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October 25, 2013

The Honorable Reena Raggi
United States Court of Appeals
Emanuel Celler Federal Building
225 Cadman Plaza East, Room 704S
Brooklyn, NY 11201-1818

Dear Judge Raggi:

I write to suggest that the Advisory Committee on the Federal Rules of Criminal Procedure consider making Pre-Sentence Reports available in advance of a guilty plea so that all parties can be aware of the potential sentence. In *United States v. Horne*, 987 F.2d 833, 839 (D.C. Cir. 1993), Judge Buckley writing for a panel that also included Judges Williams and Douglas Ginsburg recommended that "wherever feasible, the district court make their presentence reports available to defendants before taking their pleas. By doing so, sentencing judges (and reviewing courts) will have greater confidence that pleas are both willing and fully informed." Having a PSR in advance of a plea will prevent unfair surprise, and because a PSR must be prepared before sentencing anyway, preparation should not delay the proceedings.

From what I can discern, this proposal was not considered by your committee. I elaborate on the idea in the attached paper *Taking Plea Bargaining Seriously: Reforming Pre-Sentence Reports After* Padilla v. Kentucky, 31 ST. LOUIS PUBLIC LAW REVIEW 61, 62-74 (2011).

Thank you for considering this suggestion.

Very truly yours,

Gabriel J. Chin
Professor of Law

TAKING PLEA BARGAINING SERIOUSLY: REFORMING PRE-SENTENCE REPORTS AFTER *PADILLA V. KENTUCKY*

GABRIEL J. CHIN*

INTRODUCTION

As the work of Stephanos Bibas has shown, criminal procedure as a whole has failed to adjust to meet the imperatives of a system in which almost all convictions are obtained by plea rather than through a trial.[1] The Supreme Court's recent decision in *Padilla v. Kentucky*[2] may mark the beginning of a change in constitutional law to account for the current realities. In *Padilla*, the Court held that defense counsel must advise clients of the possibility that a plea may lead to deportation.[3] Though technically not a criminal consequence, deportation is critically important to many individuals choosing whether to plead guilty.

Lack of information about deportation is hardly the only discontent associated with the plea process. Inspired by *Padilla*'s recognition that the current system offered inadequate information, this Article explores how one important feature of the plea process, the pre-sentence report (hereinafter "PSR"), should evolve to be more useful in a plea-based criminal justice system.[4]

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* Professor of Law, University of California-Davis School of Law. Thanks for helpful comments to Stephanos Bibas, Douglas Burris, Laura Conover, Tigran Eldred, Dillon Fishman, Margy Love, Justin Marceau, Eric Miller, Marc Miller, Hank Shea, Ric Simmons, and Maureen Sweeney. The views expressed within are solely those of the author, gchin@aya.yale.edu.

1. *E.g.*, Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 31 ST. LOUIS U. PUB. L. REV. 79 (2011); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) [hereinafter Bibas, *Shadow of Trial*]; Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011) [hereinafter Bibas, *Regulating the Plea-Bargaining Market*].

2. 130 S. Ct. 1473 (2010).

3. *Id.* at 1486.

4. For general background on the PSR, see Nancy Glass, *The Social Workers of Sentencing? Probation Officers, Discretion, and the Accuracy of Presentence Reports Under the Federal Sentencing Guidelines*, 46 CRIM. L. BULL. 21 (2010); Gregory W. Carman & Tamar Harutunian, *Fairness at the Time of Sentencing: The Accuracy of the Presentence Report*, 78 ST. JOHN'S L. REV. 1 (2004); Gary M. Maveal, *Federal Presentence Reports: Multi-Tasking at Sentencing*, 26 SETON HALL L. REV. 544 (1996).

This Article proposes two changes. First, the PSR, or at least major parts of it, should be prepared before, rather than after, the guilty plea. Prior to the plea, the PSR will enable both the prosecution and the defendant to understand the actual sentencing range. Knowledge of the information upon which the sentence will be based, particularly the defendant's actual criminal record, benefits both parties and will produce plea bargains which are more knowing and informed.

The second proposed reform is in the area of collateral consequences, which are consequences of the plea other than the sentence itself. In addition to whatever arguments might be advanced in support of advising defendants of collateral consequences as a matter of fairness, there is a strong argument from the perspective of sentencing policy.[5] Many felony convictions are associated with months or years of some form of non-custodial supervision, such as probation in lieu of incarceration or supervised release following incarceration.[6] These forms of supervision generally require a person to work and pay restitution, as well as obey all federal, state, and local laws.[7] Accordingly, PSRs must include information relevant to a defendant's financial status and earning capacity, as well as the particular legal constraints to which a defendant is subject. Yet, PSRs and the terms of probation and supervised release given as part of the sentencing process routinely do not include collateral consequences relevant to employment or a general canvass of lesser-known legal restrictions on an individual resulting from the conviction at issue. In order to achieve the existing statutory goals of sentencing, relevant collateral consequences should be included in a PSR.

I. A PSR IN ADVANCE OF THE PLEA

A. The Unavailability of PSRs at the Time of the Plea Leads to Surprises at Sentencing

In the federal system, pre-sentence investigations and reports were part of the original Federal Rules of Criminal Procedure, adopted in 1944.[8] The

5. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.3(a) (3d. 2004) ("The rules of procedure should require a court to ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law."); UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 5 cmt. (2010).

6. *See* 18 U.S.C. § 3561 (2006).

7. *Id.* § 3563.

8. FED. R. CRIM. P. 32(c)(2) (1946) ("The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in

significance of plea bargaining in the criminal justice system was almost entirely different before and during the World War II era.[9] There were fewer criminal cases, of course, but more fundamentally, many more convictions resulted from trials rather than plea bargains.[10] This meant that the focus in criminal cases was appropriately on the underlying facts rather than on facts primarily relevant to the sentence. Also, consideration of the sentence could be postponed until after trial because an acquittal would render a PSR unnecessary. In addition, sentences were largely subject to the discretion of the court.[11] Now, most convictions are obtained by plea, and statutory mandatory minimum sentences and "advisory," but still influential, guidelines affect the discretion of judges.[12]

By federal statute and the Federal Rules of Criminal Procedure, a PSR must normally be prepared before sentencing.[13] Routinely, this is done after acceptance of a guilty plea or conviction at trial.[14] In a plea agreement, the defendant typically agrees to be bound by the findings of the sentencing court.[15] The sentencing court, in turn, typically relies on the facts of the case and defendant's criminal history as set out in the PSR.[16] Because the PSR follows the defendant to the Bureau of Prisons, it is "the critical document at both the sentencing and the correctional stages of the criminal process."[17] The PSR's unavailability at the time of the plea means that the most portentous decision in the criminal case—to accept a guilty plea to a particular set of charges or to go to trial—is made without the benefit of some of the most important facts.

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imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.").

9. *See* Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, CRIM. L. QUARTERLY, Apr. 2005, at 67, 73–74.

10. *Id.*

11. *Id.* at 82.

