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Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment

Yolanda Vazquez*

"The law and its institutions change as social conditions change. They must change if they are to preserve, much less advance, the political and social values from which they derive their purposes and their life. This is true of the most important of legal institutions, the profession of law. The profession, too, must change when conditions change in order to preserve and advance the social values that are its reasons for being."

– Cheatham[1]

"Well, if misadvice is ineffective but no advice is not, then I don't think we should have trainings."

– Public Defender Training Director

INTRODUCTION

A twenty-one year old college student walks into a criminal courtroom, charged with possession of thirty-one grams of marijuana. The defendant meets with an attorney who informs him that the government is offering a plea to the marijuana charge for time considered served, the two days the defendant had served before being released from custody. The defendant accepts the plea and walks out of the courtroom. Six months later, the defendant is put into immigration custody and found deportable based on his guilty plea. At the time of his plea, however, the defendant did not know that (1) he would be subject to deportation by pleading guilty to the charge[2] and (2) had he instead plead guilty to possession of thirty grams or less of marijuana, he would not have been subject to deportation.[3] The attorney

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1. Elliott E. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and the Organized Bar*, 12 UCLA L. REV. 438, 440 (1965).

2. Immigration and Nationality Act of 2008 § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

3. *Id.* ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State…, relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

neither informed him about the possibility of deportation, nor did the attorney negotiate a plea to reflect an amount of 30 grams of marijuana, only one gram lower, which would have prevented his deportation.[4] The defendant was a lawful permanent resident who had been living in the United States since the age of eighteen months; he did not speak, read, or write in the language of the country where he was born, and had no family outside of the United States.

Noncitizens across the country are being convicted in criminal courts without knowing the impact their criminal conviction will have on their immigration status, both in the present and in the future. In 2009 alone, approximately 128,000 noncitizens convicted of crimes were removed from the United States.[5] In addition to the defendants, their families are affected by removal proceedings. Between 1998 and 2007, more than 100,000 parents of United States citizen children were removed.[6] Since 1996, 1.6 million families have been separated by removal.[7]

Many jurisdictions have addressed what place, if any, immigration law has in the criminal courtroom.[8] Specifically, whether or not an attorney has a duty to advise his or her client about the immigration consequences of a criminal conviction. There is a jurisdictional split among federal district and state courts, and deep division on this issue persists nationwide. Among state and federal courts with decisions on the issue, there is currently a 27-5 split on whether defense counsel has a duty to advise noncitizen clients of the immigration consequences of a criminal conviction.[9] The vast majority of courts hold that an attorney has no duty to advise a client on the immigration consequences of a criminal conviction under the Sixth Amendment.[10] Three minority courts believe that there is an affirmative duty to

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4. *Id.*

5. *See* U.S. DEP'T OF HOMELAND SEC., IMMIGR. ENFORCEMENT ACTIONS: 2009 ANNUAL REPORT 4, tbl. 4 (Aug. 2010), *available at* http://www.ilw.com/immigrationdaily/news/2010,0819-dhs.pdf.

6. U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GENERAL, REMOVAL INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 1 (Jan. 2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-15_Jan09.pdf.

7. Michael E. Fix & Wendy Zimmerman, ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM, URBAN INST. 1 (1999), *available at* http://www.urban.org/UploadedPDF/409100.pdf.

8. *See* discussion *infra* Part II.A.-C.

9. *See* discussion *infra* Part II.A. and notes 10-12.

10. *See*, *e.g.*, United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000) ("Along with numerous other courts of appeals, we have held that deportation is only a *collateral* concomitant to criminal conviction. Counsel's failure to advise a defendant of a collateral consequence is a legally insufficient ground for a plea withdrawal.") (citation omitted); *see also* Santos-Sanchez v. United States, 548 F.3d 327, 334-35 (5th Cir. 2008) (deciding that (1) there was no duty to advise of negative immigration consequences and (2) merely stating that negative immigration consequences may arise from a conviction and recommending consultation with an attorney specializing in immigration did not amount to a misleading statement under the *Kwan* or *Couto* analysis); Creary v. Mukasey, 271 F. App'x 127, 128 (2d Cir. 2008) ("[A]n attorney's failure to inform a defendant of the immigration consequences of guilty plea does not constitute ineffective assistance of counsel, but that an attorney's affirmative misrepresentation…can constitute ineffective assistance [of counsel].") (citation omitted); United States v. Sanchez, 247 F. App'x 951, 951 (9th Cir. 2007) (holding that the district court's failure to advise defendant of immigration consequences of his plea did not render plea other than knowing and voluntary); Yong Wong Park v. United States, 222 F. App'x 82 (2d Cir. 2007) (holding that failure to advise of deportation consequences is not ineffective counsel); United States v. Jacquez, 191 F. App'x. 583, 584 (9th Cir. 2006) (rejecting the defendant's claim that his attorney's failure to explain immigration consequences led to an involuntary guilty plea); Resendiz v. Kovensky, 416 F.3d 952, 957 (9th Cir. 2005) (finding that despite the attorney providing erroneous advice on deportation consequences, the defendant

failed to show that this information would have changed his plea); Broomes v. Ashcroft, 358 F.3d 1251, 1257 (10th Cir. 2004) (holding that counsel was not ineffective in failing to advise petitioner of possibility of deportation as collateral consequence of pleading guilty); United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003) (stating that counsel's failure to advise of immigration consequences, without more, does not amount to ineffective assistance); Gumangan v. United States, 254 F.3d 701, 706 (8th Cir. 2001) (citing with approval to Fourth and Fifth Circuits' conclusion that failure to advise a defendant of the prospect of deportation does not constitute ineffective assistance of counsel); Russo v. United States, No. 97-2891, 1999 WL 164951, at *2 (2d Cir. Mar. 22, 1999) ("[C]ounsel cannot be found ineffective for the mere failure to inform a defendant of the collateral consequences of a plea, such as deportation."); United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993) (finding that an attorney's failure to inform client of possible deportation is not ineffective assistance of counsel; rather, the defendant must show that there was a serious deficiency in counseling and that such deficiency is prejudicial); Varela v. Kaiser, 976 F. 2d 1357, 1358 (10th Cir. 1992) (citing the stance taken by district courts on "the issue of failure of counsel to inform an accused of the likely deportation consequences arising out of a guilty plea have all held that deportation is a collateral consequence of the criminal proceeding and [failing] to advise does not amount to ineffective assistance of counsel"); United States v. Del Rosario, 902 F.2d 55, 58-59 (D.C. Cir. 1990) (holding that failure to inform him of likelihood of deportation, as collateral consequence of guilty plea, did not constitute representation below objective standard of reasonableness); Santos v. Kolb, 880 F.2d 941, 945 (7th Cir. 1989) (holding that the attorney's failure to tell the defendant about the immigration consequence of entering a guilty plea did not amount to being ineffective), *superseded by statute* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified at 8 U.S.C. § 1101 (2008)), *as recognized in,* Sasonov v. United States**,** 575 F. Supp. 2d 626, 633 (D.N.J. 2008) (trial counsel's failure to advise petitioner of immigration consequences of guilty plea did not amount to ineffective assistance of counsel); United States v. George, 869 F.2d 333 (7th Cir. 1989) (finding that failure to advise defendant that drug conviction might lead to deportation did not constitute an ineffective assistance of counsel); United States v. Yearwood, 863 F.2d 6, 7 (4th Cir. 1988) (holding that the trial attorney's failure to advise the defendant about the "collateral consequence of deportation mandated by his guilty plea" did not make him an ineffective attorney); United States v. Campbell, 778 F.2d 764 (11th Cir. 1985) (holding that "(1) Rule 11 did not require either defense counsel or court to advise alien defendant of potential deportation consequences of guilty plea; (2) failure to advise alien defendant of the deportation consequences did not require that defendant be permitted to withdraw her guilty plea; and (3) counsel was not ineffective for failing to inform defendant of deportation consequence."); United States v. Blackwell, No. 3:04-cr-00040, 2008 WL 4462000, at *9-11 (W.D. Va. Oct. 3, 2008) (stating that counsel was not unconstitutionally ineffective even if he or she failed to discuss the collateral implications of the conviction on defendant's immigration status); United States v. Astorga, No. CR S-99-0270 WBS GGH, 2008 WL 2446119, at *6-7 (E.D. Cal. June 12, 2008) (explaining that 9th Cir. case law places no affirmative duty on counsel to advise, but requires any advice to be properly rendered); Tacata v. United States, Civ. No. 07-00008 SOM/LEK, 2007 WL 1303018, at *6 (D. Haw. May 2, 2007) (finding attorney's failure to inform defendant of the immigration consequences was not ineffective); Chukwurah v. United States, 813 F. Supp. 161, 165 (E.D.N.Y. 1993) (finding that defense counsel's alleged failure to inform petitioner of possible immigration consequences of his plea is not sufficient basis for an ineffective assistance claim); Polanco v. United States, 803 F. Supp. 928 (S.D.N.Y 1992) (stating that assistance of counsel was not ineffective for failure to warn of possible deportation); Quin v. United States, 652 F. Supp. 454, 455 (D.P.R. 1987) (determining that the defendant's habeas corpus petition, which was based on the trial counsel's failure to advise of deportation consequences, was disturbing and frivolous since defense counsel has no duty to advise as to immigration consequences), *aff'd*, 836 F.2d 654 (1st Cir. 1987) (stating that failure to inform of deportation consequences was irrelevant because deportation is a collateral consequence); Gov't of Virgin Islands v. Pamphile, 604 F. Supp. 753, 756-57 (D.V.I. 1985) (stating "[w]e believe that the attorney's failure to inform Pamphile of the possibility of deportation does not cause Pamphile's guilty plea to be involuntary"); Tafoya v. State, 500 P.2d 247, 252 (Alaska 1987) (holding that trial court has no responsibility to delve into immigration consequences and counsel's failure to advise of immigration consequences does not constitute ineffective assistance); State v. Rosas, 904 P.2d 1245, 1247 (Ariz. Ct. App. 1995) (holding that defense counsel did not have duty to inform noncitizen defendants about potential collateral deportation proceedings and failure to provide such information did not constitute ineffective assistance of counsel); Major v. State, 814 So. 2d 424, 428 (Fla. 2002) (stating that defense counsel is under no obligation to advise defendant of collateral consequences of plea); People v. Huante, 571 N.E.2d 736, 741 (Ill. 1991) (concluding that the failure to advise of potential immigration consequences did not fall below an "objective standard of reasonableness" as established by *Strickland*); Commonwealth v. Fuartado, 170 S.W.3d 384, 386 (Ky. 2005) (holding that defense counsel's alleged

advise the client of immigration consequences under the Sixth Amendment.[11] Additionally, Indiana and Oregon have created an obligation to advise a defendant regarding immigration matters based upon provisions in its state constitution.[12]

With that said, however, there are circumstances under which these courts will find an ineffective assistance violation under the Sixth Amendment or the state constitution. The circumstances under which courts will uphold an ineffective assistance of counsel claim can be broken up into three categories.[13] First, some jurisdictions have held that the duty to advise rests upon whether or not the attorney knew or should have known that the client was a noncitizen.[14] Second, other courts have found a distinction between *non*advice and *mis*advice. These courts have held that while there is no duty to advise, if the attorney chooses to advise his or her client, and such advice is inaccurate, then the attorney may have violated the Sixth Amendment.[15] Finally, a few jurisdictions recognize that criminal defense attorneys,

failure to advise defendant of potential deportation consequences of his guilty plea was not cognizable as a claim for ineffective assistance of counsel); State v. Montalban, 810 So. 2d 1106, 1110 (La. 2002) (holding that plea was neither rendered involuntary by counsel's failure to advise of deportation consequences under collateral consequences doctrine nor was this ineffective assistance); State v. Zarate, 651 N.W.2d 215, 223 (Neb. 2002) (holding that counsel's failure to inform defendant of possibility of deportation does not render plea involuntary or unintelligent); Barajas v. State, 991 P.2d 474, 476 (Nev. 1999) ("The Supreme Court held that (1) failure of trial court to advise defendant of possible immigration consequences of guilty plea did not render plea involuntary, and (2) defense counsel's failure to advise defendant of possible immigration consequences of guilty plea did not rise to level of ineffective assistance of counsel."); Commonwealth v. Frometa, 555 A.2d 92, 93-4 (Pa. 1989) (holding that defendant's lack of knowledge of collateral consequences of guilty plea does not undermine validity of plea); Nikolaev v. Weber, 705 N.W.2d 72, 77 (S.D. 2005) (holding that defense counsel has no duty to advise defendant of collateral consequence of deportation); State v. McFadden, 884 P.2d 1303, 1305 (Utah Ct. App. 1994) (stating "[w]e follow the majority rule and hold that counsel's performance is not deficient by the mere failure to apprise a noncitizen defendant that entry of a guilty plea might subject defendant to deportation").

11. *See* People v. Pozo, 746 P.2d 523, 527 (Colo. 1987); State v. Paredez, 101 P.3d 799, 805 (N.M. 2004); State v. Creary, No. 82767, 2004 WL 351878, at *2 (Ohio Ct. App. Feb 26, 2004).

12. Williams v. State, 641 N.E.2d 44, 49 (Ind. App. 1994); Gonzalez v. State, 134 P.3d 955, 958-59 (Or. 2006).

13. *See* discussion *infra* Part II.A.-C. and notes 14-16.

14. *See*, *e.g.*, *Pozo*, 746 P.2d at 529 (failing to investigate potential deportation consequences of guilty pleas constitutes ineffective assistance of counsel if attorney had sufficient information to form reasonable belief that client was alien).

