanded of attorneys in criminal cases” (the performance prong),<sup>50</sup> and that “there is a reasonable probability that, but for counsel’s errors, [they] *would not have pleaded guilty and would have insisted on going to trial*” (the prejudice prong).<sup>51</sup> Prior to *Padilla*, it was almost impossible for criminal defendants to satisfy the performance prong—i.e., show that their counsel’s failure to advise them about collateral sanctions was below the objective standard of competence demanded of defense attorneys. This is because of the so-called collateral consequence rule discussed below.

## 2. The Collateral Consequence Rule

The collateral consequence rule is based largely on the Supreme Court’s rationale in *Brady v. United States*,<sup>52</sup> in which it held that due process only required trial courts to explain direct consequences to defendants prior to accepting guilty pleas.<sup>53</sup> Thus, pleas were considered voluntary as long as defendants were “fully aware of the direct consequences.”<sup>54</sup> Over the years, lower courts have relied on this rationale, reasoning that if a plea was voluntary when trial courts explained direct consequences, “defense counsel’s failure to do more cannot render the plea involuntary.”<sup>55</sup> As scholars have noted, “the extension of [the *Brady* rationale] to defense counsel’s duties under the

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<sup>45</sup> *Id.* at 688. The reasonableness standard is typically evaluated by looking at the “practice and expectations of the legal community . . . .” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010).

<sup>46</sup> *Strickland*, 466 U.S. at 694 (emphasis added).

<sup>47</sup> *See McMann*, 397 U.S. at 769 (holding that before deciding whether to plead guilty, a defendant is entitled to effective assistance of competent counsel).

<sup>48</sup> 474 U.S. 52, 57 (1985).

<sup>49</sup> *Id.* at 56.

<sup>50</sup> *Id.* (quoting *McMann*, 397 U.S. at 771); *see also Tollett v. Henderson*, 411 U.S. 258, 266–67 (1973).

<sup>51</sup> *Hill*, 474 U.S. at 59 (emphasis added).

<sup>52</sup> 397 U.S. 742 (1970); *see Chin & Holmes, supra* note 3, at 726.

<sup>53</sup> *See Chin & Holmes, supra* note 3, at 726.

<sup>54</sup> *Brady*, 397 U.S. at 755 (internal quotation marks and citation omitted).

<sup>55</sup> *Chin & Holmes, supra* note 3, at 726–27 (quoting cases from the Fifth, Seventh, and Eleventh Circuits embracing this rationale).



Sixth Amendment, although never passed upon by the Supreme Court, is nevertheless among the most widely recognized rules of American law.”<sup>56</sup>

Today, the collateral consequence rule—holding that warnings about collateral sanctions are beyond the scope of defense attorneys’ duties—is accepted in most jurisdictions.<sup>57</sup> Accordingly, lower courts use the distinction between direct and collateral consequences in evaluating ineffective assistance of counsel claims in the plea context.<sup>58</sup> This seemingly straightforward application of the bright-line rule has been explained in a number of ways. Some courts find the civil/criminal distinction dispositive and note that collateral consequences are merely civil penalties.<sup>59</sup> Others focus on the agency that imposes the punishment, explaining that collateral consequences are beyond the control of the sentencing courts, as they are imposed by agencies independent of the criminal justice system.<sup>60</sup>

The collateral consequence rule became the main obstacle for defendants who believed they were prejudiced during the plea-bargaining process and would not have pled guilty had they known of a particular collateral consequence. As a result of this rule, defendants simply could not raise a successful ineffective assistance of counsel claim during their post-conviction challenge.

### 3. Why Awareness of Collateral Consequences Matters

Scholars have long criticized the collateral consequence rule. After all, collateral sanctions are “invisible punishment[s]”<sup>61</sup> that impose “harsher and more longstanding

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<sup>56</sup> *Id.* at 706.

<sup>57</sup> *Id.* at 699. “Eleven federal circuits, more than thirty states, and the District of Columbia” have adopted the collateral consequence rule. *Id.*

<sup>58</sup> *See, e.g.*, *Slater v. State*, 880 So. 2d 802, 803–04 (Fla. Dist. Ct. App. 2004) (rejecting defendant’s claim that his plea of no contest should have been set aside because neither the court nor his attorney advised him that his parental rights would be terminated as a result of a plea); *State v. Wilkinson*, No. 20365, 2005 WL 182920, at \*2 (Ohio Ct. App. Jan. 28, 2005) (denying defendant’s motion to withdraw his guilty plea because neither the trial court nor his attorney informed him the plea could “jeopardize his nursing license”).

<sup>59</sup> *See, e.g.*, *People v. Boespflug*, 107 P.3d 1118, 1121 (Colo. Ct. App. 2004) (holding that “the loss of the right to vote while imprisoned is not a punishment” but merely a “deprivation[ ] of liberty” during incarceration, and “no advisement is required”); *Commonwealth v. Duffey*, 639 A.2d 1174, 1176 (Pa. 1994) (holding that “loss of driving privileges is a civil collateral consequence” and not a criminal penalty).

<sup>60</sup> *See, e.g.*, *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000) (holding that collateral consequences are beyond the control of the sentencing court); *Moore v. Hinton*, 513 F.2d 781, 782 (5th Cir. 1975) (holding that before pleading guilty to driving while intoxicated, defendant need not be informed that his driver’s license will be suspended because the suspension is imposed via a separate Department of Public Safety proceeding); *Commonwealth v. Shindell*, 827 N.E.2d 236, 238 (Mass. App. Ct. 2005) (holding that no advisement about the possibility of registration as a sex offender is required, because the “fact that an entity outside the court decides whether the defendant ultimately must register is the very definition of a collateral consequence”).

<sup>61</sup> Travis, *supra* note 1, at 15.

penalties than . . . formal criminal sentence[s],”<sup>62</sup> and often outlast direct consequences. Yet, “no point along the criminal justice continuum . . . formally addresses issues related to collateral consequences.”<sup>63</sup> Not surprisingly, many scholars have long advocated for more transparency with regard to collateral sanctions.<sup>64</sup> The American Bar Association (ABA) has also taken the position that “it is neither fair nor efficient . . . to label significant legal disabilities and penalties as ‘collateral’ . . . when in reality those disabilities and penalties are frequently the most important and permanent results of a criminal conviction.”<sup>65</sup> In an effort to bring more transparency to these “secret sentences,” the ABA adopted the “ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons”<sup>66</sup>—a coherent and comprehensive compilation of collateral consequences.

A “holistic representation” model,<sup>67</sup> proposed by many scholars, may be another way to bring transparency to these collateral matters. The model calls for defense attorneys to “concern themselves more generally with the broader legal effects of a criminal conviction”<sup>68</sup> and advise criminal defendants about collateral sanctions.<sup>69</sup> The push for more transparency is particularly compelling in cases involving relatively minor offenses, for which the collateral consequences are, in fact, the real punishments. As illustrated by the case of Frank Jones, our hypothetical friend from the Introduction, the effects of these collateral sanctions can be felt decades after the conviction. But even more importantly, collateral sanctions can limit future opportunities and, in many ways, shape the future experiences of convicted felons. That was certainly the case with Frank. Frank was a freshman in college when he was arrested and charged with possession of a controlled substance. Because Frank was a first-time offender, the prosecution offered a suspended sentence and community service. Frank did not spend a single day in jail. Although his formal sentence was rather insignificant, the real penalty was not the probation. Rather, it was the imposition of collateral consequences that attached to Frank’s conviction and followed him for

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<sup>62</sup> Pinard & Thompson, *supra* note 31, at 590.

<sup>63</sup> Pinard, *supra* note 11, at 629–30.

<sup>64</sup> See, e.g., Chin & Holmes, *supra* note 3.

<sup>65</sup> ABA STANDARDS, *supra* note 15, at 11.

<sup>66</sup> *Id.*

<sup>67</sup> See, e.g., Pinard, *supra* note 13; McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishment as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 490 (2005).

