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Measuring the Creative Plea Bargain

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Measuring the Creative Plea Bargain*

THEA JOHNSON†

A great deal of criminal law scholarship and practice turns on whether a defendant gets a good deal through plea bargaining. But what is a good deal? And how do defense attorneys secure such deals? Much scholarship measures plea bargains by one metric: how many years the defendant receives at sentencing. In the era of collateral consequences, however, this is no longer an adequate metric as it misses a world of bargaining that happens outside of the sentence. Through empirical research, this Article examines the measure of a good plea and the work that goes into negotiating such a plea. Through in-depth interviews with twenty-five public defenders in four states, I investigate the ways in which collateral consequences impact the negotiation of the plea. What emerges is a picture of creative plea bargaining that takes into account a host of noncriminal sanctions that fall outside of the charge and sentence. Public defenders assess the priorities of their clients—regarding both the direct and collateral consequences of the case—and piece together pleas that meet these varied needs. The length of sentence after a plea does not tell the full story about whether a defendant got a good deal because a successful plea now encompasses much beyond the final sentence.

These findings have broad implications for the way we think about assessing public defense offices and individual defenders. Much of what goes into a plea—particularly at the misdemeanor level—is a product of the client's desire to avoid certain collateral consequences, and those desires generally do not enter the formal record or off-the-record negotiations with prosecutors. As a result, pleas that look bad on paper may actually be meeting the needs of the client. Therefore, in order to assess pleas and the defenders who negotiate them, we must understand the limits of publicly available data and focus on creating a more robust data set by which to judge public defenders. Additionally, this Article provides a fuller picture of prevailing professional norms at the plea phase after Padilla, Lafler, and Frye. As courts grapple with the role of the defense attorney during plea bargaining, it is critical that they understand that in many cases lawyers achieve optimal outcomes by providing advice and advocacy for their clients on concerns outside of the immediate criminal case. Finally, this Article serves as a renewed call for attention and funding for the holistic model of public defense.

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INTRODUCTION.....	902
I. COLLATERAL CONSEQUENCES AND THE MEASURE OF A PLEA.....	905
A. <i>PADILLA</i> AND THE EVOLUTION OF CREATIVE PLEA BARGAINING.....	908
B. MEASURING PRACTICE AND PLEAS	911
II. THE RESEARCH METHODOLOGY.....	915
III. CREATIVE PLEA BARGAINING AND COLLATERAL CONSEQUENCES	919
A. PLEA BARGAIN STRATEGIES	920
1. NEGOTIATING FOR HIGHER SENTENCES OR CHARGES	922
2. “STERILIZING” THE RECORD.....	923
3. PLEADING TO A DIFFERENT STATE OF MIND OR CRIMINAL ACT	924
4. THE IMPORTANCE OF TRIAL SKILLS TO NEGOTIATION	926
B. THE BOUNDARIES OF PLEADING	926
1. PLEADING DOWN AND PLEADING UP: MISDEMEANORS AND FELONIES	926
2. THE RELATIONSHIP WITH DISTRICT ATTORNEYS	929
IV. THE INFLUENCE OF COLLATERAL CONSEQUENCES ON PUBLIC DEFENSE.....	934
A. PUBLIC DEFENSE AND THE TROUBLE WITH MEASURING OUTCOMES.....	935
B. CHANGING PROFESSIONAL NORMS AND INEFFECTIVE ASSISTANCE OF COUNSEL	939
C. A RENEWED CALL FOR HOLISTIC DEFENSE	941
CONCLUSION.....	945
APPENDIX	946

INTRODUCTION

The classic image of the defender as a trial attorney may still be popular, but the reality of public defense has changed. The frequently cited statistics remind us that trials are dead¹ and that the core work of public defense is plea bargaining.² Plea bargaining today is shaped by many factors but particularly by the cascade of collateral consequences that now result from a criminal conviction. Low-level drug offenses make even lawful permanent residents³ automatically deportable. Drug convictions can also influence a person’s ability to stay in public housing or maintain student loans.⁴ Sex crimes offenses, both misdemeanors and felonies, often carry

1. U.S. SENTENCING COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2010), <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2010/sourcebook-2010> [<https://perma.cc/6JQF-DR29>] (finding that ninety-seven percent of federal criminal cases were resolved by plea in 2010).