15. *See*, *e.g.*, United States v. Kwan, 407 F.3d. 1005, 1018 (9th Cir. 2005) (finding counsel's performance as objectively unreasonable under contemporary standards of attorney competence where counsel effectively misled his client and not just failed to inform him of the immigration consequences of the criminal conviction); United States v. Couto, 311 F.3d 179, 191 (2d Cir. 2002); Downs-Morgan v. United States, 765 F.2d 1534, 1541 (11th Cir. 1985); Riviere v. United States, No. 1:05-CV-0906, 2005 WL 2614860 (N.D.N.Y. Oct. 14, 2005); United States v. Shaw, No. CRIM.A. 99-525-01, Civ.A. 03-6759, 2004 WL 1858336, at *12 (E.D. Pa. Aug. 11, 2004); United States v. Corona-Maldonado, 46 F. Supp. 2d 1171, 1173-74 (D. Kan. 1999); Alguno v. State, 892 So. 2d 1200, 1201 (Fla. Dist. Ct. App. 2005); *see also* United States v. Mora-Gomez, 875 F. Supp. 1208, 1212 (E.D. Va. 1995) (stating, but not deciding, that counsel's affirmative misstatement of deportation consequences of plea may be ineffective assistance); Djioev v. State, No. A-9158, 2006 WL 361540, at *3 (Alaska Ct. App. Feb. 15, 2006) (reversing and remanding decision back to trial court for further reconsideration in light of federal case law stating that affirmative misrepresentation of potential for deportation may constitute ineffective assistance of counsel); People v. Soriano, 194 Cal. App. 3d. 1470, 1482 (Cal. Ct. App. 1987) (holding that counsel's advice was ineffective when she only gave the defendant general advice concerning a guilty plea, rather than targeted advice concerning federal immigration proceedings – specifically concerning possible deportation); Rubio v. State, 194 P.3d 1224, 1232 n.47 (Nev. 2008) (holding "the reasoning of the *Couto* and *Kwan* courts persuasive with respect to the affirmative misrepresentation exception to the general rule regarding collateral consequences. We now join those jurisdictions that have adopted or recognized the affirmative

at all times, have an affirmative duty to advise noncitizen clients of the immigration consequences of a criminal conviction.[16]

As the battle continues over where and how immigration law fits into the criminal courtroom, criminal defense attorneys are struggling with whether to extend immigration advice to their clients beyond what the courts have required. Will criminal defense attorneys champion their clients' interests or allow state and federal court decisions to guide their representation and, as a result, effectively deny noncitizen clients the assistance of legal counsel regarding the immigration consequences of their criminal conviction?

The questions of whether criminal defense attorneys hold a duty to advise on such matters in the criminal courtroom is of growing importance amongst courts, advocates, and scholars.[17] Scholars have addressed this issue within the scope of the

misrepresentation exception to the collateral consequence rule and hold that affirmative misadvice regarding immigration consequences may constitute ineffective assistance of counsel and support withdrawal of a guilty plea as involuntarily entered."); State v. Garcia, 727 A.2d 97 (N.J. App. Div. 1999) (holding that a guilty plea may be vacated due to affirmative misadvice regarding immigration consequences but not due to failure to advise); Commonwealth v. Tahmas, Nos. 105254, 105255, 2005 WL 2249587, at *4 (Va. Cir. Ct. July 26, 2005) (holding that counsel's affirmative misadvise is ineffective assistance of counsel); *cf. Sasonov*, 575 F. Supp. 2d at 636 (determining that the trial counsel's affirmative misrepresentation to the defendant was "objectively unreasonable"); United States v. Minhas, Nos. 4:94cr4046-WS, 4:06cv227-WS, 2008 WL 239079, at *11-13 (N.D. Fla. Jan. 28, 2008) (assuming that misadvising client about deportation consequences amounts to ineffective assistance of counsel, but finding that defendant failed to meet prejudice prong of *Strickland* test); United States v. Khalaf, 116 F. Supp. 2d 210, 214-15 (D. Mass. 1999) (holding that counsel's erroneous advice that Judicial Recommendation Against Deportation (JRAD) would protect petitioner from deportation, upon which petitioner substantially relied in deciding to plead guilty, constituted ineffective assistance); People v. Correa, 485 N.E.2d 307, 312 (Ill. 1985) (holding that defense counsel's advice that defendant would not be deported was "erroneous and misleading and…not within the range of competence required of counsel in such situations," rendering guilty plea invalid); State v. Rojas-Martinez, 125 P.3d 930, 935-37 (Utah 2005) (accepting, on first impression, *Downs-Morgan* rule that affirmatively misadvising client amounts to ineffective assistance, but holding that counsel's advice that conviction for sexual battery "might or might not" lead to deportation, was not an affirmative misrepresentation).

16. *Williams*, 641 N.E.2d at 49 (finding that failure to inform a noncitizen defendant of the immigration consequences of a criminal conviction is ineffective assistance of counsel); *Paredez*, 101 P.3d at 805 (holding that an attorney is obligated to both find out the immigration status of their client and provide specific immigration consequences of pleading guilty); Lyons v. Pearce, 694 P.2d 969, 977 (Or. 1985) (holding that defense counsel is required to inform their noncitizen client that their conviction "may" result in deportation).

17. Almost all federal circuits have held deportation to be a collateral consequence of pleading guilty, so that trial courts are not required to inform the defendant of the immigration consequences of his or her plea. *E.g.*, El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir. 2002); United States v. Amador-Leal, 276 F.3d 511, 517 (9th Cir. 2002); *Gonzalez*, 202 F.3d at 27-28; United States v. Osiemi, 980 F.2d 344, 349 (5th Cir. 1993); United States v. Montoya, 891 F.2d 1273, 1292-93 (7th Cir. 1989); United States v. Romero-Vilca, 850 F.2d 177, 179 (3d Cir. 1988); *Campbell*, 778 F.2d at 767; United States v. Russell, 686 F.2d 35, 39 (D.C. Ct. App); Michel v. United States, 507 F.2d 461, 464-66 (2d Cir. 1974); Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973). The remaining federal circuits that have not directly addressed the issue have signaled that they would reach the same holding if they received a case involving similar facts. *E.g.*, *Broomes*, 358 F.3d at 1251, 1257 n.4 (citing with approval cases from sister circuits holding that trial court is under no duty to inform defendants of immigration consequences of guilty pleas); Kandiel v. United States, 964 F.2d 794, 796 (8th Cir. 1992) (holding that immigration consequences remain collateral to a criminal conviction and citing circuit cases with this holding with approval).

State courts have debated whether failure to advise on the part of the trial court (where mandated by statute) or by defense counsel requires a plea to be vacated under theories of involuntariness or ineffective assistance of counsel claims. *See* Oyekoya v. State, 558 So. 2d 990, 990 (Al. Crim. App. 1990) (holding counsel's failure to advise defendant of collateral consequences, such as deportation, is not

right to counsel under the United States Constitution's Sixth Amendment.[18] This

ineffective assistance of counsel); *Tafoya*, 500 P.2d at 247 (finding trial court has no responsibility to delve into immigration consequences and counsel's failure to advise of immigration consequences does not constitute ineffective assistance); *Rosas*, 904 P.2d at 1245 (finding defense counsel did not have duty to inform noncitizen defendants about potential collateral deportation proceedings and failure to provide such information did not constitute ineffective assistance); *In re* Resendiz, 19 P.3d 1171, 1183 (Cal. 2001) (finding that the collateral consequence doctrine does not per se bar an ineffective claim for failure to advise as to the immigration consequences of a conviction); Slytman v. United States, 804 A.2d 1113, 1118 (D.C. 2002) (holding trial court's warning to noncitizen regarding immigration consequences, which omitted mention of exclusion and denial of naturalization, did not substantially comply with statute and defendant was permitted to withdraw plea); Daramy v. United States, 750 A.2d 552, 557 (D.C. 2000) (finding additional statements by judge beyond warning required by statute about potential impact of guilty plea on immigration were so misleading as to require reversal); State v. Sorino, 118 P.3d 645, 651 (Haw. 2005) (requiring verbatim recitation of immigration consequences, as outlined in HAW. R. PENAL P. 11(c)(5), before acceptance of defendant's plea agreement); Mott v. State, 407 N.W.2d 581, 583 (Iowa 1987) (concluding that the failure to advise defendant of even serious collateral consequences is not ineffective assistance; nevertheless, affirmative misadvice regarding the consequences of plea may render plea invalid); State v. Muriithi, 46 P.3d 1145, 1155 (Kan. 2002) (concluding that the trial court has no duty to advise the defendant of the immigration consequences of a plea); Aldus v. State, 748 A.2d 463, 468 (Me. 2000) (declining to determine if deportation falls under collateral consequences doctrine; however, blatant failure to answer client's question constitutes ineffective assistance); Commonwealth v. Villalobos, 777 N.E.2d 116, 122 (Mass. 2002) (holding that judges are permitted, but not required, to expand on warnings of immigration consequences specified by statute); *Garcia*, 727 A.2d at 97 (holding that guilty plea may be vacated due to affirmative misadvice regarding immigration consequences, but not due to failure to advise); People v. McDonald, 745 N.Y.S.2d 276, 282 (N.Y. App. Div. 2002), *aff'd* 802 N.E.2d 131 (N.Y. 2003) (explaining that while failure of counsel to advise of potential immigration consequences is not ineffective assistance of counsel, affirmative misadvice may be sufficient to satisfy the prejudice prong under *Strickland*); State v. Dalman, 520 N.W.2d 860, 860 (N.D. 1994) (holding defendants need not be informed of all collateral consequences of guilty pleas and counsel has no duty to advise); *Creary*, 2004 WL 351878, at *1 (finding that the adoption of OHIO REV. CODE ANN. § 2943.031 (LEXISNEXIS 2008) does not relieve defendant's lawyer of any duty to inform client of deportation consequences); State v. Collins, 626 P.2d 929, 930 (Or. Ct. App. 1981) (failure to advise defendant that conviction could result in deportation is harmless error where defendant was represented by counsel, entered plea as result of plea agreement, did not raise issue at trial, or appears in record of case not to be a noncitizen); Machado v. State, 839 A.2d 509, 512-13 (R.I. 2003) (finding the court's failure to inform defendant pursuant to R.I. GEN. LAWS § 12-12-22 (2008) entitles defendant to have plea vacated); Nikolaev, 705 N.W.2d at 72 (holding neither trial court nor defense counsel has a duty to advise defendant of collateral consequence of deportation in order for plea to be voluntary and informed); Harris v. State, 887 S.W.2d 482, 485 (Tex. Ct. App. 1994) (concluding that defendant, counsel, and trial judge all substantially complied with statutory requirement that defendant be informed that deportation and loss of citizenship were possible consequences of guilty plea by completing waiver form created under TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (Vernon 1989) (effective Sept. 1, 2007)); State v. Littlefair, 51 P.3d 116, 124 (Wash. 2002) (finding WASH. REV. CODE § 10.40.200 gives defendant statutory right to be advised of deportation consequences of plea).

See also Attila Bogdan, *Guilty Pleas by Non-Citizens in Illinois: Immigration Consequences Reconsidered*, 53 DEPAUL L. REV. 19 (2003); John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should this Be Grounds to Withdraw a Guilty Plea?*, 36 U. MICH. J.L. REFORM 691 (2003); Guy Cohen, Note, *Weakness of the Collateral Consequences Doctrine: Counsel's Duty to Inform Aliens of the Deportation Consequences of Guilty Pleas*, 16 FORDHAM INT'L L.J. 1094 (1993); Lea McDermid, Comment, *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CAL. L. REV. 741 (2001).

18. For a discussion of the collateral consequences doctrine's impact on the Sixth Amendment right to counsel, *see* Gabriel J. Chin & Richard W. Holmes Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 697 (2002) (arguing that the "'collateral consequences' rule is inconsistent with the Supreme Court's decision in *Strickland v. Washington*, which held that ineffective assistance of counsel consists of performance below a minimum standard of competence and resulting prejudice."); John F. Fatino, *Ineffective Assistance of Counsel: Identifying the Standards and Litigating the Issues*, 49 S.D. L. REV. 31, 31 (2003) (discussing the standards in effective assistance of counsel claims); National Lawyers Guild, *Motion to Withdraw Plea of Guilty – Ineffective*

article advances that discussion by focusing on the tensions arising between the prevailing judicial interpretations of the Sixth Amendment and the ethical duties defense counsel owe to their clients. I argue that: (1) attorneys, legislatures, and bar associations must recognize that a criminal attorney's ethical and moral duty to his client already requires advising on the immigration consequences of a criminal conviction; and, (2) courts will recognize that advising a noncitizen defendant of the immigration consequences of a criminal conviction by defense counsel is a standard "norm" of practice under a Sixth Amendment analysis if advocates and their organizations recognize this duty under their ethical and moral obligations.

Part I of this article examines the intersection between criminal and immigration law. It shows the historical involvement of immigration law in the criminal court system as well as the increased influence the criminal justice system plays in the immigration system. It demonstrates that immigration and criminal law have been historically intertwined and their effects on each other increasingly impact immigrants and their families. Part II of the article discusses the problem caused by the courts' and defense attorneys' refusal to recognize a duty beyond what the Sixth Amendment requires when advising, or not advising, noncitizen clients of the immigration consequences of a criminal conviction. Part III of this article attempts to refocus the discussion by looking to the ethical rules that confer a duty on the attorney to advise on immigration matters. This part discusses the increasing role that ethical rules are playing in assessing Sixth Amendment violations, thereby, solidifying the need for reinforcement of such standards in light of their increased use by courts – including the Supreme Court in recent cases such as *Williams v. Taylor*, *Wiggins v. Smith*, and *Rompilla v. Beard*[19] – when assessing a Sixth Amendment violation under *Strickland*.

In sum, I argue that regardless of the current Sixth Amendment holdings, an attorney's ethical and moral duty is to advise his client about the immigration consequences of a criminal conviction. Once consensus is established on this basis, courts will be forced to recognize this as a prevailing "norm" and a larger growing recognition under the Sixth Amendment will follow.