<sup>68</sup> Chin & Love, *supra* note 8, at 37 (discussing the heightened duties of defense attorneys in the wake of *Padilla*); see also Smyth, *supra* note 8, at 810 (arguing that *Padilla* implies “a rational duty of counsel to inquire into, investigate, advise about, and use strategically a wide range of penalties enmeshed with criminal charges”).

<sup>69</sup> See, e.g., Travis, *supra* note 1, at 17 (arguing that collateral consequences “should be brought into open view[,] . . . made visible as critical elements of the sentencing statutes[,] . . . recognized as visible players in the sentencing drama played out in courtrooms every day[,] . . . openly included in . . . debates over punishment policy, incorporated in . . . sentencing jurisprudence, and subjected to rigorous research and evaluation”).

the rest of his life. Frank ultimately dropped out of college after he lost eligibility for federal student loans. Due to his criminal record, Frank was disqualified from applying for many professional licenses, and his job opportunities were limited.<sup>70</sup> Decades after his conviction, as a senior citizen, Frank was still experiencing the collateral consequences of his conviction, in that he could not apply for public housing.

There are many more examples that illustrate the severity of collateral consequences. The following are just a few:

- A plea to disorderly conduct, [a non-criminal offense under New York law,] makes a person presumptively ineligible for New York City public housing for two years.
- Two convictions for turnstile jumping can lead to deportation of a lawful permanent resident.
- A conviction for any crime bars a person from being a barber, boxer, or bingo operator.<sup>71</sup>

Frank's story, and the examples above, illustrate how collateral sanctions can become the "real punishment" for many criminal defendants. These collateral sanctions often have much broader and more severe effects on convicted persons' lives than the actual sentences imposed by the courts.

Undoubtedly, the collateral consequence rule plays a significant role in further exacerbating the "invisibility" of collateral sanctions. But *Padilla v. Kentucky* may offer a promising change, and the Court's rationale and holding could be a meaningful step toward transparency and fairness, long called for by scholars and legal professionals.

## II. *PADILLA V. KENTUCKY* AND THE "PADILLA ADVISORY"

### A. *Factual Background*

Jose Padilla was born in Honduras and came to the United States as a teenager.<sup>72</sup> He had been a lawful permanent resident of the United States for over forty years and served in the United States military during the Vietnam War.<sup>73</sup> Prior to his conviction, Padilla lived with his family in California and worked as a licensed commercial truck driver.<sup>74</sup> On September 17, 2001, Padilla's truck was stopped at a weigh station because it did not have a weight and distance number.<sup>75</sup> With Padilla's consent, police

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<sup>70</sup> For an overview of statutory penalties that are triggered following a criminal conviction, see discussion *supra* Part I.A.

<sup>71</sup> Smyth, *supra* note 67, at 482 (citations omitted).

<sup>72</sup> Brief for Petitioner at 8, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651) [hereinafter Brief for Petitioner].

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Brief for the United States as Amicus Curiae Supporting Affirmance at 2, *Padilla*, 130 S. Ct. 1473 (No. 08-651) [hereinafter Brief for the United States].

officers searched his truck and discovered more than 1,000 pounds of marijuana in 23 wrapped styrofoam boxes, which were not accounted for in the shipping manifest.<sup>76</sup> After an unsuccessful attempt to suppress evidence seized during the search,<sup>77</sup> and per his attorney’s recommendation, Padilla pled guilty to misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, and felony trafficking in marijuana.<sup>78</sup> The prosecution recommended five years of imprisonment, followed by five years of probation.<sup>79</sup> On October 4, 2002, the trial court accepted Padilla’s guilty plea and imposed the agreed-upon sentence.<sup>80</sup>

According to immigration regulations, all noncitizens, including lawful permanent residents like Padilla, are subject to deportation proceedings should they run afoul of certain laws.<sup>81</sup> Unknown to Padilla, his felony drug conviction was an aggravated felony and a violation of controlled substance laws,<sup>82</sup> both of which are deportable crimes under the Immigration and Nationality Act (INA).<sup>83</sup> Subsequent to his arrest, the Immigration and Naturalization Service (INS) initiated an investigation to determine whether Padilla was subject to removal proceedings.<sup>84</sup>

On August 18, 2004, two years after entering his guilty plea, Padilla filed a pro se collateral attack on his conviction.<sup>85</sup> Padilla’s motion for post-conviction relief alleged a violation of his right to effective assistance of counsel, because his attorney misadvised Padilla regarding possible immigration consequences of his guilty plea.<sup>86</sup> Padilla claimed his attorney not only failed to advise him that deportation was virtually mandatory in his case, but in fact told him he “did not have to worry about [it] . . . since he had been in the country so long.”<sup>87</sup> This affirmative act of misadvice added a layer of complication to the collateral consequence rule and its application in the Sixth

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<sup>76</sup> Brief of Respondent at 2–3, *Padilla*, 130 S. Ct. 1473 (No. 08-651) [hereinafter Brief for Respondent].

<sup>77</sup> *Id.*

<sup>78</sup> Brief for Petitioner, *supra* note 72, at 9.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See 8 U.S.C. § 1227(a) (2006) (defining classes of deportable aliens and listing deportation grounds).

<sup>82</sup> According to Kentucky statutes, a first offense of trafficking in five pounds or more of marijuana is a Class C felony and is punishable by imprisonment for five to ten years. KY. REV. STAT. ANN. §§ 218A.1421(4)(a), 532.060(2)(c) (2011).

<sup>83</sup> See 8 U.S.C. § 1101(a)(43)(B) (2006) (defining “aggravated felony” within the meaning of the INA). The INA provides that any alien who, at any time after admission, is convicted of an aggravated felony, § 1227(a)(2)(A)(iii), or convicted for violation of controlled substance laws, § 1227(a)(2)(B)(i), is deportable.

<sup>84</sup> Brief for the United States, *supra* note 75, at 2.

<sup>85</sup> Brief for Petitioner, *supra* note 72, at 11.

<sup>86</sup> *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (2008), *overruled by* 130 S. Ct. 1473 (2010).

<sup>87</sup> *Id.*

Amendment ineffective counsel claims context. The Supreme Court granted certiorari to settle the issue.<sup>88</sup>

### *B. Procedural History*

The procedural history of *Padilla v. Kentucky* illustrates how lower courts have struggled with the collateral consequence rule and an attorney's duty to his clients with regard to collateral matters. Initially, the trial court denied Padilla's motion and noted that "a valid guilty plea [did] not require that the defendant be informed of every possible consequence of a guilty plea."<sup>89</sup> The appellate court reversed and remanded for a determination of whether Padilla had received incorrect advice, and whether this incorrect advice prevented him from entering a "knowing, intelligent and voluntary guilty plea."<sup>90</sup> Although the appellate court agreed that advice about collateral consequences is not required, the court found Padilla's attorney's affirmative act of misadvice legally significant, and held that such "'gross misadvice' relating to collateral matters can justify post-conviction relief."<sup>91</sup>

The Kentucky Supreme Court, however, took a different approach. The court did not find the distinction between a failure to advise and an affirmative act of misadvice meaningful.<sup>92</sup> Embracing the collateral consequence rule and its principle that collateral consequences are outside the scope of Sixth Amendment right to effective counsel, the court reversed the appellate court and denied Padilla's post-conviction challenge.<sup>93</sup> In doing so, the court noted that because attorneys are not required to address collateral issues, their "failure in that regard cannot constitute ineffectiveness entitling a criminal defendant to relief under *Strickland v. Washington*."<sup>94</sup> Thus, according to the court, neither counsel's failure to advise, nor his affirmative act of misadvice regarding collateral issues, provided a basis for relief.<sup>95</sup>

The United States Supreme Court, acknowledging the "unique nature of deportation,"<sup>96</sup> reversed, but carefully crafted a narrow holding. Expanding the scope of the Sixth Amendment right to effective counsel, the Court imposed a duty on defense attorneys to advise their clients of adverse immigration consequences of a guilty plea.<sup>97</sup> The Court emphasized that deportation could not be easily classified as either a collateral or direct consequence "because of its close connection to the

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<sup>88</sup> *Padilla*, 130 S. Ct. at 1478.