2. This has been true for decades, in fact. *See generally* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1 (1979); George Fisher, *Plea Bargaining’s Triumph*, 109 Yale L.J. 857 (2000).

3. A *lawful permanent resident* is “[a]ny person not a citizen of the United States who is living in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant. Also known as ‘permanent resident alien,’ ‘resident alien permit holder,’ and ‘Green Card holder.’” *Glossary*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/tools/glossary?topic_id=1 [<https://perma.cc/XR9J-LQJA>] (click “Lawful permanent resident” to view definition).

4. For a dizzying account of all possible collateral consequences on a state-by-state

long-term sex offender registration requirements.⁵ Although these consequences are not new,⁶ there is a new sense of urgency among courts, scholars, and advocates to address them.⁷

In recent years, the Supreme Court has begun to fully acknowledge the critical role of plea bargaining in the criminal process. In 2010 the Court held in *Padilla v. Kentucky* that defense attorneys are required to give accurate advice to their clients about the potential immigration consequences of a criminal conviction.⁸ *Padilla* acknowledged both the centrality of collateral consequences to the lives of criminal defendants and the ability of the defense attorney to plea bargain, in the words of Justice Stevens, “creatively” to avoid those consequences.⁹

The *Padilla* decision also made clear that how and why defense attorneys negotiate the collateral consequences of the plea remains unexplored. Although Justice Stevens pointed to the many ethical and professional standards that govern plea bargains,¹⁰ there is no data on how criminal defenders incorporate collateral consequences into their counsel to clients and decision making on pleas. This Article begins to fill that gap.

Through in-depth interviews with twenty-five public defenders, I explore how defenders are collecting information on collateral consequences and how they use that information to define the goals and strategies of the plea bargain. My findings demonstrate how deeply entangled collateral consequences are in the calculus of plea bargaining. The way defenders prepare for and approach the plea bargain is now informed by a host of concerns outside of the charge and sentence.

Traditionally, the most important measures of a plea bargain have been the seriousness of the charge and the length of the final sentence.¹¹ In an era of collateral consequences, however, defenders are, at times, focusing their energies on mitigating consequences rather than on lessening the sentence—particularly when negotiating pleas on misdemeanor offenses. To achieve these goals, defenders are bargaining creatively, using a variety of both overt and covert strategies. These strategies include, among others, trading higher sentences and higher charges for pleas that protect the client from severe collateral consequences or “sterilizing” the record to shield the client from consequences in noncriminal proceedings down the road.

basis, see generally Justice Ctr., Council of State Gov'ts, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION (2016), <https://niccc.csgjusticecenter.org>.

5. See, e.g., N.Y. CORRECT. LAW § 168-a subdiv. 1 (McKinney 2014) (defining *sex offender* to include individuals convicted of certain misdemeanors); N.Y. CORRECT. LAW § 168-f (McKinney 2014) (requiring sex offenders to register).

6. In 1995, for instance, a law review article on effective plea bargaining by Professor Rodney J. Uphoff noted that public defenders should “inquire about the defendant’s personal situation so counsel can advise the client about the collateral consequences of a guilty plea or conviction” because these consequences may actually be more important to the client than the sentence handed down by the judge. Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 100–01 (1995).

7. See *infra* Part I.A.

8. 559 U.S. 356, 374 (2010).

9. *Id.* at 373.

10. *Id.* at 367–68; see *infra* Part I.A.