I. INTERSECTION OF IMMIGRATION AND CRIMINAL LAW

One of the strongest and most successful arguments against creating a duty to advise noncitizen defendants about the immigration consequences of a criminal conviction is the "collateral consequences" doctrine.[20] Under this doctrine, courts are obligated to inform a defendant of only the "direct" consequences of a plea, not any consequences that the court deems to be "indirect" or "collateral."[21] Direct

Assistance of Counsel – State Courts, Immigr. Law & Crimes Database §4:9 (June 2010) (stating the differences between the collateral consequences doctrine and the right to effective counsel); Jamie Ostroff, Comment, *In re Resendiz,* 31 SW. U. L. REV. 367, 371 (2002) (explaining the court's distinction in *In re Resendiz* between the collateral consequences doctrine and right to effective assistance of counsel).

19. Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005).

20. *See* Chin & Holmes, *supra* note 18 (discussing the collateral consequences doctrine's impact on the right to counsel under the Sixth Amendment); L. Griffin Tyndall, Note, "*You Won't Be Deported…Trust Me!" Ineffective Assistance of Counsel and the Duty to Advise Alien Defendants of the Immigration Consequences of Guilty Pleas*, 19 AM. J. TRIAL ADVOC. 653, 665 (1996) (discussing the collateral consequences doctrine in cases where aliens raise claims of ineffective assistance of counsel).

21. Brady v. United States, 397 U.S. 742, 758 (1970) (holding that just because defendant did

consequences are defined as those that have a definite, immediate, and largely automatic effect on the defendant.[22] The United States Supreme Court declared that the immigration consequence of deportation was not a form of criminal punishment, but rather a civil remedy aimed at excluding noncitizens from the country.[23] Therefore, the majority of lower federal and state courts have found that deportation is a collateral consequence and, therefore, attorneys are not obligated to advise on it.[24]

Yet, problems with the above-mentioned determination arise. First, the Supreme Court established the collateral consequences doctrine as an answer to the question of what duty the court has to criminal defendants.[25] The Supreme Court has never applied this doctrine to Sixth Amendment violations.[26] In fact, the analysis used in determining a Sixth Amendment violation has been the *Strickland v. Washington* two-prong test, not the collateral consequence doctrine.[27] The Court has always rejected a bright line rule that eliminates case-by-case analysis under *Strickland*, such as that the collateral consequence doctrine creates, and has frequently reiterated its rejection of such a rule.[28]

Next, even if the collateral consequences doctrine will be applied in certain circumstances, immigration consequences are not "indirect" to a criminal conviction and, therefore, should not fall under that category. Although the majority of courts have found that immigration actions result from a separate proceeding in a separate court and held that criminal courts have no jurisdiction over such proceedings, strong arguments exist to contradict this long held belief.[29] One argument is that immigration is not a separate and distinct matter, outside the jurisdiction of the criminal court system.[30] Despite the refusal of most courts to recognize it, the existence of immigration law in the criminal court is well established as well as their intertwined histories and increasing ties.[31] One perfect example of this relationship is the role that criminal court judges have played and continue to play in the removal

not properly assess every factor relevant to his case is not reason enough to vacate plea, since defendant understood the direct consequences of his conviction).

22. *Cuthrell*, 475 F.2d at 1366.

23. Immigration and Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish.…"); Fong Yue Ting v. United States, 149 US. 698, 730 (1893) ("[An] order of deportation is not a punishment for a crime."); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1650 (1992). However, several courts throughout history have differed with the finding that immigration is not punishment. For a more detailed analysis, *see* Stephen H. Legomsky, *The Alien Criminal Defendant*, 14 SAN DIEGO L. REV. 105, 121-27 (1977); Stephen H. Legomsky, *Deportation of an Alien for a Marijuana Conviction Can Constitute Cruel and Unusual Punishment*, 13 SAN DIEGO L. REV. 454, 456-64 (1976).

24. *E.g., Banda*, 1 F.3d at 356 ("The courts [addressing] the question… have uniformly held that deportation is [] collateral [to] the criminal process…We are not aware of any court [holding] the contrary. Indeed, this conclusion squares with the Supreme Court's observation that the accused must be 'fully aware of the *direct* consequences' of a guilty plea." (quoting *Brady*, 397 U.S. at 755).

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

26. *In re Resendiz*, 19 P.3d. at 1180-81.

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

28. Chin & Holmes, *supra* note 18, at 711; Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000).

29. *E.g.*, Francis, *supra* note 17, at 710-11 (emphasis added) (noting the United States Supreme Court's declaration that because deportation is handled in a civil proceeding, it is separate from criminal proceedings).

30. *See* discussion *infra* Part I.A.-B.

31. *See infra* notes 35 and 50 along with accompanying text.

of noncitizens.[32] Additionally, when factors such as immigration status are used to influence the strategies of prosecutors in prosecuting cases, in negotiating pleas, in determining bail, and in influencing charges that will be imposed, the ties that bind immigration law and the criminal system are clearly illustrated.[33] Another strong argument against their categorization as a collateral consequence is the "definite immediate, or largely automatic" effect criminal convictions, especially aggravated felony convictions, have on a noncitizen defendant in light of the dramatic changes to immigration law that have taken place in the last twenty years.[34] As discussed below, immigration law in the criminal courtroom has almost always existed and continues to exist to this day.

A. History of Criminal Court Involvement with Immigration Law

1. Judicial Recommendation Against Deportation Abolished

For seventy-three years, criminal courts had the ability to protect a defendant from removal. Criminal court judges would sign a Judicial Recommendation Against Deportation (JRAD) and neither the Attorney General nor Immigration Court had the power to overturn that decision to prevent the deportation of the immigrant. This authority was conferred on the judges with the passage of the Immigration Act of 1917:

> That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence, makes a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this act.[35]

The rationale for the JRAD system was that the criminal court and its players had the best ability to assess whether the defendant should be removed based upon his criminal charges or conviction.[36] Eligibility for JRAD hinged on the defendant's ties to the community, as well as his family situation, criminal record, and evidence of rehabilitation.[37] Because the criminal court judge spent more time on the criminal case and was more familiar with all of the circumstances of the case,

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32. *Id.*

33. ARIZ. CONST. art. 2, § 22(A)(4) (imposing no bail for defendants accused of a "serious felony offense if defendant has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge."); HAW. REV. STAT. § 802E-1 (1988) (stating that "the court in such cases shall grant the defendant a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware of the possibility of deportation"); U.S. ATTY'S MAN. § 9-28.1000(A) (stating that "prosecutors may consider the collateral consequences" in determining "whether to charge" and "how to resolve" the case); NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS (2d ed. 1991), Standard 43.6(1) (stating that "undue hardship to the accused" can be a basis not to charge or to offer or accept a particular plea).

34. *See* McDermid, *supra* note 17, at 762; Cuthrell, 475 F.2d at 1366 (4th Cir. 1973).

35. Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889-90 (codified in 8 U.S.C. § 1251(b) (1994 ed.) (transferred to § 1227 (2006))).

36. 53 CONG REC. 5171 (1916).

37. For a description of the history of JRADs, *see* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1145 (2002).

the criminal court judge was seen as more knowledgeable about these factors than the immigration court judge. Therefore, it was both logical and efficient for the criminal court judge to determine whether an immigrant should be relieved from deportation for a criminal conviction.

The Congressional Record of the 1917 Immigration Act provides some insight into the legislative intent behind JRAD.[38] During the debate, legislative representatives expressed their desire for criminal court judges to be provided with a real opportunity to determine whether the defendants before them should be deported.[39] Congress' goal was to help the defendant avoid deportation by educating judges on the possibility of providing the defendant with relief from deportation under JRAD, as permitted under the law at the time.[40] Legislators also considered the length of time that a defendant could request a JRAD after sentencing.[41] Their discussion spoke to the importance of JRADs and their struggle to make JRADs available to defendants is obviously in the record.[42] The representatives' main concern seemed to be the lack of existing knowledge and opportunity to seek a JRAD, never did the discussion discuss its abolishment.[43] In this history, it is evident that Congress was aware of the detrimental effect that a criminal conviction had on a noncitizen's life and wanted the noncitizen to be given the opportunity to stay in the country. The argument that immigration law was a separate and distinct matter, therefore placing it outside the purview of the criminal court, was never brought into the discussion.

As a further illustration of the keen awareness Congress held of the ramifications of criminal convictions on noncitizens and their support for its prevention, one only needs to be reminded of the fact that JRADs were proposed in 1917, forty-three years before the right to counsel in state criminal cases was given to defendants.[44]

It was not until 1990, 74 years after its enactment, that JRADs were abolished and the criminal courts lost the ability to prevent deportation of a noncitizen defendant who might otherwise have been worthy of reprieve.[45] Very little is known about why JRADs were abolished, however the reason can be inferred from the political climate of the times. By the late 1900s, "illegal" immigration was a top political issue.[46] Scholars have pointed out that from the early 1990s to the

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38. 53 CONG REC. at 5169-72.

39. *Id.*

40. *See*, *e.g.*, *id.* at 5170 (statement of Rep. Bennett) ("A judge sentencing a man for a felony may not know of the existence of this Federal Statute. A man might come around in 48 hours afterwards and say, 'This man that you have sentenced to two years in the penitentiary for felony will at the expiration of that time be deported' and the judge will say, 'That is too bad; that ought not to be.'").

41. *See*, *e.g.*, *id.* (statement of Rep. Sabbath) ("…that he will pronounce the sentence, and the moment he is through with it he can make his recommendation or at any time thereafter.").

42. *See*, *e.g.*, *id.* at 5171 (statement of Rep. Powers) ("…there is nothing in the amendment ….which would require both the Commonwealth and the defendant to be represented at the time application was made to the judge for the purpose of securing his recommendation that the man should not be deported.").

43. *See id.* at 5170-72.

44. *See* Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963) (holding that the Sixth Amendment's guarantee of counsel in criminal cases is applicable to states via Fourteenth Amendment).

45. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050 (codified in 8 U.S.C. § 1251(b) (1994 ed.) (transferred to § 1227 (2006))).

46. For a detailed analysis of the rise of anti-immigrant attitudes in America throughout the 1990s, *see* Evelyn Crystal Lopez, Low-Intensity Conflict Doctrine Applied: A Case Study of Chandler

present day, criminal and immigration investigations "increasingly are being used in mutually reinforcing ways… the government has relied on immigration enforcement tools as a pretext for investigative techniques and detentions that would be suspect under the criminal rules."[47] Therefore, due to the increased impact of criminal law on immigration law and anti-immigrant attitudes, criminal courts were stripped of their main tool for preventing deportation.[48]

2. *Federal Criminal Courts' Ability to Deport Noncitizens in Criminal Court Proceedings*

Although JRADs were abolished in 1990, criminal court judges were not severed from the determination of an immigrant defendant's removal. Reflecting the attitudes of the political climate, the perception that both legal and "illegal" immigrants were a drain on society and somehow served as a catalyst to increase the occurrence of crimes,[49] Congress passed the Immigration and Nationality Technical Corrections Act of 1994 (INTCA). This act gave federal criminal court judges the power to *order* deportation during the sentencing phase of a federal criminal proceeding.[50] Thereby, Congress gave criminal courts a continuing and direct involvement in deportation. The purpose of INTCA was to establish procedures for expediting the deportation of criminal aliens, and it included provisions granting federal district courts authority to issue judicial orders of deportation at the time of sentencing.[51] Federal criminal court judges continue to have this authority to order deportation of a noncitizen defendant during a criminal court proceeding, thereby bypassing immigration court and expediting the removal of the noncitizen defendant from the United States.[52]

3. *Creation of Criminal Court Admonishments to Advise Defendants of the Immigration Consequences of Their Conviction at Time of Plea*

Under the Federal Rule of Criminal Procedure 11 and many states' Rule of

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Arizona (May 23, 2004) (B.A. honors thesis, Stanford University), *available at* http://publicpolicy.stanford.edu/group/siepr/cgi-bin/pubpol/?q=system/files/shared/documents/Lopez.pdf. Lopez traces the proliferation of policies and the vast expansion of Immigration and Naturalization's (INA) budget and range of enforcement. Lopez notes that "[m]ost of the money, technology, and human resources went into operations targeting areas with high numbers of unauthorized crossings." *Id.* at 2. Lopez continues to explain that "[t]hese government sanctioned operations include 'Operation Hold the Line' (September 1993) in Greater El Paso, Texas; 'Operation Gatekeeper' (October 1994), south San Diego, California, and 'Operation Rio Grande' (August 1997) in Brownsville, Texas." *Id.*

47. *See* Taylor & Wright, *supra* note 37, at 1132.

48. McDermid, *supra* note 17, at 759.

49. Lopez, *supra* note 46, at 15-16.

50. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, §224, 108 Stat. 4305, 4322-24 (codified as amended at 8 U.S.C. § 1252a (1994 ed.) (transferred to § 1228(c) (1996))) [hereinafter INTCA] ("Notwithstanding any other provision of this Act, a United States district court shall have jurisdiction to enter a judicial order of deportation at the time of sentencing against an alien whose criminal conviction causes such alien to be deportable under section 241(a)(2)(A), if such an order has been requested by the United States Attorney with the concurrence of the Commissioner and if the court chooses to exercise such jurisdiction.")

51. H.R. Res. 783, 103d Cong. (1994) (legislative history of INTCA establishing procedures for expediting deportation of criminal aliens including provisions granting federal district courts authority to issue judicial orders of deportation at time of sentencing).

52. *See* INTCA, *supra* note 50.