12. Bibas, *Shadow of Trial*, *supra* note 1, at 2487.

13. 18 U.S.C. § 3552(a) (2006); FED. R. CRIM. P. 32(c)(1)(A). This Article is based primarily on federal law, not because federal law is unique, but, rather, because it is a reasonably representative system. As I understand it, many state systems work largely the same way, in their regular reliance on PSRs, and therefore, the arguments in this Article are applicable to those state systems as well.

14. In the original rules, disclosure of the report before a plea or guilty verdict was prohibited. FED. R. CRIM. P. 32(c)(1) (1946).

15. *See, e.g.*, plea agreements cited *infra* notes 22–23.

16. Stephen A. Fennell & William N. Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1613, 1616 (1980).

17. *Id.*

Federal Rule of Criminal Procedure 11(c)(1)(C), allowing parties to stipulate to the application or non-application of sentencing factors,[18] could solve the problem. The parties could stipulate to criminal history and other factors, and if the court accepts the plea, the stipulation would be binding. However, the prosecution must first be willing to stipulate, which they may hesitate to do in the absence of a PSR.[19] In addition, the court may accept or reject the stipulation or "defer a decision until the court has reviewed the presentence report."[20] The Sentencing Commission's commentary disfavors early acceptance: "Given that a presentence report normally will be prepared, the Commission recommends that the court defer acceptance of the plea agreement until the court has reviewed the presentence report."[21] Accordingly, courts following the Sentencing Commission's recommendation may wait until they have reliable data and reject a plea if the stipulated facts are inconsistent with the PSR. Thus, where possible, a stipulation pursuant to Rule 11 offers the defendant certainty, but in many cases, it will not be available.

Currently, this informational uncertainty is frequently resolved by placing the risk on a defendant. Plea agreements often contain explicit contingencies about sentencing that are tied to a defendant's criminal record. For example, a plea agreement in the United States District Court for the Northern District of Alabama provides:

> [T]he Parties understand that if the defendant has three previous convictions for a violent felony or a serious drug offense, or both, . . . then the maximum statutory punishment that may be imposed for the crime of Felon in Possession of a Firearm . . . is:
>
> a. Imprisonment for not less than 15 years and not more than life;
> b. A fine of not more than $250,000, or;
> c. Both (a) and (b).[22]

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18. FED. R. CRIM. P. 11(c)(1)(C).

19. The U.S. Attorney's Manual hints that such agreements are disfavored: "In order to guard against inappropriate restriction of the court's sentencing options, the plea agreement should provide adequate scope for sentencing under all circumstances of the case." U.S. DEP'T. OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.430(B)(3) (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/ [hereinafter U.S. ATTORNEYS' MANUAL]. Note, however, that while a PSR is not a mandatory part of sentencing, a defendant may not simply waive its preparation. U.S. SENTENCING GUIDELINES § 6A1.1(b) (2011). Instead, the court must make a finding that it can meaningfully exercise its authority without one. *Id.* § 6A1.1(a)(2); *see also* United States v. Williams, 641 F.3d 758, 765 (6th Cir. 2011).

20. FED. R. CRIM. P. 11(c)(3)(A); U.S. SENTENCING GUIDELINES MANUAL § 6B1.1(c).

21. U.S. SENTENCING GUIDELINES MANUAL § 6B1.1 cmt.

22. Plea Agreement at 2, United States v. Kimble, No. 2:10-102-JHH-RRA (N.D. Ala. July 22, 2010), 2010 WL 3581142. A state plea agreement is similarly full of contingencies:

> (a) [I]f I have at least two prior convictions on separate occasions whether in this state, in federal court, or elsewhere, of most serious crimes, I may be found to be a Persistent

That is, depending on what the PSR reveals about currently existing facts, a defendant could be sentenced to life. In the United States District Court for the District of Montana, a plea agreement stated: "The defendant understands that Title 21 penalties may be enhanced for prior drug-related felony convictions. The defendant states that he has fully consulted with his attorney, and understands the potential impact of these enhancements to his sentence."[23] Here too, the defendant is warned that the sentence may be increased by facts which are knowable at the time of the plea, but which have not yet been uncovered.

Such warnings in plea agreements are not merely examples of over caution. Frequently, details of a criminal record not known at the time of a plea but included in a PSR create sentencing effects which neither party intended or appreciated. *United States v. White* is a good example of a misunderstanding about a criminal record.[24] White pleaded guilty to a crack offense, with the understanding that he would be entitled to the safety valve reduction below a ten year mandatory minimum "if my criminal history qualifies me for safety valve treatment."[25] As the Seventh Circuit explained, with the safety valve and "additional reductions for acceptance of responsibility and being a minor participant, White could have received a sentence as low as forty-six months."[26]

Offender. If I am found to be a Persistent Offender, the Court must impose the mandatory sentence of life imprisonment without the possibility of early release of any kind. [If *not* applicable, this paragraph should be stricken and initialed by the defendant and the judge _____.]

(b) The standard sentence range is based on the crime charged and my criminal history. . . .

(c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.

(d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendations may increase or a mandatory sentence of life imprisonment without possibility of parole maybe required by law. Even so, I cannot change my mind and my plea of guilty to this charges binding on me.

Statement of Def. on Plea of Guilty to Felony Non-Sex Offense, Washington v. Franklin, No. 06-1-10112-6 SEA (Wash. Super. Ct. Nov. 5, 2007), 2007 WL 4977223 (citation omitted).

23. Plea Agreement at 6, United States v. Jaeger, Nos. CR 05-23-BU-DWM, CR 06-03-BU-DWM, (D. Mont. July 19, 2010), 2010 WL 3182781.

24. 597 F.3d 863 (7th Cir. 2010).

25. *Id.* at 865.

26. *Id.* at 866 (quotations omitted).

The trial court warned of the mandatory minimum, and "that White's actual sentence would be determined by the court after an investigation by the U.S. Probation Office and consideration of the U.S. Sentencing Guidelines."[27] The trial judge further emphasized that he was "not going to be able to determine the advisory guideline sentence for [White] until after a presentence report has been completed."[28] However, the prosecution and defense assumed that safety valve relief would be available: "[A]t the plea hearing, the district judge asked the government's counsel if she had reviewed White's criminal history, and she responded in the affirmative."[29]

Unfortunately, the PSR revealed two marijuana misdemeanors, and the defendant's criminal record rendered him ineligible for the safety valve.[30] Even though a "mutual mistake here led both parties to believe that White would be eligible for safety valve treatment," the Seventh Circuit affirmed the trial court's denial of the defendant's motion to withdraw his plea.[31] The court noted that "[l]ike the district court, we too sympathize with White. But had he been allowed to withdraw his plea, a subsequent guilty verdict by a jury looks here like it would have been a foregone conclusion."[32]

United States v. Horne, a case from the District of Columbia, was similar to *White*.[33] Defendant Horne was charged with a crack offense.[34] "Both the defense counsel and the prosecutor had surmised prior to receiving the presentence report that Horne's prior conviction for possession with intent to distribute marijuana was only a misdemeanor in the State of Maryland as it would be in the District of Columbia; in fact, however," it was a felony.[35] As a result, Horne's sentencing guideline range was dramatically increased.[36] The D.C. Circuit affirmed the denial of Horne's motion to withdraw his plea, noting that the trial "court specifically informed Horne that no one—not even the judge—could know what sentencing range would apply until the presentence report was available."[37]

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27. *Id.*

28. *Id.*

29. *Id.* at 866 n.2.