11. See *infra* Part I.B.

This sort of creative bargaining is much more common in misdemeanor practice, where the sentences tend to be lower.¹² And although public defender offices generally allocate resources to felony practice,¹³ these findings provide fodder for the argument that public defender offices should embrace the holistic defense model, which focuses on the myriad legal issues that tend to flow from a criminal case—misdemeanor or felony.

In addition, by examining the way in which defenders plea bargain, this Article also tests the concept of a “good deal.” By looking only at the traditional metric—sentence length—courts and scholars may define “success” in a way that is divorced from the perspective of the defender or the client, or both. As there are so many collateral consequences to be negotiated “around,” plea bargains take on strange new forms that may look—on paper—like bad decisions, but are actually meeting the varied needs of defendants.

Further, in light of recent attempts to evaluate public defenders by both scholars, state oversight committees, and national defender organizations,¹⁴ this measure may not adequately capture the work that goes into crafting a plea bargain.¹⁵ Although much attention has been paid to how prosecutors think about pleas and collateral consequences,¹⁶ the real craftsmen behind plea bargains are the defense attorneys, who must weigh the priorities of their clients and come up with pleas that meet those needs—whether that means staying out of prison to avoid detection by Immigration and Customs Enforcement (ICE), keeping a local government job, or being able to secure student aid for college. Given the incredibly individualized nature of the needs of each client (the details of which tend never to enter the public record), a “good deal” is a moving target that can vary greatly from case to case. Metrics for evaluating success must incorporate and reflect all the considerations that inform plea bargaining.

12. A misdemeanor is defined as a crime that carries a sentence of less than one year. A felony must potentially carry a sentence of more than one year, but a sentence of a year or more is not mandatory on many felonies.

13. Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 411 (2016).

14. *See infra* Part I.B.

15. As Jason Kreag notes, the regular metric for measuring a prosecutor’s success—conviction rates—also does not capture the full range of a prosecutor’s performance. Jason Kreag, *Prosecutorial Analytics*, WASH. U. L. REV. (forthcoming 2017).

16. Two recent pieces, Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775 (2016), and Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197 (2016), both argue that prosecutors are beginning to strategically use collateral consequences in their plea negotiations. In addition, scholars like Heidi Altman and Ingrid Eagly have explored the way that prosecutors think about immigration consequences, specifically, when negotiating and offering pleas. Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1 (2012) (discussing the results of a survey done of district attorneys in Kings County, N.Y. (Brooklyn) District Attorney’s Office and how district attorneys incorporate immigration consequences into their decision on pleas); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013) (discussing how different prosecutors’ offices take into consideration immigration law when making decisions about how to prosecute noncitizens).

Using qualitative research, this Article aims to explore the notion of how we measure a successful plea bargain in the era of collateral consequences. In Part I, I describe the growing awareness of collateral consequences after *Padilla* and how the decision has shaped the conversation about plea bargaining. I also discuss recent attempts to evaluate public defender performance. Part II outlines my methodology for conducting qualitative interviews with defenders in four cities: New York City, Boston, the Seattle area, and Colorado Springs, Colorado. Part III discusses my findings about how the public defenders I spoke to are negotiating “around” collateral consequences in creative and innovative ways. I first explore the various strategies for creative plea bargaining and then examine the challenges to such bargaining. Finally, Part IV will explore the implications of these findings in three respects. First, I reflect on how we should define a successful plea bargain in light of these findings and what that definition means for our evaluation of public defenders. I argue that evaluation should reflect the work that goes into pleading around collateral consequences, particularly at the misdemeanor stage. Second, I discuss the implications of the work for ineffective assistance of counsel claims. Embedded in courts’ jurisprudence about the defense counsel’s duty to advise a client about collateral consequences is also a demand for them to bargain creatively around those consequences where possible. But my findings show that there are no easy answers to the knotty question of what constitutes “prevailing professional norms”¹⁷ in an era of collateral consequences. Finally, I make a renewed call for the funding and embrace of holistic public defense models that make collateral consequences a priority.