Criminal Procedure 11 or statutes, courts are *required* to admonish a defendant at the time of the plea to ensure that the plea is both knowing and voluntary.[53] Historically, the Court has limited the scope of this admonishment to information to information determined to be a "direct consequence[]" of the plea.[54] Therefore, immigration implications would not be included in the admonishment since they have been seen as "indirect" and, therefore, collateral consequences.[55]

Despite, the Court's distinction, many state legislatures have added provisions in their Rule 11 or enacted specific statutes requiring courts to admonish defendants that their plea may have adverse effects on their immigration status if they are not noncitizens.[56] Two states, Colorado and Indiana, impose this duty by case law.[57] In fact, many state-required admonishments go further and require the courts to advise that their plea may have adverse effects on, not only their immigration status, but their ability to naturalize.[58] Currently, thirty states, the District of Columbia, Puerto Rico, and the United States military require such admonishments.[59]

Although legislative history is scant on the legislature's intent when enacting such statutes, the state legislative histories that do exist reflect the overwhelming desire to inform noncitizen defendants of the potential immigration consequences of their criminal conviction so that defendants will be able to make an informed decision about their plea while they still have an opportunity to prevent deportation. For example, the legislative history of the enactment of Washington's admonishment provision reads as follows:

> The legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with

53. FED. R. CRIM. P. 11; *Brady*, 397 U.S. at 748 (1970); *see infra* notes 56-57.

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

55. *E.g.*, *Banda*, 1 F.3d at 356.

56. CAL. PEN. CODE § 1016.5 (West 2008); CONN. GEN. STAT. § 54-1j (2001); D.C. CODE § 16-713 (2001); GA. CODE. ANN. § 17-7-93 (1997); HAW. REV. STAT. § 802e-2 (1993); 725 ILL. COMP. STAT. 5/113-8 (2004); MASS. GEN. LAWS ch. 278, § 29D (2004); MONT. CODE ANN. § 46-12-210 (1997); NEB. REV. STAT. § 29-1819.02 (2002); N.Y. CRIM. PROC. § 220.50(7) (McKinney 2009); N.C. GEN. STAT. § 15a-1022 (1999); OHIO REV. CODE ANN. § 2943.031 (West 2003); OR. REV. STAT. § 135.385 (1997); R.I. GEN. LAWS § 12-12-22 (2000); TEX. CODE CRIM. PROC. ANN. art. 26.13 (2003); VT. STAT. ANN. tit. 13, § 6565(c) (2005); WASH. REV. CODE § 10.40.200 (1990); WIS. STAT. § 971.08 (1993-94); ALASKA R. CRIM. P. 11(c)(3)(C); ARIZ. R. CRIM. P. 17.2(F); FLA. R. CRIM. P. 3.172 (2008); IDAHO CRIM. R. 11(d)(1) (2007); IOWA CT. R. CRIM. 2.8(2)(b)(3); ME. R. CRIM. P. 11 (H); MD. R. CRIM. P. 4-242(e); MA. R. CRIM. P. 12(c)(3)(C); MINN. R. CRIM. P. 15.01, 15.02 (2008); N.M. R. CRIM. P. 5-303(F)(5); P.R. RULES CRIM. P. 70; *see also* U.S. Dist. Ct. for the Dist. of Colo., Local Rules § 3, App. K, *available at* http://www.cod.uscourts.gov/Documents/LocalRules/LR_App_K.pdf (form guilty plea notification requiring acknowledgement of possible deportation); Ky. Plea Form AOC-491, at 2 ¶ 10 (Ver. 1.01, Rev. 2-03), *available at* http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf; NJ Jud. Plea Form, N.J. Dir. 14-08, at 3 ¶ 17 (promulgated pursuant to N.J. R. CRIM. P. 3-9), *available at* http://www.judiciary.state.nj.us/ forms/10079_main_plea_form.pdf; PA. R. CRIM. P. 590 Plea Form, Question 30 (advice of deportation).

57. *Pozo*, 746 P.2d. at 523; Segura v. State, 749 N.E.2d 496 (Ind. 2001).

58. *See*, *e.g.*, *Slytman*, 804 A.2d at 1116-17 (finding trial court's warning to noncitizen regarding immigration consequences, which omitted mention of exclusion and denial of naturalization, did not substantially comply with statute and defendant was permitted to withdraw plea).

59. DEP'T OF THE ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK FOR TRIAL OF ENEMY PRISONERS OF WAR: ACCEPTANCE OF GUILTY PLEA, ch. 2, § II, 2-2-8 (2010); *see also* statutes cited *supra* note 56.

> an offense punishable as a crime under state law, a plea of guilty is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea.[60]

As illustrated by the language above, legislative intent reflects three issues: (1) the legislature's acknowledgement that criminal convictions have a severe impact on a noncitizen defendant's immigration status; (2) their acknowledgment that defendants are often unaware of the consequences of their plea; and (3) their desire to create a mechanism by which noncitizen defendants will be informed of the immigration consequences of their criminal conviction during criminal court proceedings. As is illustrated in the increasing number such enactments through the years, this issue is gaining an increasing amount of attention. Legislatures, along with advocates and policy makers, are aware that immigration consequences are not only critical to the noncitizen defendant but many times more important than the criminal sentence.

These legislative additions reflect the growing movement to maneuver past the courts' firmly established refusal to require advisement of immigration consequences during the criminal court proceeding, further reflecting the view that advice during the criminal proceeding is crucial. Therefore, it is not surprising that admonishment provisions continue to be enacted across the United States despite court opinions holding them to be collateral.

B. History of Criminal Convictions Affecting Immigration Status

In addition to the historical and current presence of immigration law in the criminal court system, criminal law is playing an increasing role in the immigration court system in two ways: 1) the number of crimes that qualify as a removable offense has significantly increased; and 2) many forms of relief that were previously available have been abolished for noncitizens convicted of crimes.[61] Unfortunately, these changes have done two things: (1) increased the number of noncitizens eligible for removal; and (2) increased the perception that immigrants are criminals, based on an increased pool of removable individuals. Since criminal court proceedings may be the only chance to prevent removal, receiving information on the immigration consequences at the criminal court stage becomes crucial.[62]

1. Prior to the Anti-Drug Abuse Act of 1988

Before the late 1980's, immigration enforcement officials had broad

60. WASH. REV. CODE § 10.40.200(1) (1990).

61. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms,* 64 WASH. & LEE L. REV. 469, 471-72 (2007).

62. *See* Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 382-83 (2006).

discretion to either deport or admit noncitizens convicted of crimes.[63] The first federal statutes limiting immigration were enacted in 1875 and 1882, and prohibited the entry of any "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge."[64] At the time, the only criminals excluded were those who were found guilty of "felonious crimes other than political or growing out of or as the result of such political offenses or whose sentence has been remitted on condition of their emigration."[65] The Immigration Act of 1917 provided for the removal of certain aliens from the United States, including those who had committed crimes "involving moral turpitude."[66] However, under this framework, relief was still available to those convicted of these crimes. For example, the Attorney General, during this time, had discretion to issue a waiver of deportation under § 212(c) of the Immigration and Nationality Act.[67] It is estimated that between 1989 and 1995, more than 10,000 noncitizen defendants received relief under this provision.[68] Other forms of relief, such as JRADs, asylum, and suspension of deportation, were also available to noncitizens convicted of a crime.[69]

2. *The Anti-Drug Abuse Act of 1988 and Beyond*

In the late 1980's, the climate towards immigrants began to change. This change was reflected in the various immigration acts enacted from 1988 to the present. In 1988, Congress passed the Anti-Drug Abuse Act (ADAA).[70] The ADAA was the first of a series of acts that seriously affected the immigration status of individuals convicted of crimes. For example, the category of "aggravated felonies" was first seen in the ADAA.[71] Under the ADAA, the definition of an "aggravated felony" included three crimes: murder, drug trafficking, and illegal trafficking in firearms or explosive devices.[72] Although the ADAA created this new category, there was no limit to the discretionary relief available for those noncitizens convicted of such crimes.[73] This change, however, was the beginning of the end.

63. Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 294-96 (2001).

64. Immigration Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214 (repealed 1974); Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974).

65. Act of Mar. 3, 1875 § 5.

66. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 873, 875-76 (repealed 1996).

67. *St. Cyr*, 533 U.S. at 294-95.

68. *Id.* at 295-96.

69. *See* Brian N. Hayes, Comment, *Matter of A-A: The Board of Immigration Appeals' Statutory Misinterpretation Denies Discretionary Relief to Aggravated Felons*, 34 SANTA CLARA L. REV. 247, 256-57 (summarizing the reduction in the availability of procedural relief with the enactment of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (current version at 8 U.S.C. § 1101 (1991)), including shortening the period during which an aggravated felon may petition a for review of a final deportation order thirty days, § 502(a); eliminating presidential or gubernatorial pardon of deportation for aggravated felons, § 506(a); presuming that any aggravated felon lacked "good moral character," and was thus precluded from immigration benefits, such as voluntary departure, suspension of deportation, registry, and naturalization, § 509(a), 8 U.S.C. §§ 1254(e)(1), 1259, 1427; eliminating the automatic stay of deportation pending judicial review for aliens convicted of aggravated felonies, § 513(a); and barring aggravated felons from applying for, or being granted, asylum, § 514(a)).

70. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70 (codified as amended at 8 U.S.C. § 1101(a)(43) (2008)).

71. *Id.*

72. *Id.*

73. James F. Smith, *United States Immigration Law as We Know It: El Clandestino, The American Gulag, Rounding up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747, 765 (2005).

In the Immigration and Nationality Act of 1990 (INA), Congress changed immigration law by rewriting the exclusion and deportation grounds and adopting a number of provisions directed at ensuring and expediting the removal of noncitizens with criminal convictions.[74] The INA provisions eliminated JRADs, and added additional criminal offenses to the category of "aggravated felonies."[75] While increasing the number of offenses deemed to be aggravated felonies, the INA, at the same time, limited the forms of relief available to those convicted of those crimes, including a bar on the establishment of good moral character.[76] As a result, those convicted of aggravated felonies became ineligible for gaining asylum, withholding or suspension of deportation, voluntary departure, registry, and naturalization.[77] In 1994, INTCA further broadened the category of aggravated felonies. INTCA also gave federal criminal courts the power to order deportation at the sentencing stage, thus bypassing immigration courts and expediting removal.[78]

In 1996, two years after the enactment of the INTCA, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA).[79] These acts further increased the number of crimes with removal consequences while limiting discretionary relief available to those convicted under them.[80] The two acts increased the number of noncitizens who could be classified as aggravated felons, increased the number of crimes that made a person removable, severely restricted judicial review of administrative removal orders, limited remedies for relief from deportation, limited ability for admission into the United States by aggravated felons, and limited the discretionary relief from deportation available by the Attorney General.[81] One specific example of AEDPA and IIRIRA's effects was the repeal of INA § 212(c). Prior to 1996, more than half of the applications under § 212(c) received relief from deportation.[82] In the end, these acts further increased the number of noncitizens who were subject to removal and without remedy.

In total, there are now twenty-one categories in the INA that enumerate crimes that qualify as aggravated felonies.[83] The aggravated felony category, with its expansion, now includes: a "theft offense (including receipt of stolen property) or burglary offense… for which the term of imprisonment [is] at least one year;"[84] "an offense relating to a failure to appear before a court pursuant to a court order to

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74. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1101 (2008)).

75. Immigration Act of 1990 §§ 501, 505.

76. Smith, *supra* note 73, at 772.

77. Immigration Act of 1990 §§ 509, 515(a).

78. INTCA, Pub. L. No. 103-416, §§ 222, 224, 108 Stat. 4305, 4320, 4322 (codified as amended at 8 U.S.C. §§ 1101(a)(43), 1252(a) (2008)).

79. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(b), 110 Stat 3009-546, 3009-597 (1996) (codified at 8 U.S.C. § 1101(a)) [hereinafter IIRAIRA]; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1276-77 (codified as amended at 8 U.S.C. § 1105a (2006)) [hereinafter AEDPA]; *see* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms,* 113 HARV. L. REV. 1936 (2000).

80. IIRAIRA § 304(b); AEDPA § 440(d) (expanding definitions).

81. *Id.*

82. *St. Cyr*, 533 U.S. at 296 n.5.

83. Immigration and Nationality Act § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2009).

84. Immigration and Nationality Act § 101(a)(43)(G).

answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed;"[85] and tax evasion charges "in which the revenue loss to the Government exceeds $10,000."[86] Those convicted of aggravated felonies are currently presumed deportable upon conviction and can be ordered deported in federal criminal court proceedings.[87]

C. Immigration Consequences and Its Impact

As evidenced above, removal from the United States based on criminal convictions has vastly increased over the last twenty years and has increased most drastically over the last seven to ten years.[88] This increase has had devastating results, as illustrated by the following statistical evidence. In 1986, the United States removed 1,978 noncitizens based on their criminal convictions.[89] During that same year, the total number of individuals removed from the United States was 24,592.[90] This number includes *all* individuals removed from the United States that year, regardless of the reason for removal. In stark contrast, in 2007 alone, the Department of Homeland Security removed 99,900 criminal noncitizens from the United States.[91] The total number of persons removed in 2007 was over 319,000.[92] Between 1996 and 2007, it is estimated that more than 670,000 noncitizens were removed from the United States based on criminal convictions.[93]

These statistics show the devastating effects of the AEDPA and IIRAIRA on noncitizens. Unfortunately, when taking a closer look, the statistics also reflect effects on populations that are already particularly vulnerable. For example, the majority of defendants being removed are from four Latin American countries: Mexico, El Salvador, Honduras, and Guatemala.[94] In fact, in fiscal year 2007 (through June 18, 2007), these four countries accounted for approximately eighty-

85. *Id.* § 101(a)(43)(T).

86. *Id.* § 101(a)(43)(M)(ii).

87. AEDPA, Pub. L. No. 104-132, § 442(c), 110 Stat. 1214, 1280 (1996) (codified at 8 U.S.C. § 1252a (1994 ed.) (transferred to § 1228(c) (1996))) ("An alien convicted of [any] aggravated felony shall be conclusively presumed to be deportable from the United States.").

88. *See* U.S. DEP'T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGR. STATISTICS 97-105, tbl. 38 (Aug. 2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

89. MARY DOUGHERTY, DENISE WILSON & AMY WU, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGR STATISTICS, ANN. REP.: IMMIGR. ENFORCEMENT ACTIONS 2004 6, tbl. 4 (2005), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement _AR_05.pdf.

