

**INEFFECTIVE ASSISTANCE AND DRASTIC PUNISHMENTS:  
THE DUTY TO INFORM JUVENILES OF COLLATERAL  
CONSEQUENCES IN A POST-PADILLA COURT**

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## INTRODUCTION

A common assumption is that children adjudicated delinquent continue into adulthood unencumbered by their childhood encounters with the juvenile justice system. Yet, increasingly punitive consequences collateral to an adjudication of delinquency ensure that their youthful indiscretions follow them well into their adult lives and the offenders remain largely uninformed about the consequences of their adjudications. Oblivious to the potential consequences, they are encouraged to enter admissions or guilty pleas.

Collateral consequences<sup>1</sup> hinder a juvenile's successful reintegration into society, impeding, for example, his or her ability to pursue education and obtain housing<sup>2</sup> or employment. An increasing number of college and financial aid applications inquire about juvenile adjudications<sup>3</sup> and certain drug offenses can disqualify an individual for financial aid.<sup>4</sup> Increasingly, employment applications inquire into juvenile adjudications as well as adult criminal convictions.<sup>5</sup> An adjudication of delinquency may also hinder plans to enlist in the military.<sup>6</sup> While each division of the military has distinct regulations governing the use of juvenile delinquency and criminal records, no division explicitly prohibits the consideration of such records.<sup>7</sup>

In addition to creating barriers to future success, juvenile adjudications can also restrict a youth's current livelihood. For example, as a consequence of an adjudication some courts can suspend or revoke a juvenile's driver's license for certain acts.<sup>8</sup> For juveniles who reside in rural communities where there is limited, if any, public transportation, the inability to drive may translate into an

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1. This article will not provide a comprehensive list of consequences collateral to a juvenile adjudication of delinquency.

2. See HUD v. Rucker, 535 U.S. 125 (2002); see also 42 U.S.C. § 13663; see, e.g., CHICAGO, ILL. MUN. CODE tit. 8, ch. 4, § 090 (2005) (ordinance on "drug and gang houses, houses of prostitution and other disorderly houses" that is used routinely to impose fines, eviction orders, or even forfeiture of private property based on criminal or delinquent activity of occupants).

3. See Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, 15 CRIM. JUST. MAG. 41, 42 (2000) (discussing the use of juvenile adjudications in obtaining education or employment).

4. See, e.g., 20 U.S.C.A. § 1091(r) (West 2010); see DEP'T OF EDUC., STUDENT AID REPORT: STUDENT AID ELIGIBILITY WORKSHEET FOR QUESTION 23 (2010), available at <http://www.ifap.ed.gov/drugworksheets/attachments/0107091011Drug%20WorksheetFINAL.pdf>.

5. See Shepherd, *supra* note 3, at 42.

6. See ARMY. R. 601-210, 4-24 (2008); Air Force Instruction 36-2002, at 31 (1999), available at <http://www.e-publishing.af.mil/shared/media/epubs/AFI36-2911.pdf>; Navy Recruiting Manual-Enlisted 2-95-2-98 (2002), available at <http://usmilitary.about.com/library/pdf/navrecruit.pdf>; 2 Military Personnel Procurement Manual, MCO P1100, 72C 3-95-3-105 (2004), available at <http://www.marines.mil/news/publications/Documents/MCO%20P1100.72C%20W%20ERRATUM.pdf>.

7. See *id.*

8. See, e.g., 75 PA. CONS. STAT. ANN. § 1532(c)(1) (West 2006) (stating that in Pennsylvania, juvenile adjudications can result in suspension or revocation of driving privileges); 75 PA. CONS. STAT. ANN. § 1532(a)(1) (West 2006) (stating that when a juvenile has been adjudicated of a felony offense where a vehicle was "essentially involved," his or her driver's license may be suspended for one year).

inability to work. Adjudications of delinquency may also make youth ineligible for public benefits, including Temporary Assistance for Needy Families (TANF) and food stamps.<sup>9</sup>

Finally, delinquency adjudications can carry very serious consequences that manifest in the future. For example, some states require juveniles adjudicated of sex offenses to register on a public registry of sex offenders. Other states permit involuntary commitment of individuals adjudicated delinquent on sex offenses after they have reached the age of majority.<sup>10</sup> Certain convictions can result in severe immigration consequences as well.<sup>11</sup>

Despite the severity of these penalties, courts have categorized collateral consequences as "non-punitive" or "civil," and therefore outside the scope of what competent attorneys must advise their clients about in criminal and juvenile delinquency cases. Ineffective assistance of counsel claims based on a failure to warn clients of the collateral consequences of a conviction have largely been unsuccessful. However, the United States Supreme Court's recent decision in *Padilla v. Kentucky*,<sup>12</sup> establishing an obligation for counsel to advise clients of the immigration consequences of a guilty plea, has opened the door for new argument on this issue.

Applying the logic underpinning the United States Supreme Court's holding in *Padilla v. Kentucky*, we explore the role of defense attorneys in communicating collateral consequences of adjudications to juveniles prior to entering into plea agreements. This article focuses particularly on cases where severe consequences attach. We argue that this communication is particularly important for youth, and that failure to inform juvenile clients can and should constitute ineffective assistance of counsel, and we propose solutions to overcoming the practical obstacles to fully informing juvenile clients. Part I explains that the need to communicate collateral consequences to juveniles is particularly important—even more so than in an adult criminal context—given at least three factors: (1) the shift from a rehabilitative to a punitive juvenile court system, (2) prevailing standards of practice on advising criminal and juvenile defendants of collateral consequences, and (3) the overwhelming body of research on adolescent development that finds youth less competent than their adult counterparts and unable to fully participate in their own plea-bargaining. Part II reconsiders, in light of *Padilla*, the strength of the ineffective assistance of counsel argument in cases in which serious collateral consequences attach to adjudications. We explore the duty to advise clients of consequences of juvenile sex offenses, including sex offender registration and notification and involuntary civil commitment, and demonstrate how failure to inform can be deemed deficient representation. Part III argues for an affirmative responsibility on attorneys and judges to meaningfully inform youth of collateral consequences, including those that may not actualize until the juvenile has long been discharged from court supervision. Finally, we note the obstacles to

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9. Federal Welfare Reform Law, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 115, 21 U.S.C.A. § 862a (West 2000 & Supp. 2010).

10. *See, e.g.*, WASH. REV. CODE ANN. § 71.09.025 (West 2008); 42 PA. CONS. STAT. ANN. § 6401 (West Supp. 2010).

11. *See* 8 U.S.C. § 1229(b) (2006).

12. 130 S. Ct. 1473, 1486 (2010).

communicating collateral consequences to juvenile clients as well as propose practical solutions to better inform youth of collateral consequences.

PADILLA V. KENTUCKY

Jose Padilla was a lawful permanent resident of the United States for more than forty years when he pled guilty to drug-distribution charges for transporting a large amount of marijuana.<sup>13</sup> In post-conviction proceedings, Padilla claimed that he entered a guilty plea on the advice of his attorney and that his attorney failed to warn him that his conviction could result in his deportation.<sup>14</sup> Padilla's trial counsel had told him he "did not need to worry about deportation because he had lived in the U.S. for so long," although deportation was a "virtually mandatory" consequence of a guilty conviction for his charge.<sup>15</sup> The Kentucky Supreme Court held that Padilla's attorney's failure to advise him that he would be deported did not constitute ineffective assistance of counsel because deportation was a collateral consequence of conviction.<sup>16</sup> The United States Supreme Court disagreed, holding that the Sixth Amendment requires counsel to provide affirmative, competent advice to non-citizen clients on the immigration consequences of guilty pleas.<sup>17</sup> Thus, Padilla's attorney's failure to inform him of the deportation consequence was ineffective assistance of counsel.<sup>18</sup>

In support of its holding in *Padilla*, the Court reasoned that the changes in immigration law have "raised the stakes of a noncitizen's criminal conviction," and despite the complexity of immigration law, counsel was still required to communicate the deportation consequences to his client prior to entering a plea.<sup>19</sup> Moreover, standards of practice and professional norms support informing criminal defendants of the consequences of their convictions.<sup>20</sup> Given the foregoing reasoning, the Court found that the conduct of Padilla's attorney was deficient, satisfying the first prong of the ineffective assistance of counsel standard under *Strickland v. Washington*.<sup>21</sup> The Court specified that where the consequences are unclear, counsel only had a duty to advise his or her client that there may be adverse immigration consequences.<sup>22</sup> However, as was the case here, the relevant immigration statutes clearly and explicitly state the consequences of a guilty plea, counsel has a duty to inform clients of these consequences.<sup>23</sup> Silence on the potential consequences is unacceptable.<sup>24</sup>

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13. *Id.* at 1475.