30. *White*, 597 F.3d at 866. The court stated, "[w]e are unclear how the mistake was made, but we trust that the government does not go around promising to recommend reductions that it knows will not be available." *Id.* at 866 n.2.

31. *Id.* at 867–68.

32. *Id.* at 868; *see also, e.g.*, United States v. Welch, 290 F. App'x 543, 545 (4th Cir. 2008) (upholding the district court's decision to deny defendant's motion to withdraw his guilty plea). *But see* United States v. Hernandez-Wilson, 186 F.3d 1, 6 (1st Cir. 1999) (allowing withdraw of plea based on erroneous suggestion that defendant would be eligible for safety valve relief).

33. 987 F.2d 833 (D.C. Cir. 1993).

34. *Id.* at 834.

35. *Id.* at 835.

36. *Id.*

37. *Id.* at 837.

B. *The Case for a Pre-Plea PSR*

The *Horne* court correctly observed that it was impossible to predict a sentence without a PSR, at least in the absence of a stipulation.[38] However, the unavailability of a PSR is not intrinsic or inevitable—it is the result of custom and choice. The PSR could be available at the time of the plea if it were prepared in advance.

Horne, remarkably, has two opinions for a unanimous panel, each written by a different judge, plus a third opinion by Judge Buckley, apparently concurring in his other opinion for the panel.[39] Judge Buckley, in an opinion marked "writing separately for the court," expressed a "wish to make a recommendation concerning the taking of guilty pleas. Our reason for writing separately is to emphasize that our recommendation is just that—a suggestion without the force of law."[40] The court further recommended that PSRs be prepared and disclosed before the taking of a plea.[41] The court's reasoning was straightforward:

> [C]ertain goals of the Rule 11 plea-taking procedures have become more difficult to achieve [because of sentencing guidelines]. That rule was designed to make sure that a guilty plea is both voluntary and informed. Yet, while Rule 11 requires a court to advise the defendant of the "maximum possible penalty provided by law" . . . in many federal criminal cases today, this statutory maximum is irrelevant. . . .
>
> . . . .
>
> Because the Guidelines have largely replaced the statutes as the determinants of the maximum penalty facing criminal defendants, we recommend that, wherever feasible, the district court make their presentence reports available to defendants before taking their pleas. By doing so, sentencing judges (and reviewing courts) will have greater confidence that pleas are both willing and fully informed.[42]

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38. *Id.*

39. 987 F.2d at 834.

40. *Id.* at 838 (Buckley, J., writing separately for the court).

41. *Id.* at 839.

42. *Id.* at 838–39. The court continued:

> In making this recommendation, we are mindful of the strict resource constraints faced by the district court's probation office and the severe time pressures confronting the district judges themselves. Hence, we do not suggest that defendants have a right to peruse their presentence report before pleading. Nor do we question that, in a given case, it may not be feasible to await the completion of a report or that there may be valid reasons for withholding the report until after the plea is accepted. We do no more than suggest the desirability of such a practice in the run of cases. *Cf. United States v. Salva*, 902 F.2d 483, 488 (7th Cir.1990) ("We do . . . believe that defendants will be able to make more intelligent choices about whether to accept a plea bargain if they have as good an idea as possible of the likely Guidelines result.").

Similarly, the Second Circuit has suggested, though not required, that sentencing courts[43] and prosecutors[44] advise defendants about likely sentences.

The idea that the critical information should be available in advance of the plea has much to recommend it. If the question were a matter of fault rather than fairness and accuracy, the legal system could end the matter by applying the presumption that all persons know the law. If the defendant or her lawyer has not marshaled the available facts, the risk and consequences of this failure would appropriately fall on the defendant. But in the plea context, the Supreme Court has not adopted this emptor approach: "[A] guilty plea 'not only must be voluntary but must be [a] knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances and likely consequences.'"[45] Thus, due process requires a warning of the maximum sentence, notwithstanding the fact that it is available in the U.S. Code to all who care to look. In a system where criminal history may be as significant to the sentence as is the particular crime to which the defendant is pleading guilty, there is good reason to settle it before the plea.

While denying that advice is required by the Constitution itself, courts recognize that pleading without sentence information implicates the concerns of the Due Process Clause. In *United States v. Pimentel*, the Second Circuit stated that while pleas made without understanding the likely Guideline range might be knowing and voluntary, "we are, given our own struggles with the Guidelines, not unsympathetic to their claims that they did not fully appreciate the consequences of their pleas."[46] The court urged prosecutors to inform defendants of sentencing ranges to help "ensure that guilty pleas indeed represent intelligent choices by defendants."[47] Similarly, in *United States v. Horne*, the D.C. Circuit stated that presenting a PSR in advance of a plea would lead to "greater confidence that pleas are both willing and fully informed."[48] Judge Buckley, in a second concurring opinion, added that, "Horne's decision to forego the exercise of a constitutional right was not as informed as it could have been, hence not as voluntary as it might have

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Id. at 839.

43. United States v. Fernandez, 877 F.2d 1138, 1143 (2d Cir. 1989) (suggesting that the district court should, but is not legally required, to make "each defendant, at the time of tendering a guilty plea . . . fully cognizant of his likely sentence under the Sentencing Guidelines").

44. United States v. Pimentel, 932 F.2d 1029, 1034 (2d Cir. 1991) (suggesting that the prosecution "inform defendants, prior to accepting plea agreements, as to the likely range of sentences their pleas will authorize under the Guidelines").

45. Haring v. Prosise, 462 U.S. 306, 319 (1983) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

46. 932 F.2d at 1032.

47. *Id.* at 1034.

48. 987 F.2d 833, 839 (D.C. Cir. 1993) (Buckley, J., writing separately for the court).

been."[49] Under the decision, a defendant "may well be trapped by the formal implications of a guilty plea and the failure of the Rule 11 Proceeding to provide him with a reliable understanding of its consequences."[50]

One gets the feeling that in their hearts, these judges believed that a plea made without any understanding of the likely sentence is not fully knowing, voluntary, and intelligent. However, for some, presumably pragmatic, reason, they were unwilling to conclude that due process required a warning even of the features of the sentence which were knowable and determinable at the time of the plea.

C. *A Pre-Plea PSR Would Not Be Impractical*

Whether required by the Constitution or not, PSRs could be made available before a plea. Under Rule 32, a pre-sentence investigation must include an interview of the defendant.[51] The PSR must calculate the offense level and identify the applicable guidelines, the relevant sentencing factors, and the grounds for departure.[52] The report must also indicate the defendant's "criminal history category" and "the resulting sentencing range and kinds of sentences available."[53] In addition, language carried forward from the original 1944 Federal Rules of Criminal Procedure requires information about the defendant's history and characteristics including criminal record, financial condition, and any circumstances relevant to sentencing and "correctional treatment."[54] Likewise, the PSR must also contain victim impact and restitution information, and "any other information that the court requires."[55] There is nothing in a PSR that is legally or factually incapable of investigation and determination in advance of a guilty plea. A PSR prepared in advance of a plea could be subject to the same sort of objection and correction as exist under current practice.[56]

There are several practical considerations, none of which are insurmountable.