<sup>89</sup> *Padilla*, 253 S.W.3d at 483.

<sup>90</sup> Brief for Respondent, *supra* note 76.

<sup>91</sup> *Padilla*, 253 S.W.3d at 483–84.

<sup>92</sup> *Id.* at 484–85.

<sup>93</sup> *Id.* at 485.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 484–85.

<sup>96</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

<sup>97</sup> *Id.* at 1482 (citations omitted).

criminal process,”<sup>98</sup> and found the direct/collateral distinction “ill-suited” in evaluating ineffective assistance of counsel claims in the context of deportation.<sup>99</sup> Applying the *Strickland* two-prong test,<sup>100</sup> the Court held that Padilla met *Strickland*’s performance prong because his attorney failed to inform him about the deportation consequences of his guilty plea,<sup>101</sup> and remanded the case for a determination of whether Padilla also met the second prong and could demonstrate prejudice as a result of his attorney’s deficient performance.<sup>102</sup>

### C. Rationale for Limited Extension of the “Padilla Advisory”

Since *Padilla* was decided, scholars have opined about the decision’s potential impact on the criminal justice system.<sup>103</sup> Even the concurring justices conceded that the majority decision “mark[ed] a major upheaval in Sixth Amendment law.”<sup>104</sup> Indeed, *Padilla* is the first time the Court suggested that defense counsel may have a duty to discuss collateral issues “wholly outside the control of the criminal court, if the issue is *sufficiently important* to the defendant . . . .”<sup>105</sup> It has been speculated that “the ‘*Padilla* advisory’ may become as familiar a fixture of . . . criminal case[s] as the *Miranda* warning.”<sup>106</sup> Scholars and commentators, in search of ways to address the wrongs of collateral consequences, have relied on *Padilla* to argue for various practical strategies to combat these harms, such as increasing informed choices for criminal defendants,<sup>107</sup> and creative lawyering by prosecutors and defense counsels alike.<sup>108</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also discussion *supra* Part I.C.1.

<sup>101</sup> *Padilla*, 130 S. Ct. at 1486.

<sup>102</sup> *Id.* at 1487.

<sup>103</sup> See, e.g., Chin & Love, *supra* note 8; Love & Chin, *supra* note 10; see also Seventh Annual Wiley A. Branton-Howard Law Journal Symposium, *Collateral Consequences: Who Really Pays the Price for Criminal “Justice”?*, 54 HOW. L.J. 501 (2011).

<sup>104</sup> *Padilla*, 130 S. Ct. at 1491 (Alito, J., concurring).

<sup>105</sup> John Castellano, *Castellano on Padilla v. Kentucky*, 2010 EMERGING ISSUES 4959 (Apr. 13, 2010) (emphasis added).

<sup>106</sup> Chin & Love, *supra* note 10, at 37.

<sup>107</sup> See, e.g., Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675 (2011) (arguing that open considerations of collateral consequences ensure fully informed pleas, increase client autonomy, and reduce the number and severity of undeserved collateral consequences); Smyth, *supra* note 8 (arguing that in the wake of *Padilla*, lawyers have a duty to inquire, investigate and research, and advise on consequences of pleas or sentencing and seek alternatives, all of which will empower clients to make truly informed decisions).

<sup>108</sup> See, e.g., Catherine A. Christian, *Collateral Consequences: Role of the Prosecutor*, 54 HOW. L.J. 749 (2011) (arguing that prosecutors have an ethical obligation to prevent unjust collateral consequences and suggesting a number of pre-conviction actions prosecutors should take).

Indeed, since some collateral consequences can be particularly important to a defendant, it is hard to see how the criminal justice system can impose these additional “punishments” without a single actor having a duty to inform the defendant about collateral sanctions.<sup>109</sup> Defense attorneys routinely advise clients regarding pleas, and these discussions necessarily involve an assessment of risks and benefits of going to trial versus pleading guilty.<sup>110</sup> Thus, it cannot be said that attorneys provide effective representation when these discussions do not take into consideration the effects of collateral consequences.<sup>111</sup> Accordingly, the *Padilla* advisory should be extended to other collateral consequences beyond the immigration context. Although there are many reasons for such an extension, the three main reasons, which warrant more in-depth discussions, are discussed below.

### 1. Collateral Consequences Are Not Separate from Criminal Penalties

As previously discussed, the collateral consequence rule is primarily based on a conception of collateral sanctions as indirect and separate consequences, entirely outside criminal courts’ control and separate from the criminal process.<sup>112</sup> The key rationale underlying the *Padilla* Court’s decision is that deportation is uniquely different from other collateral consequences. The Court specifically noted that deportation is “an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty”<sup>113</sup> making it difficult to “divorce the penalty [i.e., deportation] from the conviction . . . .”<sup>114</sup>

However, the idea of other, non-immigration-related collateral consequences being “divorced” and completely separate from the criminal penalty is not entirely correct.<sup>115</sup> These “invisible punishment[s]”<sup>116</sup> are, in fact, “secret sentence[s]”<sup>117</sup> that perform “[t]he real work of the conviction.”<sup>118</sup> This is particularly true when defendants are first-time offenders who plead guilty to avoid jail time (perhaps in exchange for community service or probation), only to discover later the collateral consequences

<sup>109</sup> Pinard, *supra* note 11, at 629–30 (pointing out that the criminal process has no “formal mechanism that incorporates the scope of [collateral] consequences,” and that “no point along the criminal justice continuum . . . formally addresses issues related to collateral consequences”).

<sup>110</sup> Chin & Holmes, *supra* note 3, at 698, 718.

<sup>111</sup> *Id.* at 736.

<sup>112</sup> *See id.* at 704; *see also supra* Part I.C.2.

<sup>113</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010) (citation omitted).

<sup>114</sup> *Id.* at 1481.

<sup>115</sup> In fact, collateral consequences are not separate from the criminal process at all. In some states, for example, the statute allowing for pleas of *nolo contendere* “was designed to cover situations where side effects of a plea of guilty, in addition to the penalties provided by law, would be too harsh.” *Fortson v. Hopper*, 247 S.E.2d 875, 877 (Ga. 1978); *see also* Chin & Holmes, *supra* note 3, at 699 (citations omitted).

<sup>116</sup> Travis, *supra* note 1, at 15.

<sup>117</sup> Chin & Holmes, *supra* note 3, at 700.

<sup>118</sup> *Id.*; *see also* Smyth, *supra* note 8, at 808 (citation omitted) (noting that “the real calculus of criminal justice entails much more than a binary guilt/innocence equation”).

that will affect almost every facet of their future lives—from having their driver’s licenses suspended, to becoming ineligible for federal student loans, to even, possibly, losing their parental rights.<sup>119</sup> For some citizen defendants, collateral consequences that are relevant and particularly important to their unique situations can certainly constitute an “integral part” of the punishment, just as deportation is an “integral part” of the punishment for noncitizen defendants.

## 2. Defendants Unaware of Collateral Consequences Cannot Be Said to Have Properly Waived Their Constitutional Right to Trial

Given the severity of some collateral sanctions, the collateral consequence rule is inconsistent with the standards for proper waiver of constitutional rights outlined in *Brady*.<sup>120</sup> By entering a plea, defendants forfeit their constitutional rights to trial before a jury or a judge.<sup>121</sup> The *Brady* court noted that “[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”<sup>122</sup> Thus, defendants are, and certainly should be, “entitled to make [the] decision [about whether to enter a plea] based on considerations that *they* deem important.”<sup>123</sup> To some defendants, knowledge of certain collateral consequences can be an important consideration as they contemplate entering a guilty plea.<sup>124</sup> This is particularly true for first-time offenders and offenders who have committed less serious felonies or misdemeanors. Without the awareness that collateral sanctions will affect almost every facet of their lives for many years to come, it cannot be said that these defendants have waived their constitutional rights with “sufficient awareness of the relevant circumstances and likely consequences.”<sup>125</sup>

## 3. Knowledge of Collateral Consequences Will Provide Attorneys with New Advocacy Tools

Actions of defense lawyers, prosecutors, and judges at the guilty-plea stage are particularly important to the accuracy and fairness of the criminal justice system. With over ninety percent of convictions resulting from guilty pleas, the criminal justice

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<sup>119</sup> The Adoption and Safe Families Act mandates that state child welfare agencies initiate termination proceedings against biological parents if they have not had contact with a child in fifteen of the most recent twenty-two months. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89 § 103, 111 Stat. 2115, 2118 (1997); *see also* discussion *supra* Part I.A. (presenting an overview of laws imposing a variety of collateral consequences).