90. *See* U.S. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGR. STATISTICS 2005 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005 _Yearbook.pdf.

91. *See* U.S. DEP'T OF HOMELAND SEC., IMMIGR. ENFORCEMENT ACTIONS: 2007 ANNUAL REPORT 4, tbl. 4 (2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf.

92. *See* U.S. DEP'T OF HOMELAND SEC., IMMIGR. ENFORCEMENT ACTIONS, YEARBOOK OF IMMIGR. STATISTICS: 2007, ALIENS REMOVED OR RETURNED: FISCAL YEARS 1892-2007 (2007), *available at* http://www.dhs.gov/ximgtn/statistics/publications/YrBk07En.shtm (follow "Table 36" hyperlink).

93. *House Subcommittee Holds Hearing on Deportees to Latin American and Caribbean Countries*, 84 INTERPRETER RELEASES 1802 (2007) [hereinafter *Hearing on Deportees*] (citing Representative Eliot L. Engel (D-N.Y.), Chairman of the U.S. House of Representatives Committee on Foreign Affairs, Subcommittee on the Western Hemisphere, at a July 24, 2007 hearing).

94. *See* U.S. DEP'T OF HOMELAND SEC., 2007 ANNUAL REPORT, *supra* note 91.

eight percent of the total number of removals.[95] Over 80% of prosecuted individuals are poor.[96] Of the prosecuted defendants, over 90% plead guilty.[97]

The immigration changes have also had devastating effects on the families left behind in the United States by deported noncitizens. For example, because of the enactment of AEDPA and IIRIRA, it is estimated that 1.6 million families in the United States have been separated.[98] It is estimated that nearly 10% of families with children in the United States live in a "mixed status" household.[99] Mixed status is defined as a family that has both citizen and noncitizen members.[100] As a result of these mixed status families, the change in immigration laws has dramatically affected the families' ability to stay together and left them considerably more vulnerable to separation.

For those who are not persuaded that the large number of noncitizens who are being deported is a reason to be concerned, the high cost of federal detention based on immigration violations alone may provide a different perspective. The Bureau of Justice Statistics reports that from 1995 to 2003, the number of individuals in federal prison for immigration violations grew 394% from 3,420 individuals to 16,903.[101] In 2008, Federal prisoners serving a sentence for immigration offenses comprised 10.6% of the total inmate population, or 21,359 of the 201,498 individuals in federal prison.[102] As of 2009, immigration crimes represented the single largest group of all federal prosecutions, totaling fifty-four percent.[103] The cost to imprison one state inmate is approximately $22,650, while it costs $22,632 per federal inmate per year.[104] Therefore, the amount of money spent on the detention of individuals for immigration violations alone has increased from approximately $77 million in 1995 to $483 million per year in 2008.

The immigration consequences of criminal convictions affect a defendant's immigration status, along with his or her ability to naturalize, to remain out of prison on bond while a criminal trial or hearing is pending, to negotiate a plea, and to remain with family, friends, and other loved ones. Theses consequences also impact millions of noncitizens, families, friends, communities, as well as the country's social and economic structure. The devastating impact that criminal convictions have on noncitizen defendants, their families, and society shows that giving advice

95. *Hearing on Deportees, supra* note 93.

96. STEVEN K. SMITH & CAROL J. DEFRANCES, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE (1996), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/id.pdf.

97. U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, introductory cmt. (2008). More specifically, the Sentencing Commission stated that "[n]early ninety percent of all federal criminal cases involve *guilty* pleas and many of these cases involve some sort of plea agreement." *Id.* (emphasis added).

98. *Id.*

99. Fix & Zimmerman, *supra* note 7, at 1.

100. *Id.*

101. Sandra Guerra Thompson, *Immigration Law and Long-Term Residents: A Missing Chapter in American Criminal Law (Revised)*, 5 OHIO ST. J. CRIM. L. 645, 660 (2008).

102. U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS, STATE OF THE BUREAU 2008, 61 (2008), *available at* http://www.bop.gov/news/PDFs/sob08.pdf.

103. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC), *FY 2009 Federal Prosecutions, available at* http://trac.edu/tracreports/crim/223/.

104. JAMES J. STEPHAN, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NO. NCJ 202949, STATE PRISON EXPENDITURES, 2001 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf (The average annual operating cost per state inmate in 2001 was $22,650. The average operating cost by the Federal Bureau of Prisons was $22,632 per inmate).

concerning these consequences during the criminal proceeding is immeasurable.

II. SIXTH AMENDMENT SHIELDS ATTORNEYS AGAINST RECRIMINATION FOR THEIR FAILURE TO FULFILL ETHICAL OBLIGATIONS

"[A] lawyer can never be guided solely by thoughts of profit, self-advancement or self-interest, because the first duty of his profession is to serve others. And the public he serves does not know the answers to the questions they ask, the correctness of the decisions he makes, or the wisdom of the advice he gives them. They are dependent upon the lawyer's judgment and integrity. Because of this dependence, which is becoming greater as our society becomes more complicated, the lawyer's duty must always be to place his clients' needs above his own." [105]

A. Sixth Amendment Fails to Enforce an Attorney's Duties

The United States Constitution establishes a court system giving individuals, among other things, the right to counsel in criminal trials.[106] The Supreme Court, through its decisions, has recognized that the assistance of counsel "is one of the safeguards of the Sixth Amendment deemed necessary to [e]nsure fundamental human rights of life and liberty."[107] In *Gideon v. Wainwright*, the Supreme Court stated plainly that "[t]he right of one charged with [a] crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[108] Because 90% of criminal cases are resolved with pleas, and such pleas are negotiated with prosecutors, this principle applies equally to the appointment of counsel to ensure that defendants receive a fair plea.[109]

While the Sixth Amendment right to counsel started out as one of the most important safeguards, it has proven to present one of the most disappointing and disturbingly low standards in our justice system.[110] Courts have not found counsel ineffective under the Sixth Amendment even when they have been drunk, asleep, or absent during trial.[111] As one scholar has pointed out, the standard of effective assistance of counsel under the Sixth Amendment "is not an end that defense

105. A. Stevens Halsted, Jr., *Call it Professional Responsibility*, 43 CAL. ST. B. J. 110, 110 (1968) (emphasis added).

106. U.S. CONST. amend. VI; U.S. CONST. amend. VIII.

107. Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (holding that compliance with Sixth Amendment's mandate is an essential jurisdictional prerequisite to federal court's authority to deprive accused of his life or liberty); *see also* Grosjean v. American Press Co., 297 U.S. 233, 243-44 (1936) ("[C]ertain fundamental rights, safeguarded by the first eight Amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.").

108. *Gideon,* 372 U.S. at 344.

109. McMann v. Richardson, 397 U.S. 759, 770 (1970) (stating that since *Gideon*, the defendant pleading guilty has federal right to assistance of counsel); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 97, ch. 1, pt. A, introductory cmt. (2008).

110. Paul Kelly, Are *We Prepared to Offer Effective Assistance of Counsel?*, 45 ST. LOUIS U. L. J. 1089, 1093 (2001).

111. Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions*, 34 HOFSTRA L. REV. 641, 652 (2006).

attorneys should strive to reach, but rather a marker of zealous representation."[112] It is a marker that attorneys should strive above.

All courts must use the test first laid out in *Strickland v. Washington* in deciding whether defense counsel has violated the Sixth Amendment right to counsel. Under *Strickland*, the defendant must prove: (1) that counsel's performance fell below an objective standard of reasonableness and (2) that the deficiency in counsel's performance prejudiced the defendant.[113] In *Hill v. Lockhart*, the Supreme Court expanded the *Strickland* test when assessing ineffective assistance of counsel in guilty pleas.[114] In guilty pleas, defendants must satisfy the first prong of *Strickland*, in the same manner as claims after trial, by showing that counsel's representation fell below an objective standard of reasonableness.[115] However, when pleading guilty, to satisfy the second "prejudice" prong of the *Strickland* test, defendants must prove that, but for counsel's deficiency, the defendant would not have pleaded guilty and would have insisted on going to trial.[116]

When trying to decide whether or not an attorney has violated the first prong of the *Strickland* standard, many courts rely on what a "competent" attorney would do.[117] In *Strickland,* the Court stated that courts should look at the "[p]revailing norms of practice" as one guide to judging the effectiveness of counsel and thereby determine whether counsel was competent to satisfy the first prong of the test.[118] In *Strickland*, however, the Supreme Court refused to give specific guidelines or requirements. In fact, the Court stated that "[prevailing norms of practice as reflected in the American Bar Association…are guides to determining what is reasonable, but they are only guides."[119] Therefore, although competency can be determined by looking at such things as American Bar Association (ABA) Standards, treatises, and other practitioner resources, it is not an absolute in determining a Sixth Amendment violation.[120] The Court stated that "the purpose of effective assistance of counsel was not to improve the quality of legal representation but simply to ensure that the defendant receives a fair trial."[121]

Regarding issues that the courts have found to be collateral matters, such as immigration, the analysis has been even more disturbing. Although the Supreme Court has never ruled on whether the incorporation of the collateral consequences doctrine into the analysis of the Sixth Amendment is proper, lower federal and state courts have done so. Historically, state and lower federal courts have found that defense counsel cannot violate the first prong of *Strickland* and fall below an objective standard of reasonableness when courts have determined that the matter is collateral.[122] Therefore, counsel is under no obligation to advise defendants about

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

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

114. Hill v. Lockhart, 474 U.S. 52, 58 (1985).

115. *Id.* at 57.

116. *Id.* at 59.

117. *Strickland*, 466 U.S. at 691.

118. *Id*. at 687-88.

119. *Id.* at 688.

120. *Id.* at 689.

121. *Id.*

122. *E.g.*, *Fry*, 322 F.3d at 1200-1201; *Banda*, 1 F.3d at 356; *Del Rosario*, 902 F.2d at 59; Kolb, 880 F.2d at 944-945; *Campbell*, 778 F.2d at 768; State v. Denisyuk, 991 A.2d 1275, 1305 (Md. Ct.

immigration consequences in criminal court proceedings. This holding creates a per se rule, which the Court's ruling in *Strickland* specifically rejected.[123] In spite of this, courts consistently use the collateral consequences doctrine as a rule of exclusion from a Sixth Amendment violation.

The majority of lower federal and state courts have strongly held onto this per se rule. However, some courts have veered away from this long held belief and found ineffective assistance of counsel under the Sixth Amendment when addressing the advisement of immigration consequences.[124] In fact, a few courts have rejected the use of the collateral consequences doctrine when assessing a Sixth Amendment violation, giving noncitizens and their advocates a glimmer of hope to future case holdings.[125] These courts have structured potential Sixth Amendment violations into three categories: (1) an attorney who misadvises the client may be held to be ineffective; (2) a defense attorney who "knew or should have known" that his or her client was not a United States citizen and fails to advise the defendant may result in a Sixth Amendment violation; and (3) an attorney has an affirmative duty to advise as to the immigration consequences of a criminal conviction and failure to do so can be found to be ineffective.[126]

While the first two categories allow an attorney's failure to advise on the immigration consequences to make it passed the first prong of *Strickland*, they are problematic. As you will see, these holdings give criminal defense attorneys a license to remain silent or ignorant concerning issues that their clients may deem more important than the criminal punishment that is imposed; therefore, his client is left without adequate advice, contrary to the attorney's ethical duty to his client, the criminal justice system, and society.

B. Misadvice versus Nonadvice Creates a "Don't Tell" Policy

Although the majority of courts continue to hold that there is no duty to advise, many of these courts have recognized a difference between giving no advice and giving misadvice.[127] While these courts hold firm to the belief that there is no duty to advise as to immigration consequences, many of these courts also hold that *if* an attorney chooses to advise *and* misadvises, he may be found to be ineffective under the Sixth Amendment.[128]

Spec. App. 2010), *cert. granted*, 997 A.2d 789 (Md. June 9, 2010); People v. Ford, 657 N.E.2d 265, 269 (N.Y. 1995). *Contra In re* Resendiz, 19 P.3d at 1179-83 (concluding that the "collateral nature of immigration consequences does not foreclose petitioner's ineffective assistance of counsel claim").

123. *Strickland*, 466 U.S. at 668.

124. *Couto*, 311 F.3d at 187-88; *Downs-Morgan*, 765 F.2d at 1538-41; *Williams*, 641 N.E.2d at 49; *Lyons*, 694 P.2d at 977; *Rojas-Martinez*, 125 P.3d at 934. *See generally* Rob A. Justman, *The Effects of AEDPA and IIRIRA on Ineffective Assistance of Counsel Claims for Failure to Advise Alien Defendants of Deportation Consequences of Pleading Guilty on an "Aggravated Felony,"* 2004 UTAH L. REV. 701 (2004) (providing a discussion that includes the progression of how courts sided on the collateral consequences doctrine before and after the AEDPA and IIRIRA were passed).

125. *See* cases cited *supra* note 14-16.

126. *Id.*

127. *E.g.*, Strader v. Garrison, 611 F.2d 61, 63-65 (4th Cir. 1979); *see also* cases cited *supra* note 15.

128. *E.g.*, United States v. DeFreitas, 865 F.2d 80, 82 (4th Cir. 1989); United States v. Quin, 836 F.2d 654, 655 (1st Cir. 1988); United States v. Gavilan, 761 F.2d 226, 228-29 (5th Cir. 1985); State v. Ginebra, 511 So.2d 960, 962 (Fla. 1987); Alanis v. State, 583 N.W.2d 573, 579 (Minn. 1998); People v.