The Parties Should Do It. As previously mentioned, in principle, a defendant's criminal history is available to both the prosecution and defense without a PSR. The defendant was presumably present for all of her prior convictions and sentences, and the prosecution has access to criminal history

49. *Id.* at 840 (Buckley, J., concurring).

50. *Id.* at 841.

51. FED. R. CRIM. P. 32(c)(2).

52. FED. R. CRIM. P. 32(d)(1).

53. *Id. See generally* FED. R. CRIM. P. 32(d)(2)(A)(i) (requiring that a PSR include "any prior criminal record").

54. FED. R. CRIM. P. 32(c)(2) (1946); FED. R. CRIM. P. 32(d)(2).

55. FED. R. CRIM. P. 32(d)(2)(F).

56. FED. R. CRIM. P. 32(f).

databases. Under what Professor Bibas calls the "caveat emptor" approach to plea bargaining, the system could leave it to the parties to generate their own information.[57] Yet, in the actual criminal justice system, the critical analyst of criminal record information is neither the prosecution nor the defense—it is the probation officer who prepares the PSR. In the absence of a stipulation pursuant to Rule 11(c)(1)(C), which is part of a plea agreement accepted by the court, the PSR's accounting of a criminal record will ordinarily control, particularly over a mistaken view of one or both attorneys.[58] For this reason, the approach of the Second Circuit in *Pimentel* is unsatisfactory. The prosecution is encouraged to present its understanding of the guidelines calculation before a plea, but it is free to embrace or adopt new or harsher recommendations by the Probation Office presented in the PSR.[59] Thus, the *Pimentel* approach replaces a complete absence of information about the contours of the sentence with unreliable information. The actual PSR, not an imperfect rough draft, should be the basis of a plea.

In addition, it would be much cheaper to have a criminal history generated definitively once (subject to correction by the parties) than to have it generated in full three times, once each by the prosecution, defense and probation office.

Further, both defense attorneys and prosecutors have informational disadvantages compared to probation officers. The prosecution might not easily discover out-of-state convictions, old convictions, convictions under an alias, or convictions in lower courts. For its part, the defense might not fully understand whether a particular proceeding resulted in a conviction or not, or whether particular judgments are misdemeanors or felonies. Neither prosecutors nor defense attorneys are specialists in finding out this information, while it is a critical part of probation officers' jobs.

Additional Work. Another issue is the potential additional work involved. In the normal run of cases, the argument for preparing some or all of a PSR in advance of a plea of guilty is compelling because precisely this work will have to be performed at some point anyway. However, it would, in retrospect, be undesirable to have PSRs prepared in the small number of cases that are ultimately dismissed or tried to an acquittal.

To avoid unnecessary reproductions of PSRs, Rule 32 could provide for a criminal history calculation or a full PSR in advance of a plea upon the request of one or both parties. The prosecutor and defense attorney will generally have solid information on whether there is a reasonable likelihood that a case is heading toward dismissal or trial, in which case preparation of a PSR could be

57. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 1, at 1143.

58. *See* FED. R. CRIM. P. 32(i)(3)(A) (stating a court "may accept any undisputed portion of the presentence report as a finding of fact").

59. *See* United States v. MacPherson, 590 F.3d 215, 217 (2d Cir. 2009); United States v. Habbas, 527 F.3d 266, 270 (2d Cir. 2008).

deferred. Counsel's belief that a case is heading toward a plea is also likely to be reliable. Of course, the Speedy Trial Act should be amended, if necessary, to make clear that time spent waiting for a PSR requested by defense counsel in anticipation of a plea is excluded.[60]

Nevertheless, if PSRs are prepared before entry of a plea, there will inevitably be some number of unnecessary reports generated. In some cases apparently headed toward a plea, a defendant will die before pleading. In other cases, a bargain will fall apart, and the case will be tried or dismissed, although neither of those cases renders a PSR necessarily useless.[61] But given the overwhelming number of cases that plead, the numbers of unnecessary reports are likely to be minimal, if not insignificant.

The earlier preparation of a PSR raises the possibility of another form of additional work: updating the PSR in the period between preparation of the PSR and imposition of sentence. Of course, some of this is required now if, for example, a defendant is rearrested or there are other material developments. However, pre-plea PSRs will shorten the time between plea and sentence. Most of the delay is occasioned by waiting for the PSR, so there may not be an appreciable lengthening of the period of time not covered by the PSR, and therefore, no appreciable information gap to make up at sentencing.

Frustration of Pleas. In some cases, the results of a PSR will lead the parties to change their bargain, perhaps involving a plea to different charges, if the sentence under the original charges is other than what they anticipated, or if the actual criminal record makes the original charges unwarranted for some reason. The revised charges could be more or less severe. A pre-plea PSR could improve prosecution decision-making just as it could improve defense calculations.

If an anticipated plea falls apart, more work might be required of the probation office to revise the guidelines calculations based on the new charges. To the extent that the result is a more just plea agreement, it is probably worth the effort. Some plea bargains will fail when a PSR leads defendants to recognize their actual exposure—a case that would have pleaded then turns in

60. 18 U.S.C. § 3161 (2006). The Speedy Trial Act provides time limits in an effort to "assure a speedy trial." *Id.* § 1361(a). In addition, the Act currently provides for exclusions from the time limit computation, including an exclusion for consideration of a plea agreement. *Id.* §§ 1361(h)(1)(A)–(J).

61. A PSR in a case later tried to an acquittal will be useless, but if there is a conviction, the PSR could still be updated and used. In a case where a prosecution is dismissed, the PSR would not necessarily have been wasted. In fact, the criminal history calculation or other information in a report could be the basis for an exercise of prosecutorial discretion. *See* U.S. ATTORNEYS' MANUAL, *supra* note 19, § 9-27.220(A)(3) (providing that "adequate non-criminal alternative" may be a ground for declining prosecution). Although from the perspective of the probation office this report may seem to be a waste, from the perspective of the criminal justice system as a whole, it is more likely seen as a cost-effective piece of information.

to a trial case. This means not only that the PSR could turn out to be a wasted effort if the trial results in an acquittal, but also that the early PSR has generated the costs of a trial.[62] But the PSR could still be used, as revised, if necessary, in the event of a conviction, and it can hardly be counted as undesirable that defendants reject plea bargains that are unacceptable to them.

Admissibility of Statements. There are evidentiary concerns in addition to the resource concerns outlined above. If a case that the prosecutor and defense attorney believe is heading toward a plea actually does plead, then no evidentiary difficulty would be raised by generating the PSR before rather than after the plea agreement. But if the plea does not go forward for some reason, then the PSR contains two sets of statements about which counsel might be concerned.