<sup>120</sup> *Brady v. United States*, 397 U.S. 742 (1970).

<sup>121</sup> *See* U.S. CONST. amend. VI (providing that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

<sup>122</sup> *Brady*, 397 U.S. at 748.

<sup>123</sup> Chin & Holmes, *supra* note 3, at 735 (emphasis added).

<sup>124</sup> *See, e.g., id.* at 713 (discussing how noncitizens consider risks of deportation when contemplating guilty pleas).

<sup>125</sup> *Brady*, 397 U.S. at 748.



system heavily relies on the plea-bargaining stage.<sup>126</sup> Thus, one of the most important pieces of advice defense lawyers give their clients is “whether to plead guilty and on what terms.”<sup>127</sup> Knowledge of collateral consequences will allow defense attorneys to forge creative dialogues with prosecutors and form a plea agreement that avoids “absurd or disproportionate” consequences.<sup>128</sup> This knowledge can also be used as an advocacy tool for both defense counsels and prosecutors.<sup>129</sup>

The following stories, based on actual cases, illustrate how knowledge of relevant collateral consequences can allow defense attorneys to better protect their clients’ interests. With the cooperation of prosecutors, defense counsels can formulate plea offers that will neither offend a basic sense of fairness and justice nor put individuals with criminal convictions at a further disadvantage. In his article, *Holistic is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishment as an Advocacy Strategy*, McGregor Smyth outlined the following scenarios:

- Juan R. was disabled and lived in public housing. He was charged with a drug-related offense. His attorney, aware of public housing rules on termination of tenancy for criminal activity, persuaded the prosecutor to accept a non-criminal disposition so Juan could keep his home. Any conviction, even a misdemeanor, would have resulted in Juan’s eviction.<sup>130</sup>
- Joanne F. worked as a security guard. She was charged with assault and harassment in a domestic dispute with her boyfriend. The prosecution’s plea offer would have resulted in Joanne losing both her job and her security guard license. Joanne’s attorney convinced the prosecutor to offer an adjournment in contemplation of dismissal.<sup>131</sup>
- Max S. was charged with possession of marijuana. He was eighteen years old and about to start college in the fall. His attorney discussed with the prosecutor that even a non-criminal plea to a drug offense would render Max ineligible for federal student loans and thus, unable to attend college. The prosecutor was persuaded and offered an adjournment in contemplation of dismissal. Max started college in the fall.<sup>132</sup>

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<sup>126</sup> Chin & Holmes, *supra* note 3, at 698 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999, at 432–33 tbl.5.32 (Ann L. Pastore & Kathleen Maguire eds., 2000)).

<sup>127</sup> *Id.*

<sup>128</sup> Smyth, *supra* note 67, at 494–95.

<sup>129</sup> See, e.g., Christian, *supra* note 108, at 752 (calling for prosecutors to conduct individualized assessments of collateral sanctions “to ensure that justice is achieved”); Smyth, *supra* note 67, at 494.

<sup>130</sup> Smyth, *supra* note 67, at 495.

<sup>131</sup> *Id.*; see also *id.* at 495 n.91 (“In New York, with consent of the prosecution and defense, a court can order a . . . case adjourned in contemplation of dismissal, subject to certain conditions, such as no further arrests during the adjournment or paying a fine or restitution.”).

<sup>132</sup> *Id.* at 495.

Knowledge of and familiarity with collateral consequences can help attorneys represent their clients’ interests more effectively. Thus, assessment of the full ramifications of criminal convictions should include a discussion of collateral consequences. This would not only provide criminal defendants with pertinent information, enabling them to make informed decisions on how to proceed, but would also “elevate[] the provision of legal services by fully contextualizing the representation.”<sup>133</sup> And, most importantly, a holistic approach and individualized assessment of collateral sanctions—tailoring the punishment to the crime—is consistent with the criminal justice system’s goals of fairness and justice.<sup>134</sup>

### III. PROPOSED STANDARD FOR LIMITED EXTENSION OF THE *PADILLA* ADVISORY

This Note argues for a limited extension of the *Padilla* advisory to include other collateral consequences outside of the immigration context. The *Padilla* Court’s rationale that deportation—“because of its close connection to the criminal process”<sup>135</sup>—is an “integral part”<sup>136</sup> of punishment for noncitizens cannot, and should not, be limited to the immigration context. Surely, there are other collateral consequences that are equally important to citizen defendants and can constitute “integral part[s]” of their punishments. Once this proposition is accepted, the key issue becomes where to draw the line, i.e., which collateral consequences mandate a *Padilla* advisory and how detailed an attorney’s advice must be.

Unlike other literature on the topic,<sup>137</sup> this Note takes a limited position and argues that the *Padilla* advisory should only extend to those collateral sanctions that are (1) an “integral part” of punishment; (2) objectively and reasonably important to a group of uniquely positioned defendants; and (3) rooted in clear and unambiguous federal law. This proposed standard strikes an important balance between two competing interests: aspirational and fairness-driven considerations, such as the need for greater transparency of collateral consequences and a holistic approach of representation, and purely practical concerns, such as finality of guilty pleas, costs and inefficiencies incurred by the criminal justice system or undue burdens on defense attorneys. Although scholars and commentators have relied on the *Padilla* decision to argue for improved advocacy practices by defense counsels and prosecutors, the existing literature appears to

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<sup>133</sup> Pinard & Thompson, *supra* note 31, at 609.

<sup>134</sup> See, e.g., Christian, *supra* note 108, at 750.

<sup>135</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010).

<sup>136</sup> *Id.* at 1480.

<sup>137</sup> For example, McGregor Smyth proposed a more expansive approach and argued that the *Padilla* decision and prevailing professional standards mandate that when a collateral consequence is severe, enmeshed with the criminal charges, and likely to occur, defense counsels have a duty to inquire, investigate and research, advise on consequences of pleas and sentencing, and seek alternatives. Smyth, *supra* note 8, at 810–22.

be more aspirational than realistic.<sup>138</sup> The standard proposed in this Note has the added benefit of being practical—it accounts for the lack of compilation of all collateral consequences, but calls for transparency of a limited number of collateral sanctions when the law is unambiguous and requiring a *Padilla* advisory does not pose undue burdens on defense attorneys.

*A. Prong 1: “Integral Part” of the Punishment*

At the core of the *Padilla* decision is the Court’s acknowledgment that deportation is different from other collateral consequences.<sup>139</sup> Because of “its close connection to the criminal process,” deportation is neither a collateral nor a direct consequence.<sup>140</sup> Noting that changes to immigration laws “dramatically raised the stakes of a non-citizen’s criminal conviction,”<sup>141</sup> the Court deemed “deportation . . . an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants.”<sup>142</sup> This is surely true in the case of Jose Padilla. Padilla came to the United States as a teenager.<sup>143</sup> As a lawful permanent resident of the United States for over forty years, Padilla built his entire life in America and was a full member of the society.<sup>144</sup> In fact, he pledged allegiance to the United States by serving in the Vietnam War.<sup>145</sup> Banishment from the United States is indeed an “integral part” of his punishment, in addition to a jail sentence. If deported, Padilla would be separated from his family in the United States and sent back to his “home” country, where he likely has no family, friends, or acquaintances. Thus, it is understandable that adverse immigration consequences are a central consideration as Padilla, and other noncitizen defendants like him, contemplate a guilty plea.