Currently, there is an 18-2 split as to whether misadvice violates the Sixth Amendment. The majority of jurisdictions hold that misadvice violates the Sixth Amendment while the minority hold that since immigration consequences are collateral, even misadvice on such matters can never violate the Sixth Amendment.[129] In the former, misadvice has been able to take the analysis beyond the first prong of *Strickland*. These courts have found that affirmative misadvice fails the first prong of the *Strickland* test because it falls below the objective standard of reasonableness of what a competent attorney would do.[130] Courts refuse to support the attorney's conduct of failing to properly advise a client on an issue deemed critical for deciding whether to plead guilty, regardless of the fact that the information is defined as collateral. To the courts, the plea cannot be voluntary or knowing when the information that helped to decide the plea was not correct. Currently, this holding creates the only "loophole" through the strict categorical exclusion from a full Sixth Amendment analysis based on the collateral consequences doctrine in these jurisdictions.

To the convicted noncitizen, the misadvice holding may be the only saving grace in these jurisdictions. Many advocates argue that this is a step in the right direction and that noncitizens should be allowed to withdraw their plea if they were misinformed. The client, who was misadvised and who attempted to withdraw his plea to prevent his removal from the United States, is undoubtedly grateful for the misadvice holding. However, it is hard to determine the true benefit of this holding to the system and the attorney-client relationship.

Although the client who was misadvised can successfully withdraw his plea, the defendant who comes after him will unlikely have the benefit of any advice at all. Some contend that would not be the case – that the attorney would educate himself. They suggest that counsel would take one of the many continuing legal education classes available on the subject or read one of the many books or practice guides[131] so that counsel's next noncitizen client would receive the requisite advice and information. Unfortunately, this is not the usual outcome.[132] Criminal defense attorneys have learned to say nothing. These jurisdictions, through their holding, inadvertently support a "Don't Tell" policy. Courts hold that the attorney who gives *no* advice cannot be found to be ineffective, but the attorney who *chooses to* give

Dor, 505 N.Y.S.2d 317, 320 (N.Y. Sup. Ct. 1986).

129. *Compare Kwan*, 407 F.3d at 1016-18 (finding counsel's performance as objectively unreasonable under contemporary standards of attorney competence where counsel effectively misled his client and not just failed to inform him of the immigration consequences of the criminal conviction) *with* United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971) (refusing to allow withdrawal of defendant's guilty plea notwithstanding blatant misadvice concerning the possibility of deportation, concluding that the defendant need only be fully aware of the direct consequences and misadvise on collateral consequences as a matter of law cannot invalidate a guilty plea).

130. *See* cases cited *supra* note 15 and accompanying text.

131. *E.g.*, Tova Indritz, *Puzzling Consequences of Criminal Immigration Cases*, CHAMPION, Feb. 26, 2002, at 12, 20, 26; William R. Maynard, *Deportation: An Immigration Law Primer for the Criminal Defense Lawyer*, CHAMPION, June 23, 1999, at 12; Ronald Kaplovitz, *Criminal Immigration: The Consequences of Criminal Convictions on Non-U.S. Citizens*, 82 MICH. B.J. 30, 30 (Feb. 2003); David C. Koelsch, *Proceed with Caution: Immigration Consequences of Criminal Convictions*, 87 MICH. B.J. 44, 44 (Nov. 2008); Fernando A. Nuñez, *Collateral Consequences of Criminal Convictions to Noncitizens*, 41MD. B.J. 40, 40 (Aug. 2008); Rex B. Wingerter, *Consequences of Criminal Convictions*, 37 MD. B.J. 21, 21 (Apr. 2004).

132. This writer has systematically received refusals by criminal attorneys to be trained on the issue of immigration consequences based upon the misadvice versus nonadvice holdings.

advice can be found to be ineffective according to the Sixth Amendment. Courts place a heavier burden on the attorney who gives advice, stating that while silence is supported, advisement is at the attorney's own risk. Courts, in refusing to allow the lack of advice to violate the Sixth Amendment, create an incentive for the attorney to remain silent on information that his client may deem more important than the criminal punishment itself.[133]

The rationale of the misadvice holding is based on the premise that once information is received, it must be accurate if the defendant relied upon that information when pleading guilty. However, if this information is crucial to the decision making of the client, should not it be both given and accurate? Contrary to popular norm, ignorance is not always bliss. Whether a noncitizen defendant knows the fact that immigration consequences exist and is misinformed or is ignorant of the fact that immigration consequences do exist and was not told, it cannot be deemed any less detrimental.[134] In both scenarios, the noncitizen defendant was not fully aware of the information necessary to decide whether to plead guilty.[135]

An additional problem with the misadvice holding is its definition. The term "misadvice" seems to be defined differently from jurisdiction to jurisdiction. So far, there seem to be two categories defining misadvice. The first can be defined as any information received that is clearly erroneous. For example, the attorney states that a plea will not affect the client's immigration status, but it does.[136] The second category, however, has not been as easy for the courts to determine. It is best exemplified in a case where the attorney says that the criminal conviction "may" or "could" affect the defendant's immigration status.[137] Jurisdictions are split in their conclusions of whether the latter example is misadvice or not.[138] Some courts have found that the word "may" is sufficient for the attorney to cover any obligation owed to the client.[139] Other jurisdictions, however, have found that due to the "automatic" nature of the deportation based on the conviction, it is misadvice to tell a client the plea "may" or "could" affect his immigration status.[140] This opinion seems to

133. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (stating that deportation "may result in loss of both property and life, or of all that makes life worth living."); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1922) (stating that "deportation is a drastic measure and at times the equivalent of banishment or exile"); *Correa*, 485 N.E.2d at 311 (stating that "in most cases this collateral consequence is more severe than the penalty imposed by the court in response to the plea.").

134. *See Paredez*, 101 P.3d at 804-06 (finding that whether counsel gives no advise or only general advise, the defendant does not receive sufficient information to plead guilty).

135. *Id.*

136. *See*, *e.g.*, *Couto*, 311 F.3d at 187 (holding that counsel was ineffective by advising the defendant that "there were things that could be done to avoid deportation (when in fact there were none)."; State v. Nunez-Valdez, 975 A.2d 418, 425-26 (N.J. 2009) (finding ineffective assistance where counsel advised the defendant that his immigration status would not be affected by his plea of guilty to a charge deemed an aggravated felony under immigration law).

137. *See infra* note 143

138. *Compare Rojas-Martinez*, 125 P.3d at 938 (attorney giving defendant advice that sexual battery "might or might not" lead to his deportation is not affirmative misrepresentation), *with Soriano*, 194 Cal. App. at 1482 (holding that counsel was ineffective when she informed defendant that the plea "might" have deportation consequences).

139. *E.g.*, *Gonzalez*, 134 P.3d at 958 (stating that counsel is not required to specify the likelihood that deportation will take place but is only required to make the defendant aware that deportation could result from the conviction) .

140. *E.g.*, *Paredez*, 101 P.3d at 805 (holding that counsel has an affirmative duty to determine client's immigration status and provide him with specific advice regarding the impact a guilty plea *would* have on his immigration status).

increasingly be held when there is virtually no doubt that removal is eminent, such as when a lawful permanent resident is convicted of an aggravated felony.[141]

Under the misadvice holding, an attorney cannot be confident that he will not be brought up on a Sixth Amendment violation unless he remains completely silent on the issue. Courts are not clear on the line that must be crossed for any communication or advice that is given to the noncitizen defendant regarding immigration consequences. Attorneys who respond to specific questions, purport to have experience and knowledge on the issue of immigration consequences, or respond in a way that the court deems to be ambiguous, vague, or incorrect, may be held to have violated the Sixth Amendment.[142]

All the above issues are detrimental to the attorney-client relationship, the criminal court system and society. Distinguishing between misadvice and nonadvice naturally "creates a chilling effect on the attorney's decision to offer any advice."[143] The misadvice holding acknowledges the impossibility of a noncitizen defendant, who has been incorrectly advised, to make an intelligent decision from alternative courses of action. However, the underlying premise that allows for the refusal to give advice on the same information without violation, knowing the information to have the same importance, pits the attorney's duties with that of the desire to escape the possibility of a Sixth Amendment violation. Under this holding, the Sixth Amendment fails to reinforce the attorney-client relationship since it allows attorneys the opportunity and protection under the Sixth Amendment to say nothing to his client, leaving their clients ignorant to the ramification the conviction will have on his immigration status and life and, if given a general advisement, left to determine the complex legal issue alone.[144]

C. "Knew or Should Have Known" Creates a "Don't Ask" Policy

Another category that has been able to overcome the per se exclusion from a full *Strickland* analysis is based upon whether the defense attorney "knew or should have known" that the client was a noncitizen.[145] Unfortunately, this holding can be seen as the true meaning of the phrase, "ignorance is bliss," by allowing an attorney to escape a Sixth Amendment violation by knowingly failing to investigate both the client's immigration status and the client's objectives for the outcome of the case.

141. *E.g.*, *Rojas-Martinez*, 125 P.3d at 970 (concluding that an attorney giving defendant advice that sexual battery "might or might not" lead to his deportation is affirmative misrepresentation).

142. *E.g.*, State v. Carlos, 147 P.3d 897, 902 (N.M. 2006) (holding that counsel is required to advise the defendant on the specific immigration consequences he will face as a result of his conviction and that providing only general advise of the "possibilities" is ineffective); *Kwan*, 407 F.3d at 1017; *Couto*, 311 F.3d at 187-88; Correa, 485 N.E.2d at 311-12.

143. Francis, *supra* note 17, at 726.

144. *See* Del Rosario, 902 F.2d at 61 (Mikva, J., concurring) (stating that the "possibility of being deported can be-and frequently is-the most important factor in a criminal defendant's decision how to plead."); Chin & Holmes, *supra* note 18, at 726 (stating that nonadvice places an affirmative duty to discern complex legal issues on a class of clients least able to handle that duty).

145. *E.g.*, *Pozo*, 746 P.2d at 527 (holding that determination of whether failure to investigate collateral consequences constitutes ineffective assistance of counsel "turns to a significant degree upon whether the attorney had sufficient information to form a reasonable belief that the client was in fact an alien."); Daley v. Maryland, 487 A.2d 320, 322-23 (Md. Ct. App. 1985) (finding "the factual predicate necessary to succeed on this claim-namely, that his lawyer knew or should have known that he was an alien-is absent.")

Under this ruling, the duty arises as soon as an attorney has knowledge that the client is not a United States citizen. However, there is no imposed duty on the attorney to ask about a client's immigration status. Therefore, if an attorney does not ask specifically or investigate into the possible goals or objectives of the client, the analysis when proving the attorney "knew or should have known" that the client was not a United States citizen becomes complicated. Complicated, because the facts which would indicate that the attorney "knew or should have known" that the client was not a citizen relies on subjective assumptions of alienage and citizenship. Obviously, factors such as information that a client has an immigration hold, prosecutor statements that Immigration and Customs Enforcement (ICE) wants to talk to the client, or the police report for identity theft states the arrests were part of an ICE worksite raid targeted against undocumented workers would arguably give way to objective facts that can reasonably put an attorney on notice to further investigate immigration status. However, absent these objective facts, what information could determine knowledge of immigration status? The answer raises one of the most problematic issues: under this analysis, attorneys and courts are left to determine a Sixth Amendment violation based upon subjective assumptions of alienage. Racial and ethnic stereotypes would be required as part of the process of determining the duty to advise under this analysis. The defendant must be construed as a foreigner, an "other," or an "illegal" immigrant.

Society's perceptions conclude that American citizenship status exists if one is White and English-speaking.[146] American citizenship is also assumed to be held by Blacks, although they may not receive the full benefits of citizenship.[147] Our society considers Asians and Latinos as foreigners.[148] Latin-American, Asian-American, and Arab-American citizens find themselves stigmatized and treated as perpetual foreigners.[149] In fact, most Latinos are seen as "illegal" and Mexican, lumped together as one group, regardless of whether they are from Puerto Rico,

146. *See* JILL NORGREN & SERENA NANDA, AMERICAN CULTURAL PLURALISM AND LAW 65 (Praeger Publishers 2006) (discussing pressure to conform to "mainstream version of American culture, including, perhaps most importantly by speaking English") [hereinafter NORGREN & NANDA]; Heidi Tarver, *Language and Politics in the 1980s: The Story of U.S. English,* in RACE AND ETHNIC CONFLICT: CONTENDING VIEWS ON PREJUDICE, DISCRIMINATION, AND ETHNOVIOLENCE 206-18 (1995); Juan F. Perea, Essay, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 972-81 (1995) (discussing the historical desire for America to be an English-speaking Anglo society).

147. Victor Romero, *Race, Immigration, and the Department of Homeland Security*, 19 ST. JOHN'S J. LEGAL COMMENT. 51, 54 (2004-2005) ("Generally, there is a presumption that United States citizens are either white or black—either Caucasians or African Americans—where presumptive noncitizens are Latina\os or Asians."); *see generally* PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 58-73 (1995) (discussing white America as caught between the "pincers" of Hispanic and Asian immigration); WHO BELONGS IN AMERICA: PRESIDENTS, RHETORIC AND IMMIGRATION (Vanessa B. Beasley ed., Texas A&M University Press 2006).

148. *Id.*; Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship,* 2 HARV. LATINO L. REV. 101, 117-29 (1997) (discussing the classification of Latinos as "foreigners").

149. *See* Juan Perea, *Introduction* for IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 1, 2 (Juan F. Perea ed., New York University Press 1997) ("When citizens and aliens look alike, then all are presumed to be alien and foreign and undermining of the national character. This is an old theme in American politics."); Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among "We the People*,*"* 76 OR. L. REV. 233, 252-53 (1997) (discussing the recurring belief that White is "American" and Mexican, Asian and Arab Americans are considered "foreign"); George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness,* 2 HARV. LATINO L. REV. 321, 345 (1997).