14. *Id.* at 1478. The Court addressed this issue, but held that it was not merely the "affirmative misadvice," but also the omission of information that rendered counsel ineffective. *Id.* at 1484.

15. *Id.* at 1478.

16. *Id.*

17. *Id.* at 1486.

18. *Id.*

19. *Id.* at 1480.

20. *Id.*

21. *Id.* at 1483. The case was remanded to Kentucky Supreme Court to determine whether Padilla could show prejudice.

22. *Id.*

23. *Id.* at 1483-84.

24. *Id.*

The Court also explored the collateral versus direct distinction identified by the Kentucky Supreme Court in reaching its conclusion.<sup>25</sup> This classification has been determinative in much of the case law on collateral consequences.<sup>26</sup> The Supreme Court noted that it had never before applied this distinction to define reasonable performance when determining ineffective assistance, and declined to do so in *Padilla*.<sup>27</sup> The Court reasoned that deportation is a civil rather than a criminal penalty, as it is both especially severe and "intimately related to the criminal process."<sup>28</sup> Given that current immigration law makes deportation essentially automatic for a wide range of offenses, the Court explained that it was unable to separate the penalty of deportation from the underlying conviction, noting that the collateral versus direct distinction is "ill-suited" to evaluating an ineffective assistance of counsel claim in this context.<sup>29</sup> With this assessment, the Court exposed the illogic of the collateral versus direct distinction and diminished its importance for subsequent case law on this issue.<sup>30</sup>

The Court's reasoning in *Padilla* instructs that an attorney has a duty to inform clients of collateral consequences, particularly when the clients are juveniles who lack the ability to make informed decisions about entering a plea that will impose lifelong collateral consequences. Specifically, the Court's reasoning in *Padilla* can extend to require attorneys to advise juveniles of the direct *and* collateral consequences of their adjudications, especially severe and automatic consequences such as sex offender registration and notification and civil commitment.

## I. THE DUTY TO INFORM

### A. *The juvenile justice system has dramatically changed from a largely rehabilitative to more punitive system over time.*

In *Padilla*, the Court stated that immigration law had changed dramatically over the last ninety years with increased punitive consequences and a broader class of deportable offenses.<sup>31</sup> The Court further stated that "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important."<sup>32</sup>

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25. *Id.* at 1482. The Kentucky Supreme Court found that, "collateral consequences are outside the scope of representation required by the Sixth Amendment," and, therefore, the "failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel." *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008) (citing *Commonwealth v. Fuartado*, 170 S.W.3d 384 (2005)).

26. *See Padilla*, 130 S. Ct. at 1480, n. 8 ("The disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case because, as even Justice Alito agrees, counsel must, at the very least, advise a noncitizen 'defendant that a criminal conviction may have adverse immigration consequences.'"); *see also* Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124 (2009).

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

28. *Id.*

29. *Id.* at 1481-82.

30. *Id.* at 1482.

31. *Id.* at 1478.

32. *Id.* at 1480.

Similarly, the juvenile justice system has undergone a shift during the course of its history and currently is a far more punitive system than originally imagined. First established over a century ago, the juvenile court's original purpose was to treat children in a benign, non-punitive, and therapeutic manner in order to "cure" a child's delinquent behavior.<sup>33</sup> This purpose was premised on the fundamental recognition that children required different treatment from adults.<sup>34</sup> The State assumed the role of *parens patriae* and characterized its intervention as civil rather than criminal, as well as rehabilitative rather than punitive.<sup>35</sup> By removing children from adult criminal court jurisdiction, the juvenile justice system could supervise and treat children and respond to their needs with greater flexibility. While the criminal justice system relied on punitive responses to crime, the juvenile system facilitated the opportunity for juveniles to reform and become productive citizens.<sup>36</sup>

The court's rehabilitative focus was based on the assumption that a juvenile's actions were primarily the function of his or her environment and therefore did not warrant a punitive response.<sup>37</sup> "Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. [A juvenile delinquent's] conduct is not deemed so blameworthy that punishment is required to deter him or others."<sup>38</sup> The rehabilitative ideal further rested on the belief that a child's character, not yet fully formed, could meaningfully be improved by intervention strategies geared to the minor's "best interests."<sup>39</sup>

For more than sixty years, the Supreme Court has adhered to the notion that the law should categorically treat juveniles differently from adults.<sup>40</sup> Justice Felix Frankfurter wrote, "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty toward children."<sup>41</sup>

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33. See Jay D. Blitzman, *Gault's Promise*, 9 BARRY L. REV. 67, 67 (2007) (describing original beneficent purpose of juvenile justice system).

34. See *id.*

35. See *id.* at 67.

36. See *id.*; *Gault*, 387 U.S. at 15-16.

37. *McKeiver v. Pennsylvania*, 403 U.S. 528, 551-52 (1971).

38. *Id.* (White, J., concurring).

39. Barry Feld, *The Transformation of the Juvenile Court – Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 337 (1999).

40. See *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (holding that juveniles may not be sentenced to life without parole for a nonhomicide crime); *Roper v. Simmons*, 543 U.S. 551, 574-75 (2005) (sentencing juveniles to death constitutes cruel and unusual punishment); *In re Gault*, 387 U.S. 1, 28 (1967) (noting that due process protections in juvenile court are compatible with its unique rehabilitative mission); *Kent v. United States*, 383 U.S. 541 560-61 (1966) (noting that juvenile proceedings are “non-criminal” in nature); *Gallegos v. Colorado*, 370 U.S. 49, 55 (1962) (holding that defendant's youth was key factor in determining whether confession was obtained in violation of due process); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (holding that defendant's youth necessitates greater care by police when obtaining a confession).

41. *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

Yet, the rehabilitative function of the juvenile court system is slowly dissipating. During the 1980s and 1990s the United States experienced a shift in ideology based on the perception that juvenile crime was increasing.<sup>42</sup> The media's skewed portrayal of juvenile crime ignited public fear, motivating politicians and lawmakers to respond by proposing "get tough" policies.<sup>43</sup> Policymakers moved away from a vision of a rehabilitative justice system toward one of punitive justice, where accountability and punishment are emphasized over rehabilitation.<sup>44</sup>

For example, historically the "best interests of the child" was expressly articulated as the primary objective of juvenile delinquency proceedings.<sup>45</sup> Yet, today only three states emphasize the best interests of the child as the primary purpose of juvenile court.<sup>46</sup> At least six states have enacted statutes that explicitly articulate traditional criminal justice goals, such as deterrence, punishment, accountability, and public safety.<sup>47</sup> Sixteen states embrace balanced and restorative justice principles that emphasize accountability and victim restoration over rehabilitation.<sup>48</sup> A growing majority of states have changed their juvenile codes to make juvenile delinquency proceedings look more like their adult criminal counterparts, including such features as the availability of no contest pleas, blended sentences, parole provisions, fines, and restitution.<sup>49</sup> Similarly, many states have enacted statutory changes eliminating certain long-standing features of the juvenile system such as limited access to juvenile records, limiting jurisdiction to age twenty-one, closed courtrooms, and the prohibited use of juvenile adjudications in subsequent proceedings.<sup>50</sup> The widespread elimination of these characteristics demonstrates the national consensus toward a more punitive juvenile system.

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42. See Tara Kole, Recent Development, *Juvenile Offenders*, 38 HARV. J. ON LEGIS. 231, 234 (2001) (describing increasing emphasis on punishment in juvenile court system).