While the Court’s holding in *Padilla* was narrow and limited to the immigration context, other collateral sanctions can present equally challenging issues for citizen

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<sup>138</sup> For example, Professor Chin advocates for open considerations of collateral consequences, but recognizes that “it is unreasonable to expect ordinary attorneys to make themselves familiar with the details of an entire state code addressing scores of discrete areas of law” and that “the trick [in achieving this aspirational goal of holistic representation] is learning how to generate and maintain lists of collateral consequences for each jurisdiction.” Chin, *supra* note 107, at 685. Similarly, Smyth’s proposed standard, advocating for defense attorneys to “provide affirmative, competent advice to clients of the risk of *all* penalties sufficiently ‘enmeshed’ with their criminal charges or potential pleas” is, as conceded by Smyth, “a relatively high minimum standard” that is contingent on the availability of a comprehensive summary of all collateral consequences. Smyth, *supra* note 8, at 819–20 (emphasis added).

<sup>139</sup> *Padilla*, 130 S. Ct. at 1481.

<sup>140</sup> *Id.* at 1482.

<sup>141</sup> *Id.* at 1480.

<sup>142</sup> *Id.* (citations omitted).

<sup>143</sup> Brief for Petitioner, *supra* note 72, at 8.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

defendants, just as deportation does for noncitizen defendants. The *Padilla* advisory should thus extend beyond the immigration context and include other collateral consequences that are an “integral part” of punishment for citizen defendants. This prong limits the advisory requirement to collateral sanctions that have such severe and adverse consequences for citizen defendants that they could, and should, be viewed as an “integral part” of the punishments imposed.<sup>146</sup> An example of a collateral sanction that satisfies this element is loss of eligibility for public assistance benefits. For many low-income individuals with criminal convictions, this sanction can be an “integral part” of their punishments; without access to public housing, food stamps, or cash assistance, the reintegration process is extremely difficult. Together, these collateral consequences create “a formidable set of obstacles to former offenders who want to gain a foothold in modern society.”<sup>147</sup> Accordingly, these sanctions can pose the same challenges to returning offenders as deportation does to noncitizen offenders.

*B. Prong 2: Objectively and Reasonably Important to a Group of Uniquely Positioned Defendants*

The second prong extends the *Padilla* advisory to collateral consequences that affect a uniquely positioned group of criminal defendants, to whom a particular sanction is objectively and reasonably important. This inquiry, based on an objective test, serves two important functions. First, the prong brings a degree of stability for defense attorneys as to which defendants require a notification. For example, if the *Padilla* advisory is extended to loss of eligibility for public assistance benefits, public defenders and court-appointed counsels can be on heightened alert, because their clients, by definition, are low-income individuals who cannot afford private representation. It would also be reasonable to infer that loss of public assistance benefits is particularly relevant and objectively important to them.

Second, this prong limits the scope of extension of the *Padilla* advisory, as it screens out certain facially frivolous claims. For example, the *Padilla* advisory would not extend to loss of the right to vote or suspension of driving privileges; defendants in these two circumstances do not meet the “uniquely positioned” element of this prong, because most adults have a driver’s license and all citizens over the age of eighteen have the right to vote. Low-income individuals, on the other hand, are a “uniquely positioned” group. Because of their reliance on public assistance benefits, awareness of this collateral sanction is objectively and reasonably important to the group.

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<sup>146</sup> McGregor Smyth’s proposed standard contains a similar prong—i.e., that the collateral penalty meet the test of severity, either on a relative or absolute scale. Smyth, *supra* note 8, at 822–24.

<sup>147</sup> Travis, *supra* note 1, at 24.

*C. Prong 3: Rooted in Clear and Unambiguous Federal Law*

The third and final prong of the proposed test would ensure that the extension of the *Padilla* advisory would not impose an undue burden on defense attorneys. As previously noted, there is no comprehensive compilation of all collateral sanctions, and these sanctions are scattered throughout federal and state laws and local policies.<sup>148</sup> Although it is important to bring more transparency to these collateral sanctions, it is equally important that the expansion of the *Padilla* advisory does not impose an undue burden on defense attorneys. Already overworked, public defenders, court-appointed attorneys, and defense lawyers in general cannot be required to become well-versed in other areas of law or conduct additional research to gain comprehensive knowledge regarding collateral consequences. Accordingly, this prong extends the *Padilla* advisory to collateral consequences rooted in clear and unambiguous federal law, easily accessible to attorneys. In effect, this prong only extends the *Padilla* advisory to the collateral consequences summarized in *Federal Statutes Imposing Collateral Consequences upon Conviction*, compiled by the Department of Justice (DOJ).<sup>149</sup>

This expansion of defense attorneys' duties is reasonable for two reasons. First, this invaluable DOJ resource is readily available and provides a one-stop reference for all collateral consequences imposed under federal law.<sup>150</sup> The reference guide allows attorneys to easily access relevant information and eliminates the need to spend additional time and resources researching relevant collateral consequences. Second, extending the *Padilla* advisory to collateral sanctions based on federal laws ensures that attorneys across the country are subject to the same standard and level of competence. States and localities can impose different collateral consequences based on local laws. Even when collateral consequences are rooted in federal law, states are free "to opt out of certain consequences, or broaden or narrow their scope" as appropriate.<sup>151</sup> However, defense attorneys need not be knowledgeable about how states implement a particular collateral consequence. The *Padilla* advice need only be limited to a simple warning that a particular collateral consequence *may* apply, so defendants are put on notice.

IV. CASE STUDY: LOSS OF HOUSING BENEFITS, WELFARE RIGHTS, AND FOOD STAMPS

The following case study applies the proposed three-prong standard to loss of housing benefits, welfare rights, and food stamps.<sup>152</sup> But first, to understand the need

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<sup>148</sup> Pinard, *supra* note 13, at 1080; *see also supra* notes 35–39 and accompanying text (discussing difficulties associated with disparate laws).

<sup>149</sup> FEDERAL STATUTES, *supra* note 19.

<sup>150</sup> *See id.*

<sup>151</sup> Pinard, *supra* note 35, at 490. It is worth noting that the federal government often imposes various financial and political incentives to encourage adoption of collateral consequences in local jurisdictions. *Id.*

<sup>152</sup> Although ineligibility for federal housing and welfare benefits applies to other convicted persons as well, this case study focuses on the impact of these collateral sanctions on

for expansion of the *Padilla* advisory to these collateral sanctions, one needs to understand the importance of welfare and housing benefits to low-income felons. Some collateral consequences, such as those that deny returning offenders “civil and political rights[,] serve a more symbolic function and largely concern only individuals.”<sup>153</sup> Collateral consequences that deny social and welfare benefits to returning offenders, however, not only directly impact their own well-being, but also that of their families.<sup>154</sup> Most importantly, the denial of these benefits creates significant hurdles in the reintegration process.

#### *A. Denial of Federal Housing Benefits*

“Exclusionary housing policies constitute one of the most significant barriers to reentry.”<sup>155</sup> For many returning offenders, public housing is the only realistic option for a safe and stable place to live. Over the past twenty years, federal housing laws have undergone significant changes, which have resulted in strict admission and eviction standards and “effectively restricted access to public housing for significant numbers of ex-offenders.”<sup>156</sup> Today, federal laws make it extremely challenging for convicted felons to find public housing by either prohibiting admission of convicted felons to those housing units, or allowing for eviction and termination of leases for residents who engage in certain types of criminal activity.<sup>157</sup>

First, given the broad language of the applicable federal statute, local public housing authorities (PHAs) enjoy great latitude in evicting persons from public housing.<sup>158</sup> Federal laws give PHAs statutory power to terminate leases of public housing tenants and their families, and provide that:

*any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, [or] . . . peaceful enjoyment of their residences by persons residing in the*

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offenders returning to society after release from prison. As the case study illustrates, upon their release from prisons, these offenders face challenges that are as difficult as those faced by noncitizen defendants deported to their “home” countries after serving their prison sentences.

<sup>153</sup> Demleitner, *supra* note 23, at 158.

<sup>154</sup> *Id.*

<sup>155</sup> Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 552 (2005).

<sup>156</sup> JEREMY TRAVIS, BUT THEY ALL COME BACK, FACING THE CHALLENGES OF PRISONER REENTRY 227 (2005).