I. COLLATERAL CONSEQUENCES AND THE MEASURE OF A PLEA

We have entered an era of collateral consequences. Scholars have noted the deep problems with the number and type of collateral consequences that stem from a

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

conviction.¹⁸ Courts at every level have taken up the issue.¹⁹ In practice, attorneys are mindful of their obligations to counsel clients on these concerns and of their clients' desire to avoid collateral consequences. A recent article on Vox.com, *I'm a Public Defender. My Clients Would Rather Go to Jail than Register as Sex Offenders*, tells the story of one public defender's struggle to avoid sex offender registration, even in the face of an alternative jail sentence.²⁰ The author notes,

When I first became a public defender, I believed the worst punishment that my clients would face would be time in jail. Since then, I've learned that incarceration is not the only—and perhaps not the worst—punishment the criminal justice system can impose. The registration requirements imposed on those convicted of sex offenses are unfairly harsh and punitive²¹

In addition, the impact of collateral consequences has become part of the mainstream narrative about criminal justice reform. For instance, pieces on National

18. Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013) (discussing the expansion of immigration consequences for low-level crimes and the struggle for public defenders to provide effective assistance under these circumstances, inevitably leading to poor outcomes and unwarranted deportations for defendants); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002) (discussing why effective assistance of counsel claims should reach the many collateral consequences that are the result of a criminal conviction); John P. Gross, *What Matters More: A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55 (2013) (arguing that Sixth Amendment jurisprudence must take into account the punishments, beyond incarceration, that flow from a conviction); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 464–65 (2010) (finding, in a comparative examination of countries with similar criminal justice systems to the United States, that the U.S. has a more punitive set of collateral consequences); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 586 (2006) (noting that although “civil disabilit[y]” consequences of a conviction are considered collateral to a defendant's prison sentence, their permanent and pervasive nature often outlast the direct consequence, both temporally and in severity); Yolanda Vázquez, *Realizing Padilla's Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169, 176 (2011) (arguing that as the number and type of criminal charges that make a person removable increased, the grounds for relief from removal decreased, creating an immigration system that was deeply entwined with the criminal system).

19. Some courts have extended the holding of *Padilla* beyond immigration. See, e.g., *Taylor v. State*, 698 S.E.2d 384, 389 (Ga. Ct. App. 2010) (holding that *Padilla* also applies to sex offender registration). But see *Commonwealth v. Abraham*, 62 A.3d 343, 353 (Pa. 2012) (reversing a lower court decision which held that counsel was ineffective for not warning his client of the possible loss of his pension as a result of the conviction).

20. Rachel Marshall, *I'm a Public Defender. My Clients Would Rather Go to Jail than Register as Sex Offenders.*, VOX.COM (July 5, 2016), <http://www.vox.com/2016/7/5/12059448/sex-offender-registry> [<https://perma.cc/AH6A-SLLS>].

21. *Id.*

Public Radio²² and *Last Week Tonight with John Oliver*²³ focus on the devastation of collateral consequences.²⁴

Despite this attention, there is still confusion about what exactly should be labeled a “collateral consequence.” It is not always clear—to clients, attorneys, and even courts—what is “direct” and what is “collateral.” The *National Inventory of the Collateral Consequences of Conviction* (hereinafter NICCC) defines collateral consequences as “the penalties, disabilities, or disadvantages imposed upon a person as a result of a criminal conviction, either automatically by operation of law or by authorized action of an administrative agency or court on a case by case basis.”²⁵ These include losing the ability “to vote or obtain certain licenses.”²⁶ In contrast, a direct consequence is defined as one that “is imposed by the sentencing court as part

22. Monica Haymond, *Should a Criminal Record Come with Collateral Consequences?*, NPR.ORG (Dec. 6, 2014, 5:03 PM), <http://www.npr.org/2014/12/06/368742300/should-a-criminal-record-come-with-collateral-consequences> [https://perma.cc/3F6Q-RSDP].