43. See *id.*

44. See *id.*

45. JOHN C. WATKINS, *THE JUVENILE JUSTICE CENTURY: A SOCIOLEGAL COMMENTARY ON AMERICAN COURTS* 45 (Carolina Acad. Press 1998); "The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction" in *A CENTURY OF JUVENILE JUSTICE*, Rosenheim, et al. eds. (University of Chicago Press, 2002) at 43.

46. KY. REV. STAT. ANN. § 600.010 (West 2010); MASS. GEN. LAWS. ANN. Ch. 119, § 53 (LexisNexis 2009); W. VA. CODE ANN. § 49-1-1 (LexisNexis 2009).

47. CONN. GEN. STAT. ANN. § 46b-121h (West 2009); HAW. REV. STAT. ANN. § 571-1 (LexisNexis 2010); N.C. GEN. STAT. ANN. § 7B-1500 (West 2004); TEX. FAM. CODE ANN. § 51.01 (LexisNexis 2008); WYO. STAT. ANN. § 14-6-201 (2009).

48. ALA. CODE § 12-15-1.1 (2010); ALASKA STAT. § 47.05.060 (2010); CAL. WELF. & INST. CODE § 202 (West 2008); FLA. STAT. ANN. § 985.02 (LexisNexis Supp. 2011); IDAHO CODE ANN. § 20-501 (2004); IND. CODE ANN. § 31-10-2-1 (LexisNexis 2007); KAN. STAT. ANN. § 38-2301 (West Supp. 2008); MD. CODE ANN., CTS. & JUD. PROC. § 3-802 (LexisNexis 2006); MINN. STAT. ANN. § 242.18 (West 2010); MONT. CODE ANN. § 41-5-102 (2010); N.J. STAT. ANN. § 2A:4A-21 (West Supp. 2009); OR. REV. STAT. § 419C.001 (2009); 42 PA. CONS. STAT. ANN. § 6301 (West 2000); WASH. REV. CODE ANN. § 13.40.010 (West Supp. 2011); WIS. STAT. ANN. § 938.01 (West 2009).

49. Katherine Hunt Federle & Paul Skendelas, *Thinking Like a Child: Legal Implications of Recent Developments in Brain Research for Juvenile Offenders*, in *LAW, MIND AND BRAIN* 199, 207-12 (Michael Freeman & Oliver R. Goodenough, eds., Ashgate 2009).

50. *Id.*

As an example, the Illinois Legislature amended its Juvenile Court Act to make its central goals protection of the public and holding children accountable for violations of the law.<sup>51</sup> This change, according to the Illinois Supreme Court, represented a "fundamental shift from the singular goal of rehabilitation to include the overriding concerns of protecting the public and holding juvenile offenders accountable for violations of the law."<sup>52</sup> Amendments to the California Welfare and Institutions Code have expanded the statutory purpose of juvenile court beyond "the spiritual, emotional, mental and physical welfare of the minor" and the securing of "custody, care and discipline" equivalent to that which parents should provide<sup>53</sup> to add a new purpose and powers: protecting the public from the consequences of criminal activity, authorizing the imposition of punishment, and redressing injuries to victims.<sup>54</sup> Kansas, similarly, explicitly characterizes the system as dealing with "juvenile crime" and refocused the primary goals of the juvenile justice code on public safety and accountability in addition to rehabilitation.<sup>55</sup> Moreover, Kansas has incorporated principles of punishment and accountability—the two basic hallmarks of the adult criminal justice system—throughout the juvenile system.<sup>56</sup>

The traditional juvenile justice system historically distinguished itself from the criminal system by limiting the adverse consequences that typically flow from criminal convictions. Overwhelmingly, juvenile justice experts suggest that a finding of delinquency today is not substantially different—as measured by the

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51. 1997 Ill. Comp. Stat. Ann. Adv. Legis. Serv. 64 (LexisNexis). These same amendments also added language establishing that minors are entitled to the same procedural protections as adults unless greater protections are provided by statute. *Id.* at 65.

52. *In re A.G.*, 195 Ill.2d 313, 317 (Ill. 2001).

53. The 1961 Arnold-Kennick Juvenile Court Law included the following statement of purpose: "The purpose of this chapter (the Arnold Kennick Juvenile Court law) is to secure for each minor under the jurisdiction of the juvenile court such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the State; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents. This chapter shall be liberally construed to carry out these purposes." 1961 Cal. Stat. 3459, 3460. *See also In re Gladys R.*, 464 P.2d 127, 138 (Cal. 1970) (Burke, J., dissenting) ("Proceedings in the juvenile court are conducted for the protection and benefit of minors and not to prosecute them as law violators.").

54. *See* 1998 Cal. Stat. 4990l; 1984 Cal. Stat. 2726; 1975 Cal. Stat. 1872; *In re Charles C.*, 284 Cal. Rptr. 4, 8 (Cal. Ct. App. 1991) (discussing legislative changes designed to "put an increased emphasis on punishment"); *In re Javier A.*, 206 Cal. Rptr. 386, 417 (Cal. Ct. App. 1984) (describing legislation which added protection of the public to the purposes of the juvenile justice system).

55. KAN. STAT. ANN. § 38-2301 (2010).

56. It has, for example, discarded many of the confidential and protective features of the historic juvenile court and opened juvenile court proceedings to the general public under a broad array of circumstances. *See, e.g.*, K.S.A. § 38-1607 (stating court's official file is available for public inspection unless the juvenile is under 14 years of age and a judge rules that to open the file would not be in the best interest of the juvenile); K.S.A. § 38-1608(c) (stating law enforcement files on juveniles at least 14 years of age are subject to the same disclosure restrictions as those of adults). It broadens the scope of the collateral consequences of an adjudication by explicitly permitting a juvenile's delinquency adjudication to be used against him in adult criminal proceedings for the purpose of sentencing enhancement. K.S.A. § 21-4710; *State v. Hitt*, 273 Kan. 224 (2002); KAN. STAT. ANN. § 21-4710 (West 2007) (repealed 2011); *State v. Hitt*, 42 P.3d 732, 734-35 (Kan. 2002).

degree of stigma and punishment it confers—from a finding of guilt in a criminal court.<sup>57</sup> And yet, public perception remains that juvenile records are erased or sealed upon the child reaching the age of majority because many still view juvenile court as largely rehabilitative.<sup>58</sup> As a result, defendants and their families are less likely to imagine permanent and punitive consequences, and the failure of an attorney to warn clients of the collateral effects of his or her contact with the juvenile justice system in turn bears greater injustice.<sup>59</sup>

In the current landscape of juvenile justice, youths' hearings are becoming increasingly less confidential and more individual, agencies, and employers are using juvenile records against youth in hiring and acceptance policies.<sup>60</sup> These changes in the juvenile justice system coupled with the accessibility of juvenile record information raise the stakes of a juvenile adjudication calling for a heightened standard for advising young clients prior to entering an admission.

*B. The weight of prevailing professional norms supports the view that juvenile defense attorneys should inform youth of the collateral consequences of their juvenile adjudications.*

The *Padilla* Court found that "immigration law can be complex, and is a legal specialty of its own," resulting in many practicing attorneys being uninformed of the grave consequences criminal convictions may have on immigration status.<sup>61</sup> The Court nevertheless held that the prevailing weight of professional norms—specifically the National Legal Aid and Defender Association Performance Guidelines for Criminal Representation and the American Bar Association Standards for Criminal Justice—impose a duty on counsel to advise the client of the risk of deportation upon criminal conviction.<sup>62</sup>

Juvenile defense is similarly a specialty. Juvenile law encompasses more than criminal law. For example, a different body of case law governs motions to suppress and competency hearings.<sup>63</sup> Attorneys must know nomenclature

57. See, e.g., Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 5 (1997) (discussing trend among states to develop laws which extend juvenile punishment into adulthood); see also Linda E. Frost & Robert E. Shepherd, Jr., *Mental Health Issues in Juvenile Delinquency Proceedings*, 11 CRIM. JUST. 52, 59 (1996) ("Juvenile delinquency proceedings have far more serious consequences now than at any other point in the history of the juvenile or family court.").

58. Lori M. Nehls, Note, 7 SUFFOLK J. TRIAL & APP. ADV. 91 (2002) (citing Edward Niam, Jr., *Do You Know Who You Are Hiring? Preventing Workplace and Employee Violence*, USA TODAY, July 1997, at 51).