<sup>157</sup> For an overview of federal housing laws affecting individuals with criminal records, see Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in INVISIBLE PUNISHMENT 37, 43–46 (Marc Mauer & Meda Chesney-Lind eds., 2003). See also TRAVIS, *supra* note 156, at 231 (noting that the “powers to evict individuals from public housing are remarkably broad” and listing specific language allowing for broad application of these laws).

<sup>158</sup> See 42 U.S.C. § 1437f(d)(1)(B)(iii) (2006).

immediate vicinity of the premises, or *any drug-related criminal activity on or near such premises*, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy . . . .<sup>159</sup>

In an effort to encourage PHAs to implement these laws, the Department of Housing and Urban Development (HUD) rolled out the “One Strike and You’re Out” initiative to carry out the presidential mandate to reinforce these statutes.<sup>160</sup> The “one strike” program effectively created “uniform screening tools, admission standards, and eviction policies toward people with criminal records across public housing agencies around the country.”<sup>161</sup> Federal laws also provide that tenants evicted from public housing because of drug-related criminal activity are ineligible for federally assisted housing for three years.<sup>162</sup>

Second, federal regulations outline rather vague admission criteria, effectively giving PHAs broad discretion to deny admission. For example, “applicants whose habits and practices reasonably may be expected to have a detrimental effect on the residents or the project environment” are ineligible for admission.<sup>163</sup> Additionally, in selecting families for admission, PHAs may consider past “criminal acts which would adversely affect the health, safety or welfare of other tenants.”<sup>164</sup> As a result, PHAs across the country have expanded the types of conduct that preclude individuals from obtaining public housing.<sup>165</sup> And although federal regulations call for PHAs to consider “evidence of rehabilitation”<sup>166</sup>—given the high demand for, and shortage of, public housing—former prisoners seeking admission stand little chance of success.<sup>167</sup>

The initial goal of these federal housing policies was “to allow [PHAs] to exclude potentially dangerous tenants from premises and ensure the safety of other residents.”<sup>168</sup> However, studies indicate that these policies were often “needlessly

<sup>159</sup> *Id.* (emphasis added).

<sup>160</sup> See TRAVIS, *supra* note 156, at 232 (referring to President Clinton’s 1996 State of the Union address, in which he urged local housing authorities and tenant associations to aggressively use their statutory powers); see also Rubinstein & Mukamal, *supra* note 157, at 44.

<sup>161</sup> Rubinstein & Mukamal, *supra* note 157, at 44.

<sup>162</sup> 42 U.S.C. § 13661(a) (2006).

<sup>163</sup> 24 C.F.R. § 960.202(a)(2)(iii) (2011).

<sup>164</sup> *Id.* § 960.203(c)(3).

<sup>165</sup> Carey, *supra* note 155, at 566–69 (discussing local measures excluding prospective tenants based on prior arrests, or minor or nonviolent offenses).

<sup>166</sup> 24 C.F.R. § 960.203(d)(1)(i) (2011).

<sup>167</sup> See TRAVIS, *supra* note 156, at 229 (quoting the story of Frank, who pled guilty to shoplifting and grand theft in 1961 but had no further brushes with the law. Frank was nevertheless denied admission to public housing when he applied as a senior citizen, forty years after his criminal conviction.).

<sup>168</sup> KENNETH J. NEUBECK, WHEN WELFARE DISAPPEARS: THE CASE FOR ECONOMIC HUMAN RIGHTS 95 (2006).

over-broad’ and [became] highly exclusionary.”<sup>169</sup> Over time, changes to federal housing laws have exacerbated the difficulties faced by returning offenders as they reintegrate into communities after completing their jail sentences. Further, these laws often have a harsh and destabilizing effect on communities, as they punish not only those who have paid their debts to society, but also their families.<sup>170</sup>

### *B. Denial of Welfare Rights and Food Stamps*

The welfare system underwent significant changes with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>171</sup> One provision of this law imposes a lifetime ban on eligibility for Temporary Assistance to Needy Families (TANF) and food stamps for individuals convicted of drug use, possession, or distribution,<sup>172</sup> and a ten-year ban for persons convicted of certain types of fraud.<sup>173</sup> The ban applies to all offenders convicted of possession, use, or distribution of drugs after August 22, 1996.<sup>174</sup> “The loss of TANF benefits includes not only the lifetime loss of cash benefits, but also all employment-related services individual states provide to those on their TANF rolls.”<sup>175</sup>

States can “opt out” of the ban completely or otherwise modify it, either by limiting the length of the sanction or imposing additional conditions, such as requiring drug treatment.<sup>176</sup> Currently, “twenty-two states enforce the ban in part.”<sup>177</sup> Fourteen states and the District of Columbia have opted out of the ban entirely.<sup>178</sup> The remaining fourteen states continue to adhere to the federal ban;<sup>179</sup> in those states, the ban is “permanent and continues regardless of a person’s successful job history, participation in drug treatment, avoidance of recidivism, or abstinence from drug use.”<sup>180</sup>

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<sup>169</sup> *Id.*

<sup>170</sup> TRAVIS, *supra* note 156, at 235–36.

<sup>171</sup> Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>172</sup> *Id.* § 115, 110 Stat. at 2180.

<sup>173</sup> *Id.* § 408(a)(8), 110 Stat. at 2138–39.

<sup>174</sup> 21 U.S.C. § 862a(d)(2) (2006). The amount payable to any family or household of which such an offender is a member is reduced proportionately. *Id.* at § 862a(b).

<sup>175</sup> NEUBECK, *supra* note 168, at 94–95.

<sup>176</sup> § 862a(d)(1) (2006).

<sup>177</sup> Pinard, *supra* note 35, at 494 (citing THE 2009 CRIMINAL JUSTICE TRANSITION COALITION, SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 125 (2008) [hereinafter SMART ON CRIME], available at [http://2009transition.org/criminaljustice/index.php?option=com\\_docman&task=doc\\_download&gid=10&Itemid](http://2009transition.org/criminaljustice/index.php?option=com_docman&task=doc_download&gid=10&Itemid)); see also Rubinstein & Mukamal, *supra* note 157, at 42 (noting that the most common modifications to the federal ban are exemptions for individuals who finished treatment or achieved recovery, or those who are in treatment or on a waiting list for treatment).

<sup>178</sup> Pinard, *supra* note 35, at 494 (citing SMART ON CRIME, *supra* note 177).

<sup>179</sup> *Id.*

<sup>180</sup> Rubinstein & Mukamal, *supra* note 157, at 41.



The welfare ban also creates a “catch 22” for convicted felons.<sup>181</sup> “Without access to subsistence benefits, treatment, and safe and sober housing,” life in a drug-free environment and avoidance of recidivism is significantly harder to achieve.<sup>182</sup> And so, “[i]n a vicious circle, losing public benefits . . . [makes] it harder for [persons] with criminal records to stay clean and sober, avoid abusive relationships, take care of their children, and resist engaging in criminal activity.”<sup>183</sup> And, just like the loss of federal housing benefits, ineligibility for cash assistance and food stamps creates substantial hurdles in the reintegration process of many returning offenders.

### *C. Application of the Proposed Standard*

#### 1. Loss of Federal Welfare and Housing Benefits is an “Integral Part” of the Punishment

The presumption that deportation is important to noncitizen defendants lies in the acknowledgment that upon their release from prison, offenders will be sent back to another country and banned from returning to the United States.<sup>184</sup> Indeed, the consequences of deportation are severe and extend beyond traumas associated with forced separation from family, friends, and one’s community.<sup>185</sup> Noncitizens who are deported are sent back to their “home” countries, but for those who had lived in the United States their entire lives, starting over in a foreign country is a particularly daunting task. They may not speak the language of their “home” country or have any family members there. Banished to this foreign land, they need to find housing, a new job, and learn to reintegrate into a new society.

Loss of public assistance benefits—particularly federal housing, food stamps, and cash assistance—can be an “integral part” of the punishment for indigent citizen defendants, who rely heavily on public assistance for food and shelter. Just as deported

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<sup>181</sup> *Id.* at 42.