23. LastWeekTonight, *Prisoner Re-Entry*, YOUTUBE (Nov. 8, 2015), <https://www.youtube.com/watch?v=gJtYRxH5G2k> [https://perma.cc/2XAQ-R5C8].

24. It’s worth noting that the acknowledgment that collateral consequences are a “big deal” is part of a growing awareness of other systematic issues in the criminal justice system. For instance, the injustice of the system of criminal fines and fees, and the misuse of bail against indigent defendants, are likewise problems that have existed in the system for some time but are now on the radar of academics and the general population. Beth A. Colgan, *Re-viving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 285–90 (2014) (reviewing the common and often debilitating fines that defendants are often forced to pay); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1346–47 (2012) (discussing the pressures that setting bail places on defendants). But it is not only the academy and lawyers focusing on these hot-button issues in criminal justice. For example, both fines and bail have gotten treatment by *Last Week Tonight with John Oliver*. The segment on fines, LastWeekTonight, *Municipal Violations: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Mar. 22, 2015), <https://www.youtube.com/watch?v=0UjpmT5noto> [https://perma.cc/AGJ3-46ED], and the episode on bail, LastWeekTonight, *Bail: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (June 7, 2015), <https://www.youtube.com/watch?v=IS5mwymTIJU> [https://perma.cc/YU4K-7UTE], have each been viewed over six million times on YouTube, as of this publication. Many other nontraditional sources of criminal justice reform coverage have engaged in long-form, in-depth coverage of these subjects recently, thrusting them even further into the spotlight. See, e.g., Bill Keller, *Prison Revolt*, NEW YORKER (June 29, 2015), <http://www.newyorker.com/magazine/2015/06/29/prison-revolt> [https://perma.cc/TG5H-V2JU]; Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, N.Y. REV. BOOKS (May 21, 2015), <http://www.nybooks.com/articles/archives/2015/may/21/mass-incarceration-silence-judges/> [https://perma.cc/SJ6L-PC9W]; Matt Taibbi, *Jailed for Being Broke*, ROLLING STONE (June 23, 2015), <http://www.rollingstone.com/politics/news/jailed-for-being-broke-20150623> [https://perma.cc/P9X4-ZM8E]. Even the recent arrival of the criminal justice reporting-based website and newsletter *The Marshall Project*, edited by former New York Times Editor-in-Chief Bill Keller, signifies a sea change in the attention devoted to the simmering issues in criminal justice. *Our People*, MARSHALL PROJECT, <https://www.themarshallproject.org/people> [https://perma.cc/293F-AKFN].

25. Justice Ctr., Council of State Gov’ts, *User Guide & Frequently Asked Questions*, NAT’L INVENTORY COLLATERAL CONSEQUENCES CONVICTION (2016), https://niccc.csgjusticecenter.org/user_guide/ [https://perma.cc/683K-GAUN].

26. *Id.*

of the authorized punishment, and included in the court's judgment."²⁷ This includes, for example, the imposition of a fine.

Immigration consequences, in fact, are considered—as the majority noted in *Padilla*—neither collateral nor direct.²⁸ Instead the Supreme Court found that the risk of deportation is too important to the defendant to be considered collateral, but does not qualify as direct since it is not imposed by the judge.²⁹ The Court's inability to put immigration consequences neatly into one box or the other exacerbates the confusion that attorneys face on the ground.

I use the term *collateral* in this piece to cover a number of consequences, including deportation, that may fall in this gray area. I do this because public defenders themselves use the term to encompass a wide range of client concerns that fall outside of the sentence length and conviction charge.³⁰

In asking public defenders about the most common collateral consequences they deal with in practice, the answers were far-ranging, giving some sense of the scope of what defenders encounter. Immigration was at the top of the list, but defenders also listed probation and parole, sex offender registration, loss of custody of children, loss of a job or housing, and the stigma of being convicted of a crime, to name just a few. This list, though, is just the tip of the iceberg. A review of the NICCC shows that there are 711 potential collateral consequences that may stem from a criminal conviction in Colorado, 814 in Massachusetts, 1027 in Washington State, and 1314 in New York.³¹

These interviews make clear that *collateral* has come to encompass a world of client concerns that spring from the criminal conviction, but are still apart from it.