59. See Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 321 (2003) ("In the criminal courts, relatives and friends are under no illusion as to the consequences of the criminal proceeding. . . . On the other hand, parents do not always understand what can happen to their children in juvenile court, because they may view it as a therapeutic institution.").

60. See Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L. J. 1111 (2006).

61. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

62. *Id.* at 1482.

63. See Sue Burrell, *Juvenile Delinquency: The Case for Specialty Training*, CAL. DAILY J., January 14, 2010 (describing separate standards for juveniles for "competence to stand trial, confessions, and capacity to commit a crime").

unheard of in adult court and the services available to clients.<sup>64</sup> They must be able to explain "complex legal principles to their clients in an understandable way, and assert their clients' expressed wishes even when others would like to impose their own views of the child's 'best interest.'"<sup>65</sup> One commentator has noted that the representation of juvenile offenders requires specialized skills and knowledge that appointed counsel accustomed to handling adult cases may not possess.

Special considerations are necessary when dealing with the attorney-child client relationship, including: "(1) an understanding [of] child and adolescent development from a psychological and legal perspective; (2) communication, consultation and confidentiality issues; (3) issues relating to the child-parent relationship; and (4) issues regarding the determination of the objectives of the representation."<sup>66</sup>

Practice Standards recognize juvenile court practice as a specialty,<sup>67</sup> and those standards, as well as criminal defense standards, support the view that defense counsel has a duty to inform her client of consequences attendant to an adjudication or conviction. The American Bar Association advocates a professional duty to inform clients about collateral consequences: "[to] require that the defendant is fully informed, before pleading guilty and at sentencing, of the collateral sanctions applicable to the offense(s) charged."<sup>68</sup> The ABA also advises: "[t]o the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."<sup>69</sup>

Although the introductory disclaimer "to the extent possible" appears to downplay the duty, the commentary provides clarification: "[c]ollection of applicable collateral sanctions pursuant to Standard 19-2.1 will make it possible for lawyers to give full advice in all cases. Thus, the contingency in Standard 14-3.2(f) that qualifies defense counsel's duty would no longer pertain."<sup>70</sup> Legal treatises and practitioners' materials, consistent with the ABA Standards, also consider communication about collateral consequences in evaluating risks and setting goals with a client to be a norm of competent lawyering.<sup>71</sup>

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64. *See id.*

65. *Id.*

66. Joanna S. Markman, *In re Gault: a Retrospective in 2007: Is It Working? Can It Work?*, 9 BARRY L. REV. 123, 135 (2007) (quoting Marvin R. Ventrell, Essay, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 272-73 (1995)).

67. *See* NAT'L LEGAL AID & DEFENDER ASS'N, TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS (2008), available at [http://www.njdc.info/pdf/10\\_Core\\_Principles\\_2008.pdf](http://www.njdc.info/pdf/10_Core_Principles_2008.pdf). States have adopted these standards. *See, e.g.*, JUVENILE DEFENDER ASS'N OF PA., PERFORMANCE GUIDELINES FOR QUALITY AND EFFECTIVE JUVENILE DELINQUENCY REPRESENTATION, 1 (2010), available at [http://www.pajuvdefenders.org/file/juvenile\\_performance\\_guidelines.pdf](http://www.pajuvdefenders.org/file/juvenile_performance_guidelines.pdf).

68. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-1.2(a)(iv) (Am. Bar Ass'n 2004).

69. ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2(f) (Am. Bar Ass'n, 3d ed. 1999).

70. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.3, 27. (Am. Bar Ass'n 2004).

71. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the*

Although there is no clear mandate to inform juvenile clients of collateral consequences, "notions of fairness and understanding that commentators and bar associations have urged with regard to notifying adult defendants of these consequences should naturally extend to the juvenile context," especially in light of the research suggesting the developmental differences between juveniles and adults.<sup>72</sup> Thus, while the ABA's Juvenile Justice standards do not explicitly address an obligation to inform juveniles of collateral consequences, the standards state that "[i]t is appropriate and desirable for counsel to advise the client concerning the probable success and consequences of adopting any posture with respect to [delinquency] proceedings."<sup>73</sup> As one youth advocate comments, an attorney has a duty to "educate children and adolescents on the short- and long-term consequences of all potential case-related decisions; patiently lead youth through the pros and cons of each option; and enhance the youth's ever evolving decision-making skills and capacities."<sup>74</sup> That is because "only defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case"<sup>75</sup> and "[w]hether it is a minor or an adult who stands accused, the lawyer is the *one* person to whom society as a whole looks as the protector of the legal rights of that person."<sup>76</sup>

C. *Defense attorneys have a heightened duty to inform juvenile clients of the consequences of their adjudications given their clients' lesser cognitive and developmental ability.*

That juveniles are categorically less mature, less able to weigh risks and long-term consequences, more vulnerable to external pressures, and more compliant with authority figures than are adults, necessitates a higher standard for competent representation.<sup>77</sup> In *Roper v. Simmons* and *Graham v. Florida*, the United States Supreme Court recognized that juvenile offenders, whose personal and developmental attributes sharply distinguish them from adults, should be spared the harshest adult sentences under the Eighth Amendment to the

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*Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 701 (2002) ("In this, the ABA Standards are consistent with other evidence of the norms of competent lawyering, such as legal treatises and practitioners' materials, all of which emphasize the importance of considering collateral consequences in evaluating risks and setting goals for criminal litigation.").

72. Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1111 (2006).

73. JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES §3.1(b)(ii)[a] (Institute of Judicial Administration-Am. Bar Ass'n eds. 1980)); *see also* JUVENILE COLLATERAL CONSEQUENCES: THE ABA'S SPECIAL REPORT ON BARRIERS TO EMPLOYMENT AND EDUCATION AS A RESULT OF CONTACT WITH THE JUVENILE JUSTICE SYSTEM 1 (Am. Bar Ass'n 2010) (resolving that records of juvenile adjudications should not be used against juveniles in the pursuit of employment, education, or financial aid).

74. Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 248-49 (2005).

75. ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard § 14-3.2, 126. (Am. Bar Ass'n, 3d ed.1999).

76. *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) (emphasis added).

77. *See Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (holding the death penalty unconstitutional when applied to minors); *Graham v. Florida*, 130 S. Ct. 2011, 2029-30 (2010) (holding life imprisonment unconstitutional when applied to minors convicted of non-homicide crimes).

Constitution.<sup>78</sup> Relying on developmental research, the Court concluded that, as compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility," they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and their character is not yet "as well formed as that of an adult."<sup>79</sup> More recently in *Graham*, the Court reaffirmed the rationale underlying *Roper*, declaring that "[n]o recent data provide reason to reconsider the court's observations in *Roper* about the nature of juveniles. . . . [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."<sup>80</sup>

Juveniles engage in present-oriented thinking, which interferes with their ability to engage in adult-like thinking.<sup>81</sup> Generally, adolescents seem unable to think about the future or they discount the future and weigh more heavily the short-term risks and benefits from decisions.<sup>82</sup> Adolescents are risk-takers who are more resistant to social control and less susceptible to deterrence.<sup>83</sup> Issues of risk perception are closely related to those of temporal perspective, sometimes described as future orientation.<sup>84</sup> Generally, adolescents tend to focus more on short-term consequences and less on the long-term impact of a decision or behavior.<sup>85</sup>

Adolescents are often characterized as more willing to take risks than adults and more likely to believe that they will avoid the negative consequences of risky behavior.<sup>86</sup> Not only are adolescents more prone to engage in risky or sensation-seeking behavior, but, perhaps just as important, they may have different perceptions of risk itself.<sup>87</sup> For example, adolescents appear to be unaware of many risks of which adults are aware, and they calculate the probability of positive and negative consequences differently than adults.<sup>88</sup> The proven inability of juveniles as a class to appreciate the consequences of their actions, their propensity toward reckless behavior, their immature decision-making and their susceptibility to negative external influence, warrants different treatment of children adjudicated delinquent in juvenile court.

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78. *Roper*, 543 U.S. at 578–579; *Graham*, 130 S. Ct. at 2036.