<sup>182</sup> *Id.*

<sup>183</sup> NEUBECK, *supra* note 168, at 95 (quoting AMY E. HIRSCH, ET AL., CENTER OF LAW AND SOCIAL POLICY, EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 28 (2002)).

<sup>184</sup> 8 U.S.C. § 1326 (2006) (providing criminal penalties for certain aliens who subsequently reenter or attempt to reenter the United States).

<sup>185</sup> See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 523–24 (2007) (discussing types of harm). Deportation also involves a loss of social security benefits “for which [a noncitizen] has paid and on which he or she might depend” and emotional and financial losses for U.S. citizens, lawful permanent residents, “and other family members who are left behind.” *Id.* at 513; see also Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 666–74 (2011) (discussing the impact of deportation of Latinos on the deported individuals, their families, and the community).

citizens must rebuild their lives in a foreign country, returning prisoners face an uphill battle reintegrating into society. Finding housing is the most immediate need for many returning offenders.<sup>186</sup> Without a stable and safe shelter, returning offenders “often end up swelling the ranks of the homeless” or find themselves in environments otherwise not “conducive to the development of stable, productive lives. . . .”<sup>187</sup> Unable to obtain food, safe housing, and employment as they transition back into the community, returning offenders are on their own, without any support system from society. Their path to reintegration includes many difficulties similar to those faced by noncitizens deported to their “home” countries.

There are further similarities between deportation and ineligibility for welfare and housing benefits: both have tremendous adverse effects on family relations. Once deported, a noncitizen cannot come back to the United States.<sup>188</sup> The family will be separated for a long time, particularly if they cannot afford travel expenses. Work and responsibilities of everyday life can also make overseas visits more difficult. Similarly, public housing laws can strain family relationships and “interfere with the ability of families to successfully reunify once a parent [or spouse] has returned from prison.”<sup>189</sup> In addition to adversely affecting convicted felons, the one-strike provision “has fractured family structures and . . . limit[ed] housing options . . . for those . . . returning from incarceration.”<sup>190</sup> Returning spouses cannot join their families who live in public housing, because as a condition to housing, their families have agreed “that ex-offender family members not only could not live with them, but also would not visit the public housing unit.”<sup>191</sup> Returning parents cannot reunite with their children without secure and stable housing.<sup>192</sup> Although not as difficult as traveling overseas to visit deported noncitizens, this “housing separation” imposes significant burdens. It places financial burdens on returning offenders and their families—as the offenders need to find and pay for another home—and takes away their strongest support system during the process of reintegration into society: their families.

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<sup>186</sup> “Of the many challenges . . . none is as immediate as the challenge of finding shelter. Work can wait. Drug treatment can wait. Most connections to community-based healthcare can wait.” TRAVIS, *supra* note 156, at 219.

<sup>187</sup> Carey, *supra* note 155, at 552.

<sup>188</sup> Aliens typically must wait a certain period of time before they can apply for re-admission to the United States, *see* 8 C.F.R. § 212.2 (2011), although certain waivers from the Attorney General may be available, *see* 8 U.S.C. §§ 1227(a)(1)(E), (H), (3)(c) (2008). Aliens deported for a conviction of aggravated felony face a lifetime bar and cannot reapply for admission without permission from the Attorney General. § 212.2(f); *see also id.* § 1326 (providing for criminal penalties for certain removed aliens who subsequently reenter or attempt to reenter the United States).

<sup>189</sup> Rubinstein & Mukamal, *supra* note 157, at 48.

<sup>190</sup> Pinard & Thompson, *supra* note 31, at 595.

<sup>191</sup> *Id.* (citing Fox Butterfield, *Invisible Penalties Stalking Ex-Convicts, Sanctions Target Jobs, Housing, Welfare, Voting*, PITTSBURGH POST-GAZETTE, Dec. 29, 2002, at A9).

<sup>192</sup> Rubinstein & Mukamal, *supra* note 157, at 48.

## 2. Loss of Welfare Rights and Housing Benefits is Important to Indigent Defendants

Arguably, the *Padilla* decision is grounded on a presumption that noncitizen defendants are a uniquely positioned group, to whom deportation is an objectively and reasonably important sanction.<sup>193</sup> The United States is a “nation of immigrants” with over “32.5 million foreign-born people, about 20 million of whom are noncitizens.”<sup>194</sup> For those 20 million people, adverse immigration consequences are uniquely important and warrant a warning as defendants consider entering a guilty plea.<sup>195</sup> Statistics regarding federal housing are equally compelling and indicate that a significant group of criminal defendants rely on federal housing. According to a study conducted in Maryland, Minnesota, and Ohio, the percentages of prisoners who lived in public housing and Section 8 housing (the second major federal program for publicly supported housing) prior to their incarceration were ten and fifteen percent, respectively.<sup>196</sup> These statistics “underscore[ ] the importance of federal policies regarding ex-offender access to [housing] facilities,” as nearly a quarter of individuals leaving prison each year formerly lived in publicly supported housing.<sup>197</sup> Homelessness studies show that ten- to twenty-five percent of released prisoners become homeless within a year following their release.<sup>198</sup> Thus, the data clearly indicate that knowledge about the effects of criminal convictions on eligibility for federal housing subsidies is not only relevant but also extremely important to a significant number of criminal defendants.

Additionally, assessing their clients’ financial situation and whether they are dependent on public assistance benefits should not be too burdensome on defense attorneys. In fact, this task should be easier than inquiring about their clients’ legal residency status. Public defenders and court-appointed counsels work exclusively with indigent criminal defendants and would be on “heightened alert” that ineligibility for public benefits is an important consideration as their clients contemplate a guilty plea.

## 3. Denial of Welfare Rights and Housing Benefits Is Rooted in Clear and Unambiguous Federal Law

The *Padilla* Court seems to have suggested two different levels of obligations for defense attorneys: a higher obligation where the law is clear and deportation is “presumptively mandatory,”<sup>199</sup> and a lower obligation when the law is not “succinct

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<sup>193</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

<sup>194</sup> DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 2 (2007).

<sup>195</sup> *Padilla*, 130 S. Ct. at 1481, 1484–85.

<sup>196</sup> TRAVIS, *supra* note 156, at 227. There is no comparable study on a national level.

<sup>197</sup> *Id.* at 228.

<sup>198</sup> *Id.* at 240 (hypothesizing that “imprisonment’s disruption of housing arrangements, coupled with the legal and practical barriers that returning prisoners face in their search for housing” have likely “force[d] large numbers of former prisoners” to become homeless, “wander the streets in urban America[,] and live in . . . homeless shelters”).

<sup>199</sup> *Padilla*, 130 S. Ct. at 1483.

and straightforward,” in which case lawyers need only warn their clients that “pending criminal charges may carry a risk of adverse immigration consequences.”<sup>200</sup> In recognizing this distinction, the Court most likely wanted to ensure that defense attorneys were not unduly burdened or required to become well-versed in the nuances of immigration laws.

Extending the *Padilla* advisory to loss of welfare and federal housing benefits would not necessarily impose an undue burden on attorneys, because federal law on this issue is relatively clear. Federal regulations outline rules for exclusions from public housing and denial of welfare benefits.<sup>201</sup> Although state and local agencies have the discretion to implement their own regulations,<sup>202</sup> and the law may vary from state to state, the *Padilla* advisory would only require defense attorneys to notify their clients about *potential* ineligibility for public benefits as a result of their guilty pleas. This standard does not require defense counsels to become familiar with state or local rules of how federal laws are implemented, and certainly does not require them to become well-versed in welfare benefits or public housing laws.

The goal of the *Padilla* advisory is to bring certain collateral consequences to the attention of criminal defendants and provide them with relevant and important information as they contemplate entering a guilty plea.<sup>203</sup> In many cases, warnings of loss of eligibility for public benefits may not make a difference, particularly when defendants face serious crimes with long terms of imprisonment, or the prosecution has overwhelming evidence against them. But the warning could be particularly important to a certain group of defendants: those heavily dependent on public benefits, who have a viable chance of success at trial. In those cases, justice demands that defense attorneys provide defendants with important information as they contemplate entering a guilty plea. And when the law on the collateral consequence is clear, this justice can be achieved without imposing undue burdens on attorneys.