One category of statements is the victim's statements relating to the case. The defense counsel might be happy to have these statements for use during cross-examination at trial, and the prosecutor might wish to prevent the availability of such statements. On the one hand, there is no strong policy reason to prevent the generation of these kinds of statements. A witness with a good memory who makes consistent statements will not be impeached, and the cause of justice is not harmed by allowing juries to evaluate the credibility of other categories of witnesses. However, the point of pre-plea PSRs is not to change the balance between prosecution and defense as it now exists. To avoid a side controversy, it may make sense to extend the evidentiary prohibition against admitting pleas and plea bargain discussions to make statements of witnesses contained in PSRs inadmissible, even for impeachment purposes.[63]

This might not completely resolve the situation. A second category of statements which might raise concerns for counsel is statements made by the defendant to a probation office. The defendant enjoys the privilege against self-incrimination,[64] and statements to a probation officer are admissible only if not compelled and voluntarily made.[65] A defendant may wish to get credit for accepting responsibility and avoid an enhancement for obstruction of justice, but may hesitate to speak candidly without the security of an actual plea deal in hand. Extending the protection of Federal Rule of Evidence 410 to statements made to probation officers as a part of sentencing, provided that the statements cannot be used in other cases or in any sentencing which might

62. On the other hand, the PSR may well have avoided the cost of an appeal or motion to withdraw a plea.

63. FED. R. EVID. 410.

64. U.S. CONST. amend. V.

65. *See* United States v. Perez-Franco, 873 F.2d 455, 460–62 (1st Cir. 1989).

occur if the contemplated plea bargain fails, would be helpful.[66] However, prosecutors will justly object to bearing the burden of proving that they made no direct or derivative use of the statements. On the other hand, defense counsel will be reluctant to allow statements to be made if they can be used by the prosecution for investigative leads. It may be that this part of the pre-sentence investigation must be deferred until after the plea. That would still mean that many of the most important parts of the PSR could be completed in advance.

Full PSR or Just Criminal History? Admittedly, preparation of a full PSR before a plea would be a substantial change from the practice in many districts.[67] A compromise approach might be to prepare only the criminal history. It would correct some of ignorance associated with pleading, while avoiding other problems, such as concerns about statements of witnesses or the defendant. Ultimately, preparing only the criminal history would be sub-optimal, because it would fail to address many questions about the application of the Guidelines which could be definitively determined. Yet, it would clearly be better than nothing.

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There is a final pragmatic reason that under current sentencing systems, more information should be provided to the defendant in advance of the plea. Under the old system, a person convicted of a serious crime might be subject to a sentence of probation, any term of years, or life.[68] Thus, when a defendant pled guilty and took the risk that their sentence could be on the high end of that range, that risk was counterbalanced by the possibility of getting a one day sentence or straight probation. It is one thing to warn a defendant only that they face life imprisonment when, should things go their way, they might walk out of court that day. It is another to give a limited warning when there is no hope of a low sentence because of a mandatory minimum sentence which is applicable under the circumstances, or little hope of a low sentence because guidelines recommend many years in prison.[69]

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66. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 1B1.8(a) (2011) ("Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.").

67. Fennell & Hall, *supra* note 16, at 1626 (noting that PSRs "generally cannot be submitted until the defendant pleads or is found guilty").

68. *Id.* at 1615 ("[J]udges have virtually unlimited discretion to impose any type and length of sentence for a specified offense, within statutory limits.").

69. *Cf.* United States v. Goins, 51 F.3d 400, 402–05 (4th Cir. 1995) (noting that mandatory minimum sentence must be disclosed as part of Rule 11 colloquy).

In *Boykin v. Alabama*, the Supreme Court explained further: "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."[70] By preparing PSRs in advance of a plea, courts could greatly improve the understanding of defendants and prosecutors at little to no additional cost and also improve the fairness and legitimacy of the criminal justice system.

II. COLLATERAL CONSEQUENCES AND THE DEFENDANT'S STATUS AFTER CONVICTION

Criminal convictions, particularly felonies, subject a defendant to a wide range of collateral consequences relating to employment, public benefits, family status, and civil rights beyond the sentence.[71] PSRs do not ordinarily list collateral consequences of the criminal conviction that will be applicable to the defendant.[72] To be sure, there is some overlap between collateral consequences and information provided as part of the sentencing process. For example, the collateral consequence of firearms ineligibility[73] is also a condition of probation and supervised release.[74] However, there is no systematic effort to canvass the restrictions to which a convicted person is subject as part of the sentencing process. This is both a defect and a missed opportunity, because the immediate and long-term sentencing goals cannot be achieved without an understanding and articulation of the defendant's changed legal status.

A. The Defendant's Financial Condition

The defendant's future financial and employment prospects are important to know before sentencing. Rule 32 requires a PSR to contain information about "the defendant's financial condition."[75] Financial condition is important because there is a sentencing goal "to provide restitution to any victims of the

70. 395 U.S. 238, 243–44 (1969).

71. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d. ed. 2004); UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT prefatory note (2010).

72. *See generally* FED. R. CRIM. P. 32(d) (describing the information included in PSRs).

73. 18 U.S.C. § 922(g) (2006).

74. *Id.* § 3563(b)(8).

75. FED. R. CRIM. P. 32(d)(2)(A)(ii).

offense,"[76] and because the amount of a fine depends on "the defendant's income, earning capacity and financial resources."[77]

A defendant's financial condition, ordinarily, is not a static fact, it is affected by context. Other than the wealthy, most people's "financial condition" is determined by their earning capacity more than their assets.[78] Further, even someone with limited assets may be able to pay a fine or restitution if their earning capacity is strong.[79]

A critical aspect of the context of a defendant's earning capacity is that the conviction dramatically changes the kinds of employment that are open to an individual.[80] It makes little sense to calculate a defendant's earning potential based on employment settings which are legally prohibited to the defendant or on the retention or acquisition of licenses or permits for which a defendant is no longer eligible.[81] To set a restitution schedule and a fine, then, often requires attention to collateral consequences and their effect on a defendant's earning potential.

The importance of a defendant's financial status does not end at the time of sentencing. In addition to or in lieu of incarceration, most people convicted of felonies will be under the supervision of the criminal justice system in some form. Most people convicted in federal court serve either probation instead of prison or supervised release after prison.[82] Standard conditions of probation

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76. 18 U.S.C. § 3553(a)(7).

77. *Id.* § 3572(a)(1); *see also id.* § 3572(b) (providing that "a fine or other monetary penalty" should be imposed "only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution").

78. *Id.* § 3572(a)(1); *see also* United States v. Blackman, 950 F.2d 420, 425 (7th Cir. 1991); United States v. Ruth, 946 F.2d 110, 114 (10th Cir. 1991).

79. *See, e.g.*, United States v. Castner, 50 F.3d 1267, 1278 (4th Cir. 1995); United States v. Gresham, 964 F.2d 1426, 1430–31 (4th Cir. 1992); United States v. Morrison, 938 F.2d 168, 172 (10th Cir. 1991).

80. *See* Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617 (2005).

81. *Id.* at 620–21.