79. *Roper*, 543 U.S. at 569–70 (internal quotation marks omitted).

80. *Graham*, 130 S. Ct. at 2026.

81. See Carl Keane et al., *Deterrence and Amplification of Juvenile Delinquency by Police Contact: The Importance of Gender and Risk-Orientation*, 29 BRIT. J. CRIMINOLOGY 336, 338 (1989) ("We suggest that those adolescents who are risk-takers will be more resistant to familial and formal control . . .").

82. *Id.*

83. *Id.*

84. *Id.*

85. See Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 231 (1995) ("In general, adolescents seem to discount the future more than adults and to weigh more heavily the short-term consequences of decisions—both risks and benefits—a response that in some settings contributes to risky behavior.").

86. See Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 260 (1996) ("The few extant comparisons of adults and adolescents suggest that thrill seeking and disinhibition (as assessed via measures of sensation seeking) may be higher during adolescence than adulthood.").

87. *Id.*<sup>9</sup>

88. *Id.*

Teenagers' focus on the present and their inability to weigh long-term consequences when making important decisions supports the proposition that attorneys and judges have an increased responsibility to communicate all the consequences of a juvenile's adjudication of delinquency—both direct and collateral. Youth do not have the same ability as adults to think through the consequences of entering into a plea. With an underdeveloped cognitive ability, juveniles may feel pressured to plead guilty without fully understanding the consequences that are inevitably in their future.

Furthermore, "[t]eenagers are fairness fanatics."<sup>89</sup> While perceived fairness likely matters to all defendants, adolescents are particularly sensitive to this issue. If consequences remain uncommunicated it will seem that the system was wrought with deception and this will in turn foster cynicism and mistrust.<sup>90</sup> This may be especially true when the child is led to plead guilty without all the information, in a sense feeling tricked by the system and the person appointed as his advocate.<sup>91</sup>

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. *Failing to communicate consequences to a juvenile should be deemed ineffective assistance of counsel.*

The *Padilla* Court held that failing to communicate the very severe consequence of deportation was deficient representation for purposes of determining ineffective assistance of counsel.<sup>92</sup> Claims of ineffective assistance of counsel are analyzed under the test established in *Strickland v. Washington*.<sup>93</sup> The test has two components: deficiency and prejudice. First, a defendant must establish that his defense attorney's performance was deficient in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."<sup>94</sup> Once a defendant establishes that his counsel's representation was deficient, a defendant must then demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>95</sup> Although the ultimate outcome—adjudication of delinquency—may be the same, to satisfy the second prong of *Strickland*, there must be a reasonable

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89. Marty Beyer, *Juvenile Justice: Juvenile Boot Camps Don't Make Sense*, 10 CRIM. JUST. MAG., Winter 1996, available at <http://www.abanet.org/crimjust/juvjus/cjbootcamp.html>.

90. See Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466, 476 (2007) (arguing that better representation and processes in juvenile proceedings would improve children's perceptions of fairness, which will foster respect for the law).

91. *Id.* ("Children's perceptions of the fairness of delinquency proceedings can have therapeutic consequences . . . [P]eople who believe they were treated fairly feel more obligated to obey the law, and these feelings are sustained over time.").

92. *Padilla*, 130 S. Ct. 1473 at 1482.

93. 466 U.S. 668 (1984).

94. *Id.* at 687.

95. *Id.* at 694. The focus of this paper will be on the first prong, demonstrating that failure to communicate consequences is deficient representation under *Strickland*. *Padilla* at 1487.

determination that but for his counsel's deficiency, the defendant would not have pleaded guilty and would have insisted on going to trial.

Because judicial scrutiny of defense counsel's performance is highly deferential, a defendant must overcome the presumption that the challenged action or inaction of counsel was the product of sound trial strategy.<sup>96</sup> While *Strickland* allows for a presumption that counsel's conduct falls "within the wide range of reasonable professional assistance" this presumption implies that counsel's action or inaction was undertaken *in the client's defense*.<sup>97</sup> In Padilla's case, his attorney misinformed him that there would likely be no severe immigration consequences.<sup>98</sup> His representation was therefore deemed deficient.<sup>99</sup> Defendants asserting claims for ineffective assistance of counsel for failing to communicate the consequences of a juvenile adjudication have mostly been unsuccessful.<sup>100</sup>

However, those cases can be revisited in light of *Padilla*. The requirement that children receive competent representation is more important than ever in light of the shift toward a more punitive juvenile justice system. Youth who plead guilty face graver consequences than their predecessors. Moreover, plea agreements in juvenile court happen at a greater rate than in adult court, so the obligation to inform juveniles of the consequences of their adjudications should be further enforced.<sup>101</sup> The United States Supreme Court has long recognized the critical importance of plea negotiation during litigation for purposes of Sixth Amendment right to effective assistance of counsel.<sup>102</sup> In order to enter into a plea agreement, juveniles must demonstrate they have knowingly, voluntarily, and intelligently waived their right to proceed at a hearing.<sup>103</sup> However, juveniles enter plea agreements at alarmingly higher rates than their adult counterparts.<sup>104</sup> This may be due to their underdeveloped cognitive ability to think through the consequences of their actions, their misunderstanding of the system and what possible consequences exist, or familial pressures to dispose of the charge as quickly as possible. Thus, it is even more important to ensure that juveniles are fully aware of the consequences they may suffer as a result of entering an admission.

In *Padilla*, the Court addressed the issue of the attorney's effectiveness in a post-conviction proceeding where the defendant collaterally challenged his own guilty plea.<sup>105</sup> In most states, juveniles do not share the same ability to challenge their guilty pleas. Few states afford juveniles the right to any post-dispositional

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96. *Id.* at 689.

97. *Id.*; see also *People v. Hattery*, 488 N.E.2d 513, 517 (Ill. 1985).

98. *Padilla*, 130 S. Ct. 1473 at 1494.

99. *Id.*

100. See Barbara A. Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 774 (2010).

101. Thomas F. Geraghty, *Justice for Children: How Do We Get There?* 88 J. CRIM. L. & CRIMINOLOGY 190, 232 (1998).

102. See *id.* at 1486 (2010) (citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)); *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970).

103. *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976); see also *In re Gault*, 387 U.S. at 55, 56.

104. Geraghty, *supra* note 101, at 232.

105. *Padilla*, 130 S. Ct. at 1475.

relief. Tennessee, for example, authorizes relief from juvenile orders when the commitment is void or voidable due to a violation of any right guaranteed by the state or federal laws or Constitution, or if a right is later recognized and determined to apply retroactively.<sup>106</sup> There is also no time limit for seeking post-dispositional relief as long as the juvenile is still in custody and has exhausted administrative remedies.<sup>107</sup> Wisconsin also has a strong post-dispositional relief system.<sup>108</sup> In some cases, juveniles can move for post-dispositional relief before beginning a traditional appeal.<sup>109</sup> Post-dispositional relief can be sought for the discovery of new evidence, a plea withdrawal, or even a new dispositional hearing.<sup>110</sup> If the result in the post-disposition relief proceeding is unfavorable to the juvenile, he or she can then appeal the original order or the decision in the post-disposition relief proceeding.<sup>111</sup>

In most cases, however, the only avenue a juvenile has to challenge his adjudication is by appeal.<sup>112</sup> For most juveniles, appellate review is meaningless as it is a lengthy process with no stay of disposition, resulting in the juvenile spending time in placement serving his disposition while awaiting appeal.<sup>113</sup>

*B. The obligation to inform juveniles of collateral consequences is greater when severe consequences attach.*

The *Padilla* Court held that because deportation was such a severe and automatic consequence that had a lasting impact on the defendant and his family, it was different from other consequences a criminal defendant may suffer.<sup>114</sup> As discussed earlier, juveniles are ill-equipped to navigate the complexities of the juvenile justice system and lack the cognitive ability to understand the grave consequences attendant to their adjudications, and thus require a heightened standard of representation requiring pre-adjudicatory warning of collateral consequences. This is even more important when juveniles face severe consequences to their personal liberty as a result of their juvenile record. Juveniles adjudicated delinquent for sex offenses can face even graver consequences than their peers. In many states they can be subject to sex offender registration and notification statutes and involuntary civil commitment.