Central or South America.[150] Spanish is considered "un-American" and the language of the "illegal alien," despite the fact that millions of United States citizens speak Spanish.[151]

If defendants are Caucasian and speak without an accent, does an attorney get an opportunity to show that he or she could not have known about the defendant's alienage status? If the defendant is Latino, does an attorney automatically assume that he or she is not a United States citizen? Does it matter if the Latino defendant speaks with an accent? This type of analysis opens the door for inconsistent enforcement of the Sixth Amendment that relies upon stereotypes, assumptions, and discriminatory perceptions based upon who we deem to belong in our society and who we deem to not belong to the highest class of individuals in this country – citizens.

Given this underlying reasoning, courts have been astute in their refusal to find a violation using any of the assumptions or stereotypes of alienage and reluctant to find any characteristic as a way to determine whether the attorney "knew or should have known." For example, in *Daley v. Maryland,* the Maryland Appellate Court held that the mere fact that the defendant spoke English with a foreign accent was not enough for the attorney to have known that the defendant was not a United States citizen.[152] In *Proulx v. State*, the Florida District Court of Appeals seemed to concur with the *Daley* court, finding that the attorney's knowledge that the client was born in Canada, not the United States, was not enough to show that the attorney "knew or should have known" that the defendant was not a United States citizen nor enough to require for further inquiry of the defendant regarding his status.[153]

Simultaneously, while refusing to use factors that society uses to assess alienage as a means to show an attorney "knew or should have known" that the defendant was not a citizen, courts have used factors that reinforce stereotypes of citizenship such as the ability to speak English. For example, the assumption that citizens speak English was used as an important factor in determining that the attorney in *Daley* lacked sufficient knowledge to be held ineffective.[154] In reaching the aforementioned holding, the court mentioned that the defendant spoke "fluent English with a Caribbean accent."[155] The Maryland court, however, did not explain the rationale behind its holding. We can only speculate that the court agreed that English fluency is a sign of citizenship, which is consistent with society's opinion of belonging.[156] Yet, the defendant in *Daley* spoke with a *Caribbean* accent. While

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150. Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"? Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1290 ("Although many consider Latinos to be a monolithic group…"); *see* David Montgomery, *One Label Does Not Fit All,* THE WASHINGTON POST, September 11, 2008, at C1.

151. G. Gordon Liddy on Sotomayor, *The G. Gordon Liddy Show* (May 29, 2009) (while discussing Justice Sotomayor, who is of Puerto Rican descent and, therefore, a United States citizen, he stated that "raza in 'illegal alien' meant race"); *see generally* NORGREN & NANDA, *supra* note 146 at 65 (discussing speaking a foreign language as a sign of "national disloyalty" and "inadequate assimilation"); Raymond Tatalovich, *Official English as Nativist Backlash*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 78-102 (Juan F. Perea ed., New York University Press 1997).

152. *Daley*, 487 A.2d at 323.

153. Proulx v. State, 422 So. 2d 1096, 1097 (Fla. Dist. Ct. App. 1982).

154. Daley, 487 A.2d at 323.

155. *Id.*

156. *See generally* T. Alexander Aleinikoff & Ruben G. Rumbaut, *Terms of Belonging: Are*

many Caribbean individuals speak English, not all are United States citizens. In fact, the United States administers over only three out of numerous English-speaking islands that are located in the Caribbean.[157] Therefore, the court's belief that citizens speak English attests to the core belief that fluency in English is a sign of citizenship.[158] Additionally, in *Proulx*, the attorney knew he was from Canada.[159] However, the court refused to acknowledge that birth outside the United States was sufficient evidence to show noncitizenship or render further inquiry. However, what is also transparent is the fact that the defendant was white and spoke English. It is acutely apparent that courts, while not willing to use stereotypical factors to show alienage, reinforce stereotypes of citizenship when making their determinations under this analysis.[160] In the courts' refusal to hold to society's stereotypes of who is a noncitizen, the courts' continue to maintain and reinforce society's stereotype and assumptions of who is a citizen and who belongs. Therefore, the outcome is the same; individuals are subjectively perceived as either foreign or citizen.

However, neither factors used by society to assume citizenship nor determine foreignness can be used in assessing whether an attorney should reasonably have known that his or her client was not a citizen. Nearly all immigrants who come to the Unites States at a young age speak English as a first language and are fully socialized into the dominant culture.[161] Approximately 650,000 foreign-born individuals naturalize each year.[162] Almost two million United States citizens born abroad to American parent(s) were reported in the 2000 United States Census.[163] The census also reported that 12.5 million naturalized citizens were living in the United States and 18.5 million noncitizens were living in the U.S.[164] Therefore, there are thirty-one million people in this country that were born in a foreign country and nearly half of them are citizens.

Neither citizenship nor alienage can be distinguished by looking at individuals, observing their mannerisms for signs of "assimilation," knowing their place of birth, determining their first language, or hearing their accent or lack

Models of Membership Self-fulfilling Prophecies?, 13 GEO. IMMIGR. L.J. 1 (1998) (examining cultural assimilation into America, including the importance of speaking English as a first language).

157. Dep't of the Interior, Office of Insular Affairs, Commw. & Territories of the United States, http://www.doi.gov/oia/Firstpginfo/islandfactsheet.htm (last visited Sept. 1, 2010).

158. This is an interesting observation because many Caribbean Islanders speak English, but not all are United States citizens. *See More Caribbean Nationals Becoming U.S. Citizens*, NEW AM. MEDIA, Apr. 1, 2009, at 1, *available at* http://www.blacktino.net/index.php?option=com_content&task =view&id= 3575&Itemid=9).

159. *Proulx*, 422 So.2d at 1097.

160. For a discussion on the use of case law to reinforce racial hierarchy, *see generally* Ian F. Haney Lopez, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 1850-1990 (New York Univ. Press 1996) (analyzing cases applying the naturalization prerequisite that a noncitizen be "white"); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATIONS IN THE UNITED STATES: FROM 1960'S TO THE 1980'S (1986) (discussing the historical legal and political formation of race); Kevin R. Johnson, *Racial Hierarchy, Asian American and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?,* 76 OR. L. REV. 347, (1997) (discussing the limitations that new laws and the court system will have in diminishing racial hierarchy based upon a historical perspective).

161. Aleinikoff & Rumbaut, *supra* note 156, at 3.

162. JEFFREY S. PASSEL, PEW HISPANIC CENTER: A PEW RESEARCH CENTER PROJECT, REPORT: GROWING SHARE OF IMMIGRANTS CHOOSING NATURALIZATION 1, 6 (2007), *available at* http://pewhispanic.org/files/reports/74.pdf.

163. U.S. CENSUS BUREAU, CENSUS 2000 (2000).

164. *Id.*

thereof. The reinforced stereotypes continue to incorrectly differentiate between citizens and noncitizens and impede the equal treatment of all individuals in society. It also does nothing to assist in the necessary investigation of status and fails to assist in the determination of a Sixth Amendment violation under jurisdictions that use the "knew or should have known" criteria.

Furthering the argument against this holding, courts have placed the burden on the client to inform his attorney about his immigration status to find a violation under the Sixth Amendment. In many of the courts' holdings, defendants were admonished for their failure to inform their attorney of their immigration status. For example, in *Daley*, the court made sure to comment that the defendant failed to inform his attorney that he was not a citizen.[165] An additional point, in which the court focused its opinion, was that he was aware that he must "obey the laws" and, therefore, should have known that his conviction would have jeopardized his immigration status.[166] While the court in *Proulx* did not directly admonish the defendant, they did incorporate his cross-examination by the assistant state's attorney into their opinion, which attempted to establish his knowledge that he was not an American citizen.[167] Again, in *State v. Muriithi*, the court blamed the defendant for failing to inform his counsel that he was not a United States citizen. In response to the argument that the defendant was not aware that the conviction would have immigration consequences, the court stated that "he did, however, know he was not a citizen and never conveyed that fact to his counsel."[168] Concluding that, "even though the defendant may not have been aware of the immigration consequences, he knew that he wasn't a citizen and, therefore, should have known that a criminal violation could impact his ability to stay in this country."[169]

The above holdings illustrate the refusal for courts to recognize both the duty of the attorney to his client and his role in the system. Defendants are given a Sixth Amendment right because they are not expected to be educated in the law.[170] The requirement that the defendant know that their immigration status could be affected by his or her plea of guilty fails to take into account the very core of the attorney-client relationship and the Sixth Amendment right to counsel. It is the client who may know the facts, but it is the lawyer who knows the law.

Currently, an attorney can escape a Sixth Amendment violation simply by refraining from asking about the immigration status of his client. The created "Don't Ask" policy runs counter to the desired balance in an attorney-client relationship. It fails to obligate the attorney to fulfill his duties to his client to investigate and determine the needs and goals of the client. It fails to hold the attorney to his obligation to protect his client from harm, to advocate on his behalf, and to utilize his capacity as the individual educated by the system and the law. The goals of the client many times are not known to him, because the client is unfamiliar with the choices he has and the possible effects of his decision. It is the attorney who has the

165. *Daley*, 487 A.2d at 323.

166. *Id.*

167. *Proulx*, 422 So.2d. at 1097.

168. *Muriithi*, 46 P.3d at 1151.

169. *Id.*

170. Powell v. State of Alabama, 287 U.S. 45, 68-69 (1963) (stating that "the right to be heard would be …of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law… He requires the guiding hand of counsel …).

knowledge and expertise to advise the client of the possible goals. Attorneys are trained to interview a client, educated to know more about the law than the client, and charged with looking out for the best interests of the client. Restraint may shield the attorney from delving into an unfamiliar area of law, from further overburdening the attorney who may already have a heavy caseload, and from a Sixth Amendment violation. However, it does nothing to put faith in the court criminal system as it deteriorates the attorney-client relationship, the system's perception of fairness, and society's sense of justice.

III. DEFENSE COUNSEL'S OBLIGATIONS TO THE CLIENT ARE MET USING ETHICAL OBLIGATIONS

Although the Sixth Amendment has been the overwhelming framework for claims of "failure to advise" as to the immigration consequences of a criminal conviction, attorney ethics have been largely overlooked when determining responsibility to the client/defendant. Carl Schurz once said, "[i]deals are like stars; you will not succeed in touching them with your hands. But like the seafaring man on a desert of waters, you choose them as your guide, and following them you will reach your destiny."[171] Many scholars agree that defense lawyers should look to both their lawyering role and to ethical norms to guide their obligations pertaining to collateral consequences.[172]

Very little guidance or definition is given to the true responsibilities obligatory to defense counsel, especially in terms of counseling and pleas. All definitions are vague. An attorney finds little comfort in trying to find the answer to a question he may have on how to act in a given situation. This is especially true when certain obligations or duties conflict with each other or with court decisions. Professor Hazard said it best when he wrote, "[o]ne can say that serious ethical dilemmas usually involve, not questions of distinguishing right from wrong, but deciding upon the priority between obligations emanating from different normative realms that dictate inconsistent courses of action."[173] The question is how we resolve, accommodate, or somehow adjust to these inconsistencies.[174] Here, the "inconsistent courses of action" arise between the current Sixth Amendment holdings as to the immigration consequences of a criminal conviction and the ethical obligations that an attorney has to his client, the court system, and society.[175] Currently, Sixth Amendment holdings are allowing defense attorneys to avoid counseling their clients on immigration consequences of their criminal conviction while fully acknowledging that noncitizen defendants are suffering increasingly harsh immigration penalties as a result of the lack of advisement during their criminal proceedings. So who wins: court interpretations of the Sixth Amendment or the client?

The determination of an attorney's duty is not solved only with the current

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171. Carl Schurz, born in 1829, died in 1906, was a German-born, United States citizen, who became a general in the United States Army for the Union in the American Civil War, and an American politician.

172. *See* Pinard, *supra* note 112, at 1083.

173. Geoffrey C. Hazard, Jr., *Law, Ethics and Mystery*, 82 U. DET. MERCY L. REV. 509, 512 (2005).

174. *Id.* at 513.

175. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7, 8; MODEL RULES OF PROF'L CONDUCT, PREAMBLE 1 (1983).

analysis of the Sixth Amendment but with the assistance of an attorney's ethical duties. Historically, a counselor's priority was to mitigate the client's suffering, previously defined as imprisonment or financial penalties.[176] Currently, all attorney obligations are not only based on the law but also on other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.[177] Rules do not "exhaust the moral and ethical consideration…for no worthwhile human activity can be completely defined by legal rules."[178] The key is the client and the client's goals, including immigration consequences.[179]

A. *Attorney's Duty to the Client*

The attorney-client relationship is at the heart of lawyering. Without legal counsel, the right to a fair trial itself would be of little consequence, for it is through counsel that the accused secures his or her rights.[180] The Supreme Court stated plainly that "[t]he right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[181] The right to counsel also attaches to a guilty plea since it is a "critical" stage of the process.[182] The Court has held that "[c]ounsel's concern is the faithful representation of the interest of [the] client."[183]

To further emphasize the attorney-client relationship as the basis on which attorneys are defined, one need only to look at another functional definition of an attorney. The function of the defense attorney is to "serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation."[184] To do that, a lawyer should represent a client "zealously" and "competently."[185] To properly perform this duty, the attorney must communicate, investigate, and advise the client.[186] Attorneys who are disciplined for such

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176. AMERICAN BAR ASSOCIATION, COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 40, 41 (2007) [hereinafter SECOND CHANCES].

177. MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983) (amended 2003).

178. MODEL RULES OF PROF'L CONDUCT, PREAMBLE AND SCOPE 16 (1983).

179. *See* SECOND CHANCES, *supra* note 176, at 41.

180. Kimmelman v. Morrison, 477 U.S. 365, 377 (1986) (citations omitted).

181. *Gideon*, 372 U.S. at 344.

182. *See* Arsenault v. Massachusetts, 393 U.S. 5, 6 (1968); White v. Maryland, 373 U.S. 59, 60 (1963).

183. Tollett v. Henderson, 411 U.S. 258, 268 (1973). In *Tollett*, the majority noted:

> The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it.…Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution, or by contesting all guilt. *Id.* at 267-68 (citation omitted).

184. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION 4-1.2(b) (1993).

185. MODEL RULES OF PROF'L CONDUCT, PREAMBLE 2 ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); MODEL RULES OF PROF'L CONDUCT 1.1 (2007) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

186. MODEL RULES OF PROF'L CONDUCT 1.4 (2007).

violations have broken the cardinal ethical rule – never pursue one's "self-interest to the detriment of [a] client's interest."[187]

"Zealous" and "competent" representation, as with all functions and responsibilities, must have a goal. One overarching goal is that an attorney, as an advocate, ensures that the defendant receives justice. However, justice is an ambiguous concept with goals and priorities based on the individual's wishes and desires. In this instance, under the attorney-client relationship, the goals of "justice" for the case should be set by the client and respected by the attorney.[188] The attorney must abide by the client's decision and consult with him concerning how the client would like his objectives pursued.[189] However, all decisions by the client must be made only after the attorney has done his or her best to inform the client of the relevant considerations.[190] The objectives, relevant considerations, and goals of the client are not categorized in terms of "collateral" and "direct" under ethical obligations, but as those that are "deemed important by defense counsel or the defendant."[191] In fact, a lawyer may not unreasonably limit the focus or objective of his representation, or limit representation without the consent of his client.[192]

In addition to overall general ethical obligations and considerations, the ABA Standards of Criminal Justice seek to reinforce the duty to the client. Under these standards, the attorney has an obligation to advise the client according to the client's objectives, including collateral consequences.[193] The Standards' reasoning does not stray from that of most scholars, academics, and even courts – many times immigration consequences are the defendant's greatest concern, and, therefore, create a responsibility for defense counsel to investigate and advise clients concerning such matters.[194]

B. Attorney's Duty to the Legal System

An attorney's duty is also to the legal system. Our adversarial system functions on the belief that opposing viewpoints must be zealously advocated in front of a neutral arbitrator in order to succeed.[195] The adversarial system is defended as the best way to protect the rights of each side and to pursue the truth.[196] In the court system, the judge has a duty to ensure that both the rights of the

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187. Stephen Wizner, *Rationing Justice*, 1997 ANN. SURV. AM. L. 1019, 1025 (1997).

188. John Burkoff, Criminal Defense Ethics: Law and Liability §5:4 (2d ed. 2010).

189. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983).

190. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8; MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (1983) (amended 2007).

191. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 14-3.2(b) (1999).

192. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (1983) (amended 2007).

193. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 14-3.2(b) ("To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision."); STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 14-3.2(f) ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.").

194. *Id.* 14-3.2(f) cmt.

195. MODEL CODE OF JUDICIAL CONDUCT R. 2.2; MODEL CODE OF PROF'L RESPONSIBILITY EC 7-19 (1980).

196. Rhode, *supra* note 111, at 642.

defendant and the interests of society are protected;[197] the prosecutor has a duty to punish a crime without undue harshness and to seek justice based on societal interests;[198] and the defense attorney has a duty to ensure that his client receives a just outcome while acting respectfully and upholding the legal process.[199] Therefore, "[t]he duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law."[200]

Since our adversarial system is based on zealous advocacy from both sides, it is insightful to know the ethical obligations and responsibilities the prosecution owes to the legal system. A prosecutor's function is to seek justice and advocate on behalf of societal interests.[201] The prosecutor has complete discretion when deciding whether to charge an individual with a crime and, if charged, whether to offer the individual a plea and under what terms.[202] With complete discretion comes responsibility.[203] Robert M.A. Johnson, former president of the National District Attorneys Association, stated that prosecutors should understand all consequences that stem from a criminal conviction.[204] Mr. Johnson understood that justice cannot be served if the prosecutor does not understand all the possible effects of the plea offer on the defendant because the plea must be proportionate to the crime in order to seek justice; this includes immigration consequences of a criminal conviction.[205] For this reason, in recent years, prosecutors have become increasingly aware of immigration consequences. Prosecutors, therefore, have obligations regarding immigration in courtrooms.

Currently, criminal prosecutors along with local police officers increasingly are given the responsibility, duty, and mission to assist in the removal of the defendant from this country during criminal proceedings.[206] Meanwhile, defendants are still deprived of receiving advice about immigration consequences. The current Sixth Amendment holdings, that refuse to require attorneys to counsel defendants, create an imbalance in our criminal justice system by failing to oppose the zealous advocacy by the prosecution on the issue of immigration with zealous advocacy by the criminal defense attorney. Permitting the government to enforce immigration laws that are affected by criminal convictions in criminal court, but not obligating assistance in the prevention of deportation of noncitizen defendants goes against our balanced adversarial structure, as well as a civilized society's sense of justice. A right to protection from government abuse is worthless when there is no attorney at

197. STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE 6-1.1(a) (2000).

198. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION 3-1.2(b)-(c) (1993).

199. MODEL RULES OF PROF'L CONDUCT PREAMBLE 5.

200. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-19 (1983).

201. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION 3-1.2(b)-(c).

202. *See* Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design,* 93 CORNELL L. REV. 703, 734-36 (2008).

203. *See* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 427-36 (2009).

204. Robert M.A. Johnson, *Collateral Consequences*, THE PROSECUTOR, May-June 2001, *available at* http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html.

205. *Id.*

206. *See* U.S. Dept. of Homeland Sec., Immigration and Customs Enforcement, programs such as Operation Community Shield, Memorandum Agreements of Cooperation in Communities to Enhance Safety and Security, Criminal Alien Program, Delegation of Immigration Authority 287(g), Rapid REPAT, Secure Communities, *available at* http://www.ice.gov/pi/topics/.

the defendant's side willing to fight for those protections.[207]

C. Attorney's Duty to Society

A defense attorney, as an individual in society, has a "special responsibility for the quality of justice" and "should seek to reform and improve the administration of criminal justice."[208] "When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action."[209] It is the attorney's duty to improve the law and the legal system.[210] Under this set of duties and responsibilities, attorneys have a duty to seek change and reform the system.

D. Incorporation of Ethical Standards into the Sixth Amendment

As stated, an attorney's main duty is to the client. However, court decisions, and heavy court dockets have watered down that duty. Legal reinforcement and intervention may be needed for lawyers to start to see their clients within their role as legally-obligated individuals, whose responsibility includes a commitment to fulfill a duty to their client, the court, and society. It is too hard to escape the reality that lawyers fail to conduct an adequate investigation of their client's status because of a conflict between their own self-interest for fear of an ineffective assistance of counsel claim, the existence of a burdensome caseload, and the availability of Sixth Amendment case law to support their decision to remain silent on the subject.

Historically, the Supreme Court has made clear that what is ethically required of criminal defense attorneys may not be the same as what is constitutionally required as a matter of effective assistance of counsel.[211] Therefore, courts had not looked to ABA Standards in a way that complement the Sixth Amendment. The Court has however given a glimmer of hope to those who have long awaited a Sixth Amendment analysis that could harmoniously coexist with ethical standards and the true duty of zealous advocacy to clients. The Court in *Williams*, *Wiggins*, and *Rompilla* incorporated the use of ethical standards in its Sixth Amendment analysis.[212] In these cases, the Court used the ABA Standards of Criminal Justice as "norms" in determining that counsel's performance fell below an objective standard of reasonableness.[213] In addition to the Court's ruling in these matters, other courts have seriously considered ethical standards in determining what the norm consists of, which in turn has resulted in an increased recognition of Sixth Amendment violations.[214]

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207. Rhode, *supra* note 111, at 643.

208. MODEL RULES OF PROF'L CONDUCT PREAMBLE 1; STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION 4-1.2(b) (1993).

209. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION 4-1.2(b).

210. MODEL RULES OF PROF'L CONDUCT PREAMBLE 1, 6, 7.

211. *Strickland*, 466 U.S. at 688-89; Nix v. Whiteside, 475 US. 157, 166-67 (1986); Burkoff, *supra* note 188, §3:9.

212. Williams v. Taylor, 529 U.S. at 362; *Wiggins*, 539 U.S. at 522; *Rompilla*, 545 U.S. at 388-89.

213. *Id.*

214. *See* John H. Blume & Stacey D. Neumann, *"It's like Déjà Vu All Over Again:"* Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the*

The emphasis of ethical rules when conducting the Sixth Amendment analysis has also occurred in the context of immigration consequences. The Supreme Court recognized that removal from the United States is often a greater imposition than a criminal sentence.[215] Although the Court has not made a formal determination as to whether there is a duty to advise of immigration consequences under the Sixth Amendment or of an objective standard of reasonableness based on immigration consequences, in *INS v. St. Cyr*, the Court suggested, in dicta, that "competent" attorneys should advise clients of the immigration consequences of their plea.[216] In commenting on this, the Court acknowledged that noncitizen defendants could be more concerned with their right to remain in the country than their potential jail sentence, if they knew, and agreed that the defendant's decision on whether to plea or not could be based on the immigration consequences and on the possibility of relief in immigration court.[217] The Court reinforced the importance of ethical standards by adding that if the defendant were not aware of the immigration consequences, "competent" counsel would have advised him on this information and look to the advice of numerous practice guides to make that determination.[218]

Other courts have followed that reasoning and have held that deportation is a legitimate factor that would enter the decision-making process of a defendant of whether to plead guilty or go to trial.[219] Therefore, some courts have begun to reject the collateral consequence rule in its Sixth Amendment analysis and have looked at ethical rules to determine the duty of an attorney to the client.[220] In doing so, courts have looked to the ABA Standards for Criminal Justice, Standard 14-3.2(f) when determining the first prong of the *Strickland* standard or when examining "prevailing norms of practice."[221]

The above determinations are consistent with the courts' own ethical duties to the criminal system. Under the ABA Standards, courts are encouraged to ensure that defense counsel are aware of, and can fulfill, their obligation to determine and advise a defendant about the immigration consequences of a plea.[222] In fact, through legislation and/or ethical rules, courts are under an obligation to inform a defendant that a plea may affect his immigration status and allow him time to speak with his counsel if additional information is requested.[223]

In order to fulfill these obligations and responsibilities, judges have their own guides and handbooks to assist them on the issue of immigration in the criminal

Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127, 155-62 (2007).

215. Bridges v. Wixon, 326 U.S. 135, 164 (1945) (stating that the "impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever…Return to his native land may result in poverty, persecution and even death.").

216. *St. Cyr*, 533 U.S. at 333 n.50.

217. *Id.* at 323.

218. *Id.*

219. *E.g.*, *Williams*, 641 N.E.2d at 49 ("Deportation may be a penalty more severe than a prison sentence.").

220. *E.g.*, *Id.; Paredez*, 101 P.3d at 805; *Soriano*, 194 Cal. App. 3d at 1481.

221. *Id.*

222. *See generally* KATHLEEN M. SULLIVAN, A JUDGE'S BENCHBOOK ON IMMIGRATION LAW AND RELATED MATTERS (C. Wolchok & A. Brown eds., 2001) (citing STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY (1999)) [hereinafter SULLIVAN].

223. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 14-1.4(c) (1999).

courtroom.[224] Judges use these guides and handbooks to educate themselves on immigration law.[225] However, even if this specific information did not exist, judges can use any information they deem important.[226] In sentencing, judges must make a determination that achieves justice. Again, according to ethical duties, justice cannot be accomplished without both parties being present and engaged in that determination.[227] If the court believes the defendant does not have effective assistance of counsel, the court cannot accept a plea.[228] Therefore, courts have an obligation to ensure that immigration consequences are advised on by the attorney.

The argument that judges may not use a defendant's immigration status to aid in their final determination, or that immigration status is irrelevant, is neither true nor accurate. Currently, immigration consequences have increasingly come within the criminal judges' purview as exemplified by: the increasing number of cases across the country that seek plea withdrawal based on failure to be advised as to the immigration consequences by both the criminal court and defense counsel; the fact that judges have the capacity to order deportation; the court's responsibility, in many states, to inform the client of the immigration consequences at the time of plea; and the judge's ability to use immigration status to determine detention, bond, and pretrial-motions. Therefore, archaic beliefs and case law cannot be maintained if the goals of our system are to remain intact.

CONCLUSION

As Karl Llewellyn stated, "It is the profession that keeps the law alive."[229] A lawyer "can either set himself across the path of progress, he can either check or block, by the exercise of utmost ingenuity, each new forward step. Or he can do the opposite."[230] It is this progress, the ability to choose the needs of the client over the law of the courts that will be the only answer to the movement of the law as it currently stands.

With the increased resources of the Department of Homeland Security, improved access to criminal records, Congress's harsher laws on crime, and increased cooperation from local law enforcement, probation and parole officers, the need for lawyers to assist their noncitizen clients in matters affecting their ability to remain in this country is the responsibility of their defense attorney. Therefore, attorneys must "step up" and counsel their clients on the immigration consequences of a criminal conviction. Defense attorneys cannot ethically turn a blind eye to the inadequacies and injustice of the current interpretation of the Sixth Amendment to their noncitizen client's detriment. When there is a conflict within the bounds of the law, an attorney should resolve it in favor of the interests of his or her client. To do

224. A JUDGE'S GUIDE TO IMMIGRATION LAW IN CRIMINAL PROCEEDINGS 4-7 (Pamela Goldberg & Carol Leslie Wolchok eds., 2004) [hereinafter JUDGE'S GUIDE]; *see* SULLIVAN, *supra* note 222.

225. JUDGE'S GUIDE, *supra* note 224.

226. Nichols v. United States, 511 U.S. 738, 747 (1994) ("As a general proposition, a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.") (quoting United States v. Tucker, 404 U.S. 443, 446 (1972)).

227. JUDGE'S GUIDE, *supra* note 224.

228. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 14-1.4(d) (1999).

229. KARL N. LLEWELLYN, THE BRAMBLE BUSH 163 (Oxford Univ. Press 2008) (1930).

230. *Id.*

otherwise runs afoul of an attorney's duty to his or her client, the criminal system, and society.