## V. PRACTICAL CONSIDERATIONS

### A. Concerns over “Floodgates”

One of the strongest objections against extension of the *Padilla* advisory is the “floodgates objection.”<sup>204</sup> Scholars and courts worry that such a change would unsettle

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<sup>200</sup> *Id.*

<sup>201</sup> *See supra* Parts IV.A–B.

<sup>202</sup> Rubinstein & Mukamal, *supra* note 157, at 43–44.

<sup>203</sup> Extending the *Padilla* advisory to the loss of eligibility for federal housing and welfare benefits would allow defendants who subsequently raise ineffective counsel claims, alleging their attorneys failed to advise them about these consequences, to meet *Strickland*’s performance prong. *See* discussion *supra* Part I.C.1 (explaining when a defendant may attack his guilty plea). The *Padilla* advisory has no bearing on *Strickland*’s prejudice prong, and defendants still need to show they have been prejudiced due to their counsel’s unprofessional errors in order to prevail. *Padilla*, 130 S. Ct. at 1487.

<sup>204</sup> Chin & Holmes, *supra* note 3, at 736–41.

a large number of already-obtained convictions and render them uncertain, as convicted offenders file motions for post-conviction relief.<sup>205</sup> The fear is that these motions would create a significant burden on an already overloaded judicial system.<sup>206</sup> However, a closer look at the doctrine of ineffective assistance of counsel can dispel these concerns. The *Strickland* prejudice prong serves an important floodgate-keeping function, and its importance cannot be overstated.<sup>207</sup> Keeping out potentially meritless claims, the prejudice inquiry is designed to distinguish “defendants who merely regret their pleas in hindsight . . . from defendants whose attorneys’ deficient advice skewed their plea decision at the time.”<sup>208</sup> Many defendants, particularly those who plead guilty to serious crimes with longer terms of imprisonment, most likely cannot “show that the knowledge or ignorance of a collateral consequence would have had any impact on their decision.”<sup>209</sup> This rationale would also apply in cases in which there is overwhelming evidence against the defendant; it would not be reasonable for defendants to subsequently claim they would have gone to trial had they known of a particular collateral consequence. Accordingly, many defendants will not be able to make a showing that “but for counsel’s unprofessional errors, the result of the proceeding would have been different”<sup>210</sup> and “that a rational defendant[s] in [their] position would not have [pled guilty] had [they] received competent advice.”<sup>211</sup>

In some ways, the *Padilla* advisory will increase litigation, but most likely, many—if not most—claims could be dismissed on summary judgment. Because *Strickland*’s performance prong requires a showing of prejudice, only a limited number of cases would actually go to trial for a determination of whether knowledge of a particular collateral consequence would have changed a defendant’s plea. Even if these limited cases increase the courts’ dockets, this is an important, and much-needed, step to address the wrongs related to the invisibility of collateral consequences and achieve justice for criminal defendants.

### *B. Undue Burden on Defense Attorneys*

Extending the *Padilla* advisory also raises concerns that the duty may impose undue burdens on defense attorneys and require them to become familiar with new areas of law. These concerns, however, overlook two important considerations. First, the law only asks that attorneys make a “reasonable effort” to explore potential consequences that could attach following a criminal conviction.<sup>212</sup> A standard of “reasonable effort” certainly does not require attorneys to become well-versed in areas of law

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<sup>205</sup> *Id.* at 736.

<sup>206</sup> *Id.*

<sup>207</sup> *Padilla*, 130 S.Ct. at 1484–85 (discussing the floodgate function of *Strickland*).

<sup>208</sup> Brief for the United States, *supra* note 75, at 7.

<sup>209</sup> Chin & Holmes, *supra* note 3, at 703.

<sup>210</sup> *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

<sup>211</sup> Brief for the United States, *supra* note 75, at 7.

<sup>212</sup> Chin & Holmes, *supra* note 3, at 703.

outside their expertise. “Representation is an art,”<sup>213</sup> and attorneys would only have a duty of “reasonable knowledge and investigation,”<sup>214</sup> nothing more and nothing less. Second, for many defendants, knowledge of collateral consequences will not make a difference as to their decision whether to plead guilty. Thus, holding attorneys to a “reasonable standard” merely means that they would need to consider collateral consequences and discuss them with their clients more carefully when the decision to plead guilty is a close one, and the balancing of costs and benefits of going to trial versus entering a plea is not clear-cut.

But perhaps most importantly, the *Padilla* advisory is not necessarily an undue burden at all. Instead, it is a step toward “a holistic approach” to representation that encompasses various underlying issues defendants face when dealing with the criminal justice system.<sup>215</sup> Already, some public defenders’ offices have shifted toward this holistic representation and broadened the range of legal services offered to indigent clients.<sup>216</sup> As a result, many of them also provide representation on non-criminal matters, such as housing and public benefits.<sup>217</sup> The holistic approach can also prevent future criminal involvement, as defendants—with the guidance of their attorneys—become more knowledgeable about their rights, obligations, and responsibilities under the law. Extending the *Padilla* advisory beyond the immigration context is an important step toward implementation of this holistic representation model.

#### CONCLUSION

*Padilla v. Kentucky* extended the Sixth Amendment right to effective assistance of counsel to include advice about deportation consequences of a criminal conviction.<sup>218</sup> The *Padilla* decision was the first time the Court suggested defense counsel may have a duty to discuss collateral consequences—issues wholly outside the control of criminal courts—as long as the issue is *sufficiently important* to the defendant.<sup>219</sup> The *Padilla* advisory, however, should not be limited to the immigration context. This advisory warning should apply to other collateral consequences that are (1) an “integral part” of punishment (2) objectively and reasonably important to a group of uniquely positioned defendants and (3) rooted in clear and unambiguous federal law. These prongs ensure that the rationale for this expansion is consistent with the reasoning underlying *Padilla v. Kentucky*. They would also screen out facially frivolous claims and limit additional burdens the *Padilla* advisory may impose on defense attorneys.

As the case study illustrated, loss of eligibility for housing benefits, cash assistance, and food stamps upon a criminal conviction are examples of collateral consequences

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<sup>213</sup> *Id.* at 711 (quoting *Strickland*, 466 U.S. at 693).

<sup>214</sup> *Id.* at 703.

<sup>215</sup> Pinard & Thompson, *supra* note 31, at 605–06 (explaining the “holistic approach”).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 606.

<sup>218</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

<sup>219</sup> *Id.* at 1480–81.

that meet the proposed standard.<sup>220</sup> Accordingly, the *Padilla* advisory should be extended to these collateral consequences, and low-income defendants should be advised about them prior to entering guilty pleas. Just as deportation is an “integral part” of the punishment for noncitizens, the loss of federal housing benefits, food stamps, and cash can be an “integral part” of the punishment for indigent citizen defendants who rely heavily on public assistance for food and shelter. Without stable and safe housing, returning offenders find themselves in unsafe environments that are not conducive to the development of stable and productive lives. Unable to obtain food, safe housing, and employment as they transition back into the community, the path to reintegration includes many difficulties for returning offenders similar to those faced by noncitizens deported to their “home” countries.<sup>221</sup>

Lastly, justice requires that a limited expansion of the *Padilla* advisory is adopted. Collateral sanctions act as secret sentences, and often impose harsher and more long-standing penalties than the formal criminal sentence.<sup>222</sup> Yet, no single actor in the criminal justice system is required to inform criminal defendants about these “invisible punishments.”<sup>223</sup> This shortcoming should be addressed, and a limited extension of the *Padilla* advisory can both be a meaningful and important step toward a “holistic model of representation” and help defense attorneys represent their clients’ interests more effectively.

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<sup>220</sup> See *supra* Part IV.

<sup>221</sup> See *supra* Part IV.C.1.

<sup>222</sup> See *supra* Part I.C.3.

<sup>223</sup> See *supra* note 109 and accompanying text.