*i. Sex Offender Registration and Notification*

A potential consequence many juveniles face as a result of a delinquency adjudication for a sex offense is registration on a public registry. The federal

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106. TENN. CODE ANN. § 37-1-305 (2010).

107. *Id.*

108. WIS. STAT. ANN. § 938.46 (West 2009).

109. *Id.*

110. *Id.*

111. *Id.* §§ 938.46-47 (providing section 809.30 applies to motions for post-dispositional relief brought by juveniles); Telephone Interview with Eileen Hirsch, Assistant State Pub. Defender in the Wis. State Public Defender's Madison Appellate Office (Feb. 11, 2010).

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

113. Wendy N. Davis, *Town Without Pity*, 95 A.B.A. J. 50, 53-54 (Sept. 2009).

114. *Padilla*, 130 S. Ct. 1473 at 1481-1483.

Adam Walsh Child Protection and Safety Act of 2006 specifically mandates juveniles are to be included in sex offender registries.<sup>115</sup> According to the Adam Walsh Act, all states must "substantially comply" with the Sex Offender Registration & Notification Act (SORNA) requirements of the Walsh Act or risk forfeiting ten percent of the funds normally received from the federal Omnibus Crime Control and Safe Streets Act.<sup>116</sup> Under the mandate of SORNA, Tier II or Tier III classification could result in registration for twenty-five years to life,<sup>117</sup> and require in-person "show-ups" two to three times each year.<sup>118</sup> Failing to register can subject the person to a maximum term of imprisonment greater than one year.<sup>119</sup>

Registration pursuant to SORNA can result in restrictions on the individual's residency, employment, and higher education. For example, adjudications may disqualify juveniles from obtaining public housing.<sup>120</sup> Housing authorities routinely conduct background checks for adult applicants and may "investigate whether any member of the family unit, including a juvenile member, has been convicted of specific disqualifying offenses."<sup>121</sup> While juvenile records can often be inaccessible, "[t]here is evidence that some housing authorities attempt to screen for juvenile records despite state laws that limit or deny access."<sup>122</sup> Juveniles adjudicated delinquent for sexual offenses who are required to register as sex offenders may have their housing options limited by community notification provisions.<sup>123</sup> Sex offenders subject to community notification requirements may often find themselves with limited, undesirable housing options when community members mobilize to prevent registered sex offenders from moving into their neighborhoods.<sup>124</sup> Furthermore, a minor trying to readjust to normal life will experience extreme hardship because registration makes their name, picture and offense available to the public, including to their classmates and the press via the internet.<sup>125</sup>

Using the reasoning set forth by the Supreme Court in *Padilla*, the consequence of sex offender registration is severe and should trigger the duty to inform the juvenile. A case decided years before *Padilla* virtually mirrors its application. In *State v. Edwards*, a case involving an adult sex offender, the New Mexico Appellate Court noted that ABA Standards recommended advice of collateral consequences, particularly in the context of immigration proceedings.<sup>126</sup> The court continued to note that it "see[s] no reason why the

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115. § 111, 42 U.S.C.A. § 16911 (West Supp. 2010).

116. *Id.* § 125, § 16925(a).

117. 42 U.S.C.A. § 16915.

118. *Id.* § 16916.

119. *Id.* § 16913(e).

120. See Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities be Notified?*, 79 N.Y.U. L. REV. 520, 563-76 (2004).

121. Pinar, *supra* note 60, at 1114.

122. Henning, *supra* note 120, at 570.

123. WIS. STAT. ANN. § 16921 (West 2009).

124. *Moms Fight Back Against Sex Offenders*, available at <http://abcnews.go.com/GMA/AmericanFamily/story?id=2943449&page=1>.

125. WIS. STAT. ANN. §§ 16918, 16920 (West 2009).

126. *State v. Edwards*, 2007-NMCA-43, 141 N.M. 491, 157 P.3d 56, 59, 63 (N.M. Ct. App. 2007) (citing *State v. Paredes*, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799 (N.M. 2004)). In *Edwards*, the

similarly harsh consequences of sex offender registration should not also necessitate specific advice from counsel so that defendants can make informed decisions regarding their pleas.<sup>127</sup> Moreover, the Washington Supreme Court squarely held that a juvenile's plea was involuntary when he was misinformed by his attorney that his juvenile sex offense conviction could be removed from his record.<sup>128</sup> Although the court did not specifically hold the attorney was ineffective for failing to inform the juvenile of the consequence of sex offender registration, the court held that the plea was rendered involuntarily because the juvenile was not fully informed of the registration consequence.<sup>129</sup> The court concluded that although the registration obligation did not affect the immediate sentence, the impact is "significant, certain, and known before a guilty plea is entered."<sup>130</sup> A New Jersey court also applied *Padilla* in finding that a juvenile should have been warned of Megan's Law consequences because those consequences are especially important.<sup>131</sup>

A Georgia court applied *Padilla's* framework to the requirements of the state's sex offender registration system.<sup>132</sup> One of the factors the court relied upon was that "prevailing professional norms" supported counsel advising their clients of potential collateral consequences of pleas, including specifically sex offender registration.<sup>133</sup> It also considered the nearly automatic result of sex offender registration.<sup>134</sup> The court found that the sex offender registration is a "drastic measure."<sup>135</sup> Finally, the court ruled that the terms of the statute at issue were "succinct, clear, and explicit."<sup>136</sup> In ruling that the attorney must advise as to the consequence of sex offender registration, the court also provided guidance as to which practical factors may be determined as essential by the courts.<sup>137</sup> Certainly, if the adult sex offender registration statutes in these cases meet the *Padilla* standards, SORNA too will require a duty to inform juvenile clients as to its consequences.

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court held that the adult defendant could have his guilty plea set aside because counsel failed to sufficiently advise him that sex offender registration was a virtually certain consequence of his plea and, thus, performed deficiently.

127. *Id.*

128. *See* State v. A.N.J., 225 P.3d 956, 970–71 (Wash. 2010).

129. *Id.* at 971.

130. *Id.* at 968.

131. *In re* C.P.H., No. A-0936-08T4, 2010 N.J. Super. Unpub. Lexis 1721, at \*16 (N.J. Super. Ct. App. Div. July 23, 2010).

132. Taylor v. State, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010). In *Taylor*, the court held that counsel performed deficiently when he failed to advise the adult defendant that pleading guilty to a child molestation charge would require him to comply with requirements of Georgia's sex offender registry statute program.

133. *Id.* (relying on ABA and NLADA standards).

134. *Id.*

135. *Id.* (internal quotation marks omitted).

136. *Id.* (internal quotation marks omitted).

137. *Id.*

ii. *Pennsylvania Involuntary Civil Commitment*

Another potential consequence for juveniles adjudicated delinquent of sex offenses is involuntary civil commitment for an indeterminate period.<sup>138</sup> Pennsylvania is the only state in the country that provides for involuntary commitment of juvenile sex offenders without a similar requirement for adult sex offenders.<sup>139</sup> In Pennsylvania, Act 21 authorizes involuntary civil commitment for "sexually violent delinquent children who, due to a mental abnormality or personality disorder, have serious difficulty in controlling sexually violent behavior and thereby pose a danger to the public and further provides for additional periods of commitment for involuntary treatment for said persons."<sup>140</sup> Act 21 has three requirements. First, the juvenile must have been adjudicated delinquent for an act of sexual violence, including rape, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, indecent assault, or incest.<sup>141</sup> Second, he must be committed to a facility and remain there when he turns twenty years old.<sup>142</sup> Finally, the Sexual Offender Assessment Board makes a determination that he is in "need of involuntary treatment due to a mental abnormality or personality disorder which results in serious difficulty in controlling sexually violent behavior that makes the person likely to engage in an act of sexual violence."<sup>143</sup> Civil commitment can last from one year to life.<sup>144</sup>

According to *In the Interest of A.C.*, the Pennsylvania Superior Court found that Act 21 has a non-punitive purpose and effect.<sup>145</sup> It relied primarily on the burden of proof—clear and convincing evidence—in the Act 21 hearings.<sup>146</sup> Decided sixteen days before *Padilla* was issued, this case did not specifically address whether counsel or the court must advise the defendant about possible Act 21 consequences.<sup>147</sup> Therefore, it is instructive to look at a post-*Padilla* case.