82. Probation and supervised release are similar in many ways. Both are administered by the U.S. Probation Service. The conditions mandated by statute and the sentencing guidelines are, for the most part, the same. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 5B1.3 (2011) ("Conditions of Probation"), *with* U.S. SENTENCING GUIDELINES MANUAL § 5D1.3 ("Conditions of Supervised Release"). They are also similar in that the conditions of probation and conditions of supervised release are communicated by a probation officer at the time of sentencing. *See* 18 U.S.C. § 3563(d) ("The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required."); *id.* § 3583(f) ("The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.").

and supervised release require that a person pay restitution,[83] "work regularly at a lawful occupation,"[84] and "support the defendant's dependents and meet other family responsibilities."[85] Defendants are commonly returned to prison for failure to comply with these conditions. Thus, even if the defendant is able to pay any restitution and fine in full upon sentencing, a defendant will ordinarily be subject to ongoing financial and employment responsibilities. A defendant's ongoing financial obligations, imposed as part of the criminal judgment, mean a sentencing judge and counsel must understand the defendant's future occupational restrictions at the time of sentencing.

B. General Compliance with Law

In addition to financial obligations, probation and supervised release require the defendant to be generally law-abiding. It is a condition of both that "[t]he defendant shall not commit another federal, state or local offense."[86] When the violations are of *malum in se* criminal prohibitions, a defendant should not be heard to complain that she did not know, for example, that it was illegal to sell drugs.[87] But the legal restrictions on those convicted of crime are often little-known, even to lawyers and judges.

A system aiming for compliance with a complex set of restrictions must actually articulate the nature of the behavior for which it is looking.[88] Once again, the law seems to require this already.[89] Conditions of supervised release and probation must be "sufficiently clear and specific to serve as a guide for the defendant's conduct."[90] The implication is that if there is a particular set of unusual restrictions applicable because of a criminal conviction, it should be

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83. U.S. SENTENCING GUIDELINES MANUAL § 5B1.3(a)(6); *id.* § 5D1.3(a)(6).

84. *Id.* § 5B1.3(c)(5); *id.* § 5D1.3(c)(5).

85. *Id.* § 5B1.3(c)(4); *id.* § 5D1.3(c)(4).

86. *Id.* § 5B1.3(a)(1); *id.* § 5D1.3(a)(1).

87. United States v. Ortuno-Higareda, 450 F.3d 406, 411 (9th Cir. 2006) (quoting United States v. Dane, 570 F.2d 840, 843–44 (9th Cir. 1977)), *vacated en banc*, 479 F.3d 1153 (9th Cir. 2007).

88. *See, e.g.*, United States v. Gallo, 20 F.3d 7 (1st Cir. 1994).

89. United States v. Felix, 994 F.2d 550, 552–53 (8th Cir. 1993) (holding that a probation violation must be supported by fair notice, but failure to serve written statement of conditions as required by statute can be cured by providing oral notice); *see also* United States v. Ortega-Brito, 311 F.3d 1136, 1139 (9th Cir. 2002) (noting the importance of compliance with 18 U.S.C. § 3583(f) by emphasizing that "the obligations of the district courts and probation officers under those statutes are specific, and we encourage the establishment of procedures that would ensure compliance with the letter, as well as the purpose, of the statutes").

90. 18 U.S.C. § 3563(d) (2006); *id.* § 3583(f); *see also* United States v. Stanfield, 360 F.3d 1346, 1354 (D.C. Cir. 2004) (quoting United States v. Simmons, 343 F.3d 72, 81 (2d Cir. 2003)) ("Due process requires that the conditions of supervised release be sufficiently clear to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

set out in the PSR. For example, in many states, those on probation or parole may not vote, and voting when not authorized to do so can be a criminal offense.[91] But some states do allow probationers and parolees to vote, and this turns out to be something more than a simple question.[92]

Like other people, defendants travel and move their residences, so it will not always be a simple matter to determine which collateral consequences are germane to a particular defendant. In state systems, it would be reasonable to list the collateral consequences applicable in the state. In the federal system, federal consequences plus those applicable in the defendant's current state of residence should be listed.

CONCLUSION

The PSR was invented in a time when most cases were decided by trial and judges generally imposed discretionary sentences. It is inadequate for an era when most cases are decided by guilty plea, and most sentences are imposed by judges with limited discretion. To the extent that critical ingredients of mandatory or discretionary sentences, such as a defendant's criminal history, are legally and factually determinable in advance of a plea, they should be determined at that time.

In addition, current law requires a PSR to describe the defendant's current and prospective financial condition and earning capacity in order to set fines and restitution.[93] Probation and supervised release documents also require sufficient detail about restrictions and obligations so as to "serve as a guide for the defendant's conduct."[94] These goals require clear articulation of the collateral consequences to which a defendant will be subject while on probation or supervised release.

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91. *See* Ryan S. King, SENTENCING PROJECT, A DECADE OF REFORM: FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2006), *available at* http://www.sentencingproject.org/doc/publications/fd_decade_reform.pdf.

92. *See id.*

93. *See supra* notes 76–86 and accompanying text.

94. 18 U.S.C. 3583(f).

THE MYTH OF THE FULLY INFORMED RATIONAL ACTOR

STEPHANOS BIBAS*

I. THE OUTDATED LAISSEZ-FAIRE MODEL OF THE PLEA BARGAINING MARKET

Traditionally, American criminal procedure has treated the jury trial as the norm, the basic event protected by the Bill of Rights and rules of criminal procedure. The Supreme Court has developed a range of doctrines to ensure fair jury selection and instructions, confrontation and cross-examination, and the like. But when it comes to waiving a jury trial and pleading guilty, the Court has largely assumed that defendants can readily forecast the costs and benefits of pleading guilty and do so only if plea bargaining serves their interests. Put another way, the Court has taken a laissez-faire, hands-off approach, assuming that plea bargaining is a rational and well-functioning market in which price signals obviate regulation. Free markets require only the most modest regulation to prevent force, threats, fraud, and deceit; governments need not go much further to help buyers assess the substantive desirability of deals. In this respect, the case law presupposes economists' stylized model of plea bargaining, in which each party chooses to enter into a plea agreement only if there is "mutuality of advantage."[1] The defendant gets a lower sentence; in exchange, the prosecution frees up time and money to pursue more defendants, and may also purchase one defendant's testimony or cooperation to use against others.

The free market works pretty well for commercial transactions, in which enough market participants are sophisticated and shop around that sellers must lower prices for everyone to match the going rate. That model roughly describes much bargaining over civil settlements, where each side usually maximizes its own dollar recovery and attorneys' fees are often pegged to a percentage of their clients' recoveries.