27. *Id.*

28. *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010).

29. The Court noted that deportation is “uniquely difficult to classify as either a direct or collateral consequence.” *Id.* But the majority was clear that the Court has never distinguished between a direct and collateral consequence in making *Strickland* inquiries. *Id.* at 365.

30. The first question I asked interviewees during the interviews was what collateral consequences they deal with most commonly in their practice. I did not define collateral, keeping the answer open to what came to mind when they heard the term collateral consequence. Here is a list of all collateral consequences that defenders brought up and how frequently they were mentioned as a common consequence: immigration (22); housing (14); employment (13); licensing (including both driver's licensing and professional licensing) (12); student financial aid (6); parole/probation (3); Family Court consequences (3); sex offender registration (3); impact on future cases (3); school suspension (2); loss of benefits (2); loss of the vote (1); loss of firearm privileges (1); stigma (1).

31. Justice Ctr., Council of State Gov'ts, *Colorado*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION (2016), <https://niccc.csgjusticecenter.org/search/?jurisdiction=3> [<https://perma.cc/6Z9S-2C5G>]; Justice Ctr., Council of State Gov'ts, *Massachusetts*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION (2016), <https://niccc.csgjusticecenter.org/search/?jurisdiction=25> [<https://perma.cc/E8LF-JDUR>]; Justice Ctr., Council of State Gov'ts, *New York*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION (2016), <https://niccc.csgjusticecenter.org/search/?jurisdiction=35> [<https://perma.cc/PW8T-E9NL>]; Justice Ctr., Council of State Gov'ts, *Washington*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION (2016), <https://niccc.csgjusticecenter.org/search/?jurisdiction=48> [<https://perma.cc/3CE3-ZTCH>].

A. Padilla and the Evolution of Creative Plea Bargaining

Part of the reason that collateral consequences and plea bargains are having their moment is because of the Supreme Court's 2010 decision in *Padilla v. Kentucky*. *Padilla* involved a lawful permanent resident who was prosecuted in Kentucky for transporting a large amount of marijuana.³² Before trial, he pleaded guilty on the advice of his attorney, who told him that he did not need to worry about immigration consequences because he had been in the United States for over forty years.³³ That advice was wrong. The drug conviction made the defendant's deportation "virtually mandatory."³⁴

On appeal, the Supreme Court of Kentucky denied the defendant's request for post-conviction relief, holding that the Sixth Amendment did not protect him from erroneous advice about deportation because removal from the country was a collateral consequence of a conviction.³⁵ The U.S. Supreme Court disagreed and found that defense counsel has a Sixth Amendment duty to give correct immigration advice to a noncitizen defendant when the law is clear about the nature of the immigration consequence.³⁶ Where the law is not clear, the Court found that defense counsel would satisfy the duty where he gave a more general warning to his client that there may be immigration consequences as a result of his conviction.³⁷

Padilla was decided on ineffective assistance of counsel grounds. Under the test laid out in *Strickland v. Washington*, a defendant must show, first, that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment" and, second, that "counsel's errors were so serious as to deprive the defendant of a fair trial."³⁸ The first prong of the test, often referred to as the reasonableness prong, takes into account a totality of the circumstances, including "prevailing professional norms."³⁹ For the second part of the test, or the prejudice prong, the Court found that a defendant must show that the "decision reached [by the fact-finder] would reasonably likely have been different absent the errors [of the lawyer]."⁴⁰

Justice Stevens found that the first prong of *Strickland*—regarding prevailing professional norms—was the locus of the issue in *Padilla*.⁴¹ In *Padilla*'s case, the

32. 559 U.S. at 359.