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138. See, e.g., WASH. REV. CODE § 71.09.030 (West Supp. 2011); MINN. STAT. ANN. § 253B.02 et seq. (West 2010); WIS. STAT. § 980.02(2)(C) (WEST 2010); MASS. G.L. C. 123A PART I, TITLE XVII, CHAP. 123A § 1 et seq. (West 2010); 725 ILCS 207/1 et seq. (WEST 2010).

139. 42 PA. CONS. STAT. ANN. § 6401 (West 2010).

140. *Id.*

141. *Id.* § 6403(a)(1).

142. *Id.* § 6403(a)(2); *In re K.A.P.*, 916 A.2d 1152, 1158 (Pa. Super. Ct. 2007), *aff'd*, 934 A.2d 262 (Pa. 2007). The court in *K.A.P.* held, despite the plain reading of section 6403, which refers to section 6352, that the institution or facility should not be literally meant as a juvenile facility, but as any facility, including an adult correctional institution. 916 A.2d at 1158.

143. 42 PA. CONS. STAT. ANN. § 6403(a)(3) (West 2010). For a discussion of the dangers of the science of this determination, see Robert Prentky et al., *Sexually Violent Predators in the Courtroom*, 12 PSYCHOL. PUB. POL'Y & L. 357, 369 (2006).

144. *Legal Consequences of Juvenile Sex Offense Adjudications: Involuntary Civil Commitment and Registration & Notification*, prepared by Nicole Pittman, Esq., Juvenile Justice Policy Analyst Attorney, Defender Association of Philadelphia; Rich Cholodofsky & Richard Gazarik, Pittsburgh Tribune-Review, June, 7, 2007 ("Although commitments are to last a maximum of one year, there is no limit to the number of times a person can be committed.").

145. 991 A.2d 884, 893 (Pa. Super. Ct. 2010); see also 42 PA. CONS. STAT. ANN. § 6401 (West Supp. 2010).

146. *Id.*

147. *Id.*

In *Commonwealth v. Abraham*, the Pennsylvania Superior Court found that a defendant who pleaded guilty to offenses that resulted in a loss of his vested pension should have been fully advised of such consequences.<sup>148</sup> Although the court found that the loss of pension is punitive, it applied *Padilla*.<sup>149</sup> It held that the loss of pension is "automatic and inevitable, the stakes are high and the consequences are succinct, clear and distinct."<sup>150</sup> It also noted that only criminal behavior triggers forfeiture, so it is intimately connected to the criminal process, similar to deportation.<sup>151</sup>

Applying *Abraham* and *Padilla* to Act 21, it is clear that Act 21 is intimately connected to the criminal process. Not only are specific offenses required to trigger Act 21, but the juvenile must still be placed at the time the commitment review process begins.<sup>152</sup> The stakes are undoubtedly high. A person can be involuntarily committed from one year to his entire life.<sup>153</sup> His freedom is taken away, and the only measure of process is a review every year.<sup>154</sup> This would certainly surpass juvenile court's jurisdiction that expires at age twenty-one.<sup>155</sup> It may also surpass the maximum sentence for any of the enumerated offenses if the defendant had been arrested as an adult.<sup>156</sup> In fact, Act 21 penalties easily could be considered harsher for juveniles than adults; in Pennsylvania, only juveniles are subject to indefinite, involuntary commitment.<sup>157</sup>

The only question in applying *Padilla* and the Pennsylvania Superior Court's interpretation of it to Act 21 is whether Act 21 penalties are automatic. The Sexual Offender Assessment Board must first make a determination, so at the time of the defendant's admission or finding of guilt it is not yet known whether he would be committed under Act 21. However, it is quite simple to advise based simply on the offense that the client could *possibly* be Act 21 eligible. Applying the logic in *Padilla*, an attorney must, at a minimum, advise that there are adverse consequences. Because of the severity of the consequence and because the consequences are "succinct, clear, and distinct," Act 21 consequences are no different than deportation consequences or, certainly, losing a vested pension.

148. 996 A.2d 1090, 1094-95 (Pa. Super. 2010), *cert. granted*, 9 A.3d 1133 (Pa. 2010).

149. *Id.* at 1094-95; *Id.* at 1092 ("Under *Padilla*, it is unclear if the direct/collateral analysis is still viable. That analysis might still be useful if the nature of the action is not as 'intimately connected' to the criminal process as deportation.").

150. *Abraham*, 996 A.2d at 1095.

151. *Padilla*, 130 S. Ct. 1473 at 1094-95.

152. 42 PA. CONS. STAT. ANN. § 6403(a).

153. See Pittman, *supra* note 144; 42 PA. CONS. STAT. ANN. § 6401 (West Supp. 2010).

154. 42 PA. CONS. STAT. ANN. § 6404.

155. See 42 PA. CONS. STAT. ANN. § 6302 (West Supp. 2010) (defining a "child" as a person under the age of 18 or a person under the age of 21 years who committed an act of delinquency before reaching the age of 18 years).

156. See 18 PA. CONS. STAT. ANN. § 1103 (West 1998); 42 PA. CONS. STAT. ANN. § 9714 (West 2007) (specifying the maximum penalties for most adult offenses); *but see* *Kansas v. Hendricks*, 521 U.S. 346, 368-69 (1997) (ruling that Kansas' adult involuntary commitment statute did not violate the Constitution's double jeopardy prohibition).

157. *In re K.A.P.*, 916 A.2d 1152, 1162 (Pa. Super. Ct. 2007) (holding that the appellant's equal protection claim failed but acknowledging that no such commitment existed for similar adult offenders).

## III. THE AFFIRMATIVE DUTY OF DEFENSE ATTORNEYS AND JUDGES

There are obvious challenges to fulfilling an ethical duty to inform. It may be difficult to know what the collateral consequences are in a particular jurisdiction. "[T]he collection of consequences that can attach to a single conviction is exceedingly difficult to grasp, as they comprise a mixture of federal and state statutory law, regulatory law and local policies."<sup>158</sup>

Yet, even with perfect information, systemic barriers hinder lawyers from fulfilling their duty to inform of collateral consequences. When juveniles are represented, a lack of resources and time constraints often leave children's lawyers overburdened and ill-prepared to provide adequate representation.<sup>159</sup> Many juvenile attorneys handle enormous caseloads and cannot devote sufficient time to each case.<sup>160</sup> Attorneys may not be appointed until late in the process, and through no fault of their own may not even meet their clients until moments before a hearing.<sup>161</sup> Thus, "[t]he priority becomes resolving cases quickly, with the overwhelming majority of children pleading guilty."<sup>162</sup>

Prior to adjudication and during the adjudicatory hearing itself, the defense attorney's hands are often tied in terms of negotiating a disposition. Issues that would be aggressively litigated before a jury with the presentation of experts—the likelihood of a false confession or the reliability of an eyewitness, for example—may be seen by the juvenile court as a waste of time and resources, as the court may feel it has heard it all before and can judge those things on its own.<sup>163</sup> Sensing the futility of such arguments, attorneys may not even pursue investigation or the appointment of experts that would be routinely sought in adult criminal proceedings.<sup>164</sup>

Furthermore, "many attorneys who recognize their proper role are stymied by the pressures to cooperate and hostility on the part of the court toward the adversarial process."<sup>165</sup> For example, often there is pressure to plead as the easiest way to access services. "Particularly for children of color, the juvenile justice system has become the de facto mental health system because of a lack of community-based treatment programs to address mental health needs."<sup>166</sup> This might make information about collateral punishments seem less relevant, especially if a child has no meaningful alternative but to accept these consequences as the price of ensuring their current well-being through key

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158. Pinard, *supra* note 60, at 1119.

159. See Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y 543, 559-60 (2009).

160. Puritz & Majd, *supra* note 90, at 470. See also Jerry R. Foxhoven, *Effective Assistance of Counsel: Quality Representation For Juveniles Is Still Illusory*, 9 BARRY L. REV. 99, 120-21 (2007).