Unfortunately, plea bargaining is far from a well-functioning market with transparent, competitive prices. For starters, the prosecutor is a monopsonist, the only buyer with whom a defendant can shop unless he will risk going to

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1. Brady v. United States, 397 U.S. 742, 752 (1970).

trial.[2] The prosecutor probably is not looking to maximize the overall punishment or sentence, but rather is seeking to guarantee a conviction and willing to trade off severity for certainty. Likewise, the defense lawyer, often underpaid and overworked, has strong interests in moving his docket by getting his clients to plead quickly. Appointed defense lawyers are often paid a salary, a flat fee, or a low fee per case, so there is little incentive to invest extra work and resources to turn over every stone.[3] Also, defense lawyers vary greatly in their skills, experience, and relationships with prosecutors, which can further influence plea bargaining outcomes.[4] Nevertheless, the Court put great faith in defense lawyers' advice as the key to making defendants' pleas knowing and voluntary and set a very high bar for overturning pleas based on deficient legal advice.[5]

Perhaps the biggest problem is the assumption that defendants have enough information to rationally forecast their guilt and expected sentences and whether it makes sense to plead guilty. Most defendants do indeed know whether they are guilty of something and whether they have an obvious defense, and most guilty defendants have a reasonable idea of the witnesses and other evidence against them.[6] But criminal cases are much more complex than binary judgments of guilt or innocence. Often, there is a range of criminal charges that can fit a criminal transaction, and prosecutors start out stacking multiple charges only to bargain some away. There also is usually a range of criminal sentences that can fit a particular charge. That is most obvious in unstructured-sentencing systems, in which a judge can give zero to twenty years for a robbery, for example. Structured sentencing systems, though narrower, still preserve a range over which the parties can bargain. In the federal system, for example, the top of the range is at least 25% higher than the bottom.[7] Even when mandatory-minimum penalties can apply, prosecutors may agree to drop charges, let them run concurrently, or recommend reductions below the minimum in exchange for cooperation against other defendants.[8]

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2. *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1477–88 (1993); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 64–66 (1988).

3. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2477 (2004).

4. *Id.* at 2480–82.

5. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

6. Even so, stingy discovery rules can hurt defendants, especially those who are innocent or were too intoxicated or mentally ill to remember the details. Bibas, *supra* note 3, at 2494.

7. *See* 28 U.S.C. § 994(b)(2) (2006) (limiting top of guidelines range to 25% or six months above the bottom of the range, whichever is greater); U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A tbl. (2011) (setting forth federal sentencing ranges).

8. Bibas, *supra* note 3, at 2485.

Today, criminal convictions not only carry prison terms and fines, but also trigger a range of so-called collateral consequences. A violent-crime conviction may cost a convict his right to carry a gun and thus to work as a police officer or security guard. A sex-offense conviction, even for flashing or public urination, may require a convict to register as a sex offender and not live in large parts of cities near schools, parks, or playgrounds. A drug conviction may count as an aggravated felony, making a noncitizen automatically removable from the country. These consequences can matter greatly to defendants;[9] someone who has lived in America for decades and has family here may care far more about deportation than about a sentence of probation or a few months in jail. But because these consequences are nominally civil, they are not mentioned in plea agreements or plea colloquies. Traditionally, neither judges nor defense lawyers have mentioned them to their clients, as they are imposed by civil agencies and statutes rather than criminal courts.[10] Criminal proceedings remained formally divorced from civil ones, even though collateral consequences have in effect become predictable parts of the total punishment package. And often, especially in cases of moderate severity, that package is negotiable. Traditionally, a criminal defense lawyer might ask to have a one-year sentence bumped up from 365 to 366 days, to qualify his client for good-time credits. But where a one-year sentence is the threshold for deportation, prosecutors and judges often will agree to lower a sentence by a day, to 364 days, if a defense lawyer is knowledgeable enough to request such a favor.[11] Savvy, experienced defense lawyers knew enough to advise their clients and try to bargain over these consequences where possible, but many others did not.

All too often, however, these plea-bargaining issues remained below the Court's radar. Guilty pleas, and especially plea bargains, waive most possible appellate issues. Thus, disproportionately few plea-bargained cases make it all the way up to the Supreme Court's docket. Confronting an unrepresentative sample of cases, the Court continued to hyper-regulate trials while leaving plea bargaining largely untouched.[12]

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9. *See* Gabriel J. Chin and Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002).

10. *Id.*

11. *See, e.g.*, State v. Quintero Morelos, 137 P.3d 114, 119 (Wash. Ct. App. 2006); 1 NORTON TOOBY & JOSEPH ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 10.1 (4th ed. 2007).

12. *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1118–19 (2011).

II. *PADILLA*'S RECOGNITION OF PLEA BARGAINING REALITIES

The traditional model has long since become an anachronism for the 95% of defendants who plead guilty.[13] What they need is not a litany of boilerplate warnings about the procedural trial rights they are waiving, as criminal procedure rules require,[14] because for most, a jury trial was never a serious option and the various trial procedures were immaterial. Rather, they need clear information about the substantive outcomes they will face and how good a deal they are receiving. They need to know not only the prison and parole terms but also whether they will lose custody of their children or be deported, forbidden to live at home, or barred from working in their profession.

The bar had begun to acknowledge these realities. Bar publications explained how to spot and understand immigration consequences of criminal convictions, and continuing legal education programs taught criminal defense attorneys how to navigate the thicket of immigration consequences.[15] Good, experienced criminal defense attorneys increasingly saw explaining these consequences as part of representing the whole client's interests within the criminal case. But less experienced attorneys and those who do not specialize in criminal or immigration law remained ignorant or unconcerned with consequences beyond the criminal sentence itself. Thus, many defendants were unpleasantly surprised, taking seemingly lenient pleas only to discover that they had unwittingly agreed to be deported.

In *Padilla v. Kentucky*, the Court for the first time confronted this cluster of issues in interpreting the Sixth Amendment's guarantee of effective assistance of counsel.[16] The Court acknowledged that plea bargaining is no longer a negligible exception to the norm of trials; it is the norm.[17] A defendant who pleads guilty is not getting some exceptional break, but ought to be getting the going rate. In contrast, the defendant who goes to trial will probably receive a heavier sentence than usual, just as only a few suckers pay full sticker price for a car. A range of options is on the table, and defendants need to explore where within that range they can fall. A competent defense lawyer "may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence" that serves both the prosecution's and the defense's interests.[18] The parties trade risks for certainty and may likewise

13. *Id.*

14. *See, e.g.*, FED. R. CRIM. P. 11.

15. *See generally* J. McGregor Smyth, *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, CRIM. JUST., Fall 2009, at 42 (describing ways to mitigate collateral consequences).

16. 130 S. Ct. 1473 (2010).

17. *Id.* at 1485 & n.13.

18. *Id.* at 1486.

agree to heavier criminal sentences or restitution in exchange for avoiding collateral consequences.[19]

Plea bargaining is thus not an esoteric corner of the market reserved for indisputably guilty defendants who should be happy to receive any lower sentences as a matter of grace. It *is* the market, and defendants need competent advice about the facets and consequences of the transaction before they agree to a deal. A corollary is that a fair deal requires more than a rubber stamp by a lawyer with a pulse. Defense lawyers must explain not only the criminal sentences, but also the other consequences that will clearly flow from the convictions.[20] Not only affirmative misadvice, but even failure to offer advice where the correct advice is clear, violates the Sixth Amendment.[21] That means that defendants are not left to fend for themselves, but have an affirmative right to at least minimally competent advice.