33. *Id.*

34. *Id.*

35. *Id.* at 359–60.

36. *Id.* at 369.

37. *Id.* at 369, 374–75 (reversing and remanding to determine whether there was prejudice under the second prong of *Strickland*).

38. 466 U.S. 668, 687 (1984).

39. *Id.* at 688. The Court has since elaborated on *Strickland* by referring to prevailing standards of professional norms. *See, e.g.,* *Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003) (citing American Bar Association guidelines to determine scope of counsel's duty to investigate mitigating circumstances).

40. *Strickland*, 466 U.S. at 696. Applying the test to the facts in *Strickland*, the Court found that the defendant failed to satisfy either prong: his lawyer had made a reasonable "strategic choice" in focusing on the defendant's remorse before the judge, and the other evidence was not strong enough to have likely made a difference in the outcome. *Id.* at 698–99.

41. *Padilla*, 559 U.S. at 366.

immigration statute at play was explicit: drug-related convictions result in deportation. Because the law was clear, there was a duty for defense counsel to give correct advice.⁴² Stevens acknowledged many of the basic realities facing noncitizens in criminal proceedings today. He noted the limited discretion judges have to grant noncitizens relief from removal.⁴³ He rightly pointed out that removal was nearly inevitable for noncitizens who were convicted of removable offenses.⁴⁴ As such, deportation had become a critical part—perhaps the most important part—of the penalty that might be imposed on a noncitizen defendant.⁴⁵

Justice Stevens also noted that the inclusion of immigration consequences in the plea negotiation could work in favor of both the defendant and the prosecutor.⁴⁶ This perspective was also on view in the 2012 companion cases of *Missouri v. Frye* and *Lafler v. Cooper*, where the Court held that a defense lawyer may be ineffective where his deficient advice resulted in rejection of a favorable plea bargain.⁴⁷ In *Frye* the Court wrote that “the potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.”⁴⁸

But it is in *Padilla* that the contours of the creative plea bargain—one that allows a defendant to escape collateral consequences through the careful fashioning of the plea—begin to emerge. As Justice Stevens noted towards the end of his opinion, “Counsel . . . may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.”⁴⁹ In this conception of plea bargaining, Stevens also makes clear that a good bargain is one in which the defendant avoids certain immigration penalties.

In this sense, *Padilla* articulates a different notion of a “bargain” than courts normally apply when looking at the deal the client received in the plea. Courts, in examining ineffective assistance of counsel at the plea bargain phase, primarily focus on the lesser sentence that the defendant received as the result of the plea.⁵⁰ Although

42. *Id.* at 366–69.

43. *Id.* at 363–64.

44. *Id.* at 364.

45. *Id.*

46. *Id.* at 373 (“[The] informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargain process.”).

47. *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

48. *Frye*, 132 S. Ct. at 1407.

49. *Padilla*, 559 U.S. at 373.

50. *United States v. Cobb*, 110 F. Supp. 3d 591, 599 (E.D. Pa. 2015) (considering what constitutes effective assistance of counsel during the plea bargain phase and noting that to show prejudice, a defendant must show “the reasonable probability of two things: (1) that he would have pled guilty had he known of his true sentencing exposure, and (2) that, had he pled guilty, he would have received a lesser sentence”); *Nicholson v. United States*, No. 09-cr-474 (RJS), 2014 WL 4693615, at *9 (S.D.N.Y. Sept. 22, 2014) (“Notwithstanding Petitioner’s arguments to the contrary, the Court finds that counsel’s advice with respect to these issues was not objectively unreasonable and that Petitioner did indeed benefit from the Plea Agreement. As consideration for the stipulated Guidelines range and appellate waiver, the government consented to dismiss [certain charges], thereby reducing Petitioner’s maximum

not explicitly, *Padilla* appears to expand the definition of a “good deal” to include avoiding collateral