161. Puritz & Majd, *supra* note 90, at 470.

162. *Id.*

163. See generally Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Conviction?*, 34 N. KY. L. REV. 257 (2007).

164. National Juvenile Defender Center, *State Assessments*, <http://www.njdc.info/assessments.php> (last visited Apr. 28, 2008); see also ABA Juvenile Justice Ctr. & Mid-Atl. Juvenile Defender Ctr., *Maryland: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, 31 (2003), available at <http://www.njdc.info/pdf/mdreport.pdf>.

165. Puritz & Majd, *supra* note 90, at 470.

166. *Id.* at 471.

services and interventions. Yet, this desire to connect children with services actually amplifies the importance of relaying the punitive ramifications of what superficially may seem like an acceptable solution to a child's problems.

In order to facilitate a meaningful duty to inform, the very role of the juvenile defender needs to be re-imagined. One solution is to create specialized juvenile defense units and restructure the provision of services.<sup>167</sup> Through better training, attorneys will be equipped to discuss collateral consequences with their clients. For example, the Juvenile Defender Delinquency Notebook provides a manual for defenders that also outlines professional responsibility standards.<sup>168</sup> Similarly, the ABA has called for legislatures to compile information about their jurisdiction's criminal code into an easily navigable resource.<sup>169</sup> And, in Pennsylvania, the Juvenile Indigent Defense Action Network recently issued a Collateral Consequences Checklist to better inform attorneys of the consequences attendant to a juvenile adjudication of delinquency.<sup>170</sup> Making the dispersal of this information easier may be particularly helpful to over-burdened attorneys.

Yet, even an affirmative duty to inform may not be sufficient in helping youth who waive their right to counsel before any opportunity to be advised of collateral consequences.<sup>171</sup> "Studies report that more than one-half of children accused of criminal acts appear in juvenile court without counsel and enter pleas to crimes they may or may not have committed."<sup>172</sup> While the waiver of counsel by juveniles presents a distinct dilemma, the importance of communicating collateral consequences provides an additional argument for prohibiting such waivers, and perhaps establishing an unwaivable right to counsel.<sup>173</sup>

Requiring judges to instruct on collateral consequences in the colloquy arguably would provide a procedural safeguard to ensuring the dispersal of information. Moreover, this may be the only way to warn juveniles if loose attorney waiver provisions are in place. In fact, ABA guidelines advocate judicial warnings stating that, "[t]he judge should separately advise youth in open court of the conduct with which they are charged, the rights they are relinquishing, the

167. *See id.* at 477.

168. ELIZABETH CALVIN ET AL., JUVENILE DEFENDER DELINQUENCY NOTEBOOK 14-17 (2d ed. 2006), available at [www.njdc.info/pdf/delinquency\\_notebook.pdf](http://www.njdc.info/pdf/delinquency_notebook.pdf).

169. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS STANDARD § 19-2.1(Am. Bar Ass'n Criminal Justice Standards Comm. 2004).

170. PENNSYLVANIA JUVENILE INDIGENT DEFENSE ACTION NETWORK, THE PENNSYLVANIA JUVENILE COLLATERAL CONSEQUENCES CHECKLIST 2 (2010), available at <http://www.pajuvdefenders.org/file/checklist.pdf>.

171. *See Pinard, supra* note 60, at 1116 ("[T]rial judges do not render defendants' pleas unknowing by failing to inform the defendants of collateral consequences when either accepting pleas or pronouncing sentences."). In *Boykin v. Alabama*, the Supreme Court held that the constitution requires that a guilty plea be entered voluntarily and knowingly to be valid. 395 U.S. 238, 242-43 (1969). Arguably, pleading to a juvenile adjudication without knowing the future punitive consequences cannot be considered "knowingly" or "intelligent." However, this argument meets the same fate as ineffective counsel claims. Just as an attorney's failure to inform her client of collateral consequence is not ineffective assistance of counsel, a trial judge's failure to inform the defendant when accepting a guilty plea does not render the plea "unknowing." *Pinard, supra* note 60, at 1115-16.

172. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 580 (2002).

173. *Id.* at 642-49.

possible sentence and other consequences of such a plea, *including collateral consequences*.<sup>174</sup>

If it is the professional duty of the attorney to advise clients in advance of any pleas or trial and if judges are warning defendants in open court, there are more protections to ensure defendants understand their rights as well as the exceptionally serious consequences. A colloquy is just one way to standardize such warnings and make certain that juveniles are being given accurate advice, no matter their jurisdiction.

Although SORNA has not yet been adopted in Pennsylvania, the Juvenile Court Judges' Commission released a model colloquy in response to the probable enactment of SORNA in the Commonwealth.<sup>175</sup> The background memorandum states that the colloquy may be modified for each jurisdiction and will have to be modified once SORNA is enacted in Pennsylvania.<sup>176</sup> The memorandum also states that "it is recommended that courts utilize the attached SORNA colloquy . . . prior to accepting an admission in any case that meets" specified criteria.<sup>177</sup> The colloquy itself is designed for the attorney to review with the client.<sup>178</sup> It is a four page form that includes explanation as well as signatures by the juvenile, parent, and attorney.<sup>179</sup>

In *Padilla*, the Court described immigration law as, at times, "complex."<sup>180</sup> But the Court also found that counsel could have easily looked up the consequences of *Padilla*'s plea and thus advised him correctly.<sup>181</sup> A colloquy like the one proposed by the Juvenile Court Judges' Commission in Pennsylvania could both educate attorneys who would otherwise be unsure of these consequences and give them the resources to find the right advice. In turn, the trial court provides a check to make certain that the colloquy is reviewed and the juvenile understands what it contains. There is little difference between SORNA and the immigration consequences of *Padilla*. The colloquy is one way to ensure judges and attorneys provide the proper advice on these exceptionally serious consequences.

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174. YOUTH IN THE CRIMINAL JUSTICE SYSTEM: GUIDELINES FOR POLICYMAKERS AND PRACTITIONERS 18 (AM. BAR ASS'N CRIMINAL JUSTICE SECTION, TASK FORCE ON YOUTH IN THE CRIMINAL JUSTICE SYS. 2001) (emphasis added). Even in a jurisdiction where the state Supreme Court has ruled that courts are not required to advise about consequences, specifically sex offender registration, the court stated, "[I]t is clearly better practice for a trial court to advise a defendant that a consequence of pleading guilty to an offense requiring sex offender registration is that the defendant must register as a sex offender, and we encourage trial courts in Tennessee to make every effort to ensure that defendants are so advised prior to entering a guilty plea." *Ward v. Tennessee*, 315 S.W.3d 461, 472 (Tenn. 2010).

175. See SORNA COLLOQUY (Juvenile Court Judges' Comm'n 2008), [http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS\\_0\\_152425\\_404264\\_0\\_0\\_18/sorna\\_colloquy\\_final\\_draft\\_10-6-08.doc](http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS_0_152425_404264_0_0_18/sorna_colloquy_final_draft_10-6-08.doc).

176. Memorandum from James E. Anderson, Exec. Dir., Juvenile Court Judges' Comm'n to Juvenile Court Judges and Chief Juvenile Prob. Officers 2 (Oct. 10, 2008), [http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS\\_0\\_152425\\_404263\\_0\\_0\\_18/10-10-08\\_background\\_correspondence.pdf](http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS_0_152425_404263_0_0_18/10-10-08_background_correspondence.pdf).

177. *Id.* at 1.

178. *Id.*

179. *Id.*

180. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

181. *Id.*

## CONCLUSION

Juvenile defense attorneys already have a difficult responsibility to shoulder—youth are more impetuous and less likely to consider the consequences of their adjudications even when informed simply because it is a future consequence. However, that merely makes the duty to inform juveniles stronger. As youth are unable to comprehend the devastating effects that collateral consequences may have on their future, it is the responsibility of their attorneys to inform them of those repercussions, and to do so before the youth admit to wrongdoing. The Supreme Court in *Padilla* has made clear that the direct versus collateral distinction fades when dealing with grave risks, such as deportation. Juveniles deserve the same protection for the consequences they may suffer. By finding counsel ineffective when they fail to warn their young clients of the consequences of their adjudications, attorneys are held accountable, ensuring a participatory and informed process.