Padilla thus goes well beyond the night watchman state's minimal regulation of force, threats, fraud, misrepresentations, and broken promises in an otherwise laissez-faire market. It imposes an affirmative obligation: the state must ensure that defendants have counsel who will help them to understand and evaluate the substantive merits of plea deals. The goal is not simply to forbid inaccurate or coerced pleas, but to promote a more robust and intelligent choice among alternative outcomes. That goes much further than *Santobello*'s ban on broken promises[22] or *Brady*'s ban on threats, misrepresentations, and bribes.[23] *Brady* had also required judges and counsel to explain the direct consequences authorized by the plea,[24] but *Padilla* significantly extended that disclosure requirement as well.

Looking backwards, one might see something vaguely similar in earlier cases that trusted competent defense counsel to ensure fair deals.[25] But *Padilla* imposes a much more robust and affirmative requirement on counsel. It follows the accumulated wisdom of the bar and the academy in gradually explicating defense lawyers' professional obligations. Rather than creating a new duty out of whole cloth, *Padilla* takes an incremental, common-law approach to discerning the minimum that a client can expect. That minimum need not mirror best practices, but at least it evolves to adapt to new plea-bargaining realities in a fluid market.

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19. *Id.*

20. *See, e.g., id.* at 1481–82.

21. *Id.* at 1483; *see also id.* at 1494 (Alito, J., concurring) (proposing a rule that would go beyond forbidding misadvice to require a generic warning to consult an immigration attorney about possible immigration consequences).

22. Santobello v. New York, 404 U.S. 257, 261–62 (1971).

23. Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)).

24. *Id.* at 754–55.

25. *E.g., id.* at 756–57; McMann v. Richardson, 397 U.S. 759, 769–71 (1970).

III. THEORETICAL MODELS VERSUS REALITY

At root, the *Padilla* decision has gone a great way toward rejecting the simplistic assumption that defendants are fully informed rational actors. Anyone who has practiced criminal law for any length of time knows that few defendants resemble a cool, calculating, cerebral Vulcan. Many are hampered by poor education, low intelligence, and limited proficiency in English. Many mistrust their appointed defense lawyers, assuming that lawyers whom they are not paying are not looking out for their interests. More importantly, though some defendants are experienced recidivists and think they know the system, few understand the process, the legalese, and the realistic range of outcomes very well. Up until now, our system has trusted judges' boilerplate plea colloquies, which are mostly about foregone procedural rights rather than the substantive merits of deals and which largely rubber stamp deals already struck. Defendants need substantive information about likely outcomes before they strike deals from defense lawyers familiar with their particular cases.

Padilla cannot solve all of these problems. Given the chronic underfunding of criminal defense counsel and the wide variations in their quality and workloads, no constitutional doctrine could. But it begins to attack the problem of poor information and chronic misunderstandings in plea bargaining. One of the worst aspects of collateral consequences is that, even though they are often predictable, they are hidden because they take place outside the criminal courtroom. *Padilla* brings them out into the light. That will not help all defendants: those facing very serious charges, or those whose criminal transactions are extremely simple, may face deportation regardless and have little room to bargain. But it warns them of what is coming down the pike and empowers them to explore whether there is anything they can do.

There are many other ways to provide more information to complement *Padilla*'s new right to information about deportation. *Padilla*'s right may or may not ultimately reach other consequences such as loss of custody, employment, public housing, or residency restrictions. Even if the Constitution does not require it, good defense lawyers should mention at least these serious consequences where they are likely to apply. Likewise, statutes and rules of criminal procedure can learn lessons from another area of law that has experimented with imparting useful information to inexperienced market participants: consumer-protection law. Laws could require putting plea agreements in writing and in plain English, with graphics to help defendants grasp numbers and comparisons. They could forbid or disfavor high-pressure tactics, such as threats to prosecute a family member, and require cooling-off periods before accepting serious felony pleas. Mildly pro-defendant default rules of construction could force prosecutors to set out their understandings and terms clearly, so that defendants will focus on them. And most of all, defense lawyers need not only better funding and lower caseloads, but also

better training and checklists to keep them from overlooking common issues and concerns.

The root problem, however, is deeper and harder to fix. There are two distinct barriers to informed decision-making: first, defendants must have enough information; and second, they must be able to understand, digest, and use that information. Almost all of our efforts, from *Boykin* on,[26] have gone into the first requirement. If some information is good, we reason, then more must be better. *Padilla* makes sure that defendants get some good information about immigration consequences. But that important information risks drowning, unnoticed, amidst the many other warnings that defendants receive in preparation for and during their plea colloquy. Litany after boilerplate litany can cause defendants to tune out, as the unimportant procedural wallpaper of a plea colloquy masks the crucial substantive information on which defendants ought to be focusing. Mandatory disclosures often fail for this very reason.[27] Less is more. But trial judges and legislatures are unlikely to pare back warnings, lest some appellate court reverse a conviction for omitting some minor point. As happens with jury instructions, warnings can encrust the plea process like barnacles, becoming verbose and incomprehensible. If it could be done, boiling down information to a simple grade or report card, and training defense counsel to offer better advice, would help more.[28]

Improving the advice of counsel would also address a second problem with our current over-reliance on judges' advisements at plea colloquies: the information comes too late to be of help. By the time of the plea colloquy, the defendant is not legally but psychologically committed to the deal. Given psychological sunk costs, time pressures, and all actors' desires to get things over with, defendants have almost no time to reflect and weigh collateral-consequence information if it comes at the end of the process. They need substantive information about criminal and collateral civil penalties when they are weighing the deal in earnest.

There are concrete things defense lawyers can do to improve the timely advice that defendants receive. As Professor Jack Chin suggests, defender organizations can collaborate to create and update lists of collateral consequences for each jurisdiction, as the ABA is in the process of doing, and then to turn these into usable checklists.[29] Lawyers must also question their clients and then summarize the most serious and common consequences

26. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

27. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 737–38 (2011).

28. *Id.* at 743–44.

29. Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 685–87 (2011).

applicable to each client's situation.[30] They must, for example, learn their clients' citizenship and professions in order to figure out whether they may face immigration or employment consequences. They must focus on the type of convictions: violent, drug, and sex offenses each carry consequences specific to that category. Margaret Love recommends that defenders take time to explore with their clients ways to avoid or mitigate collateral consequences, both by negotiating with the government at the front end of cases and through relief mechanisms at the back end.[31] And, as Professor Ron Wright suggests, defense lawyers can band together into larger public-defender organizations with in-house immigration and collateral-consequence experts, to better handle complex areas in which not all line attorneys can become experts.[32]

Padilla cannot revolutionize criminal justice; our system suffers from too many pathologies for a single decision to fix. But it is a welcome recognition that defendants are not fully informed rational actors who need only the negative rights to be free of threats, broken promises, lies, and bribes. They need affirmative help from their defense counsel to evaluate the fairness and desirability of their pleas, and *Padilla* is an important step in that direction.

30. *Id.* at 689–90.

31. Margaret Colgate Love, *Collateral Consequences After* Padilla v. Kentucky*: From Internal Punishment to Regulation*, 30 ST. LOUIS U. PUB. L. REV. 87, 113–16 (2011).

32. Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1536–39 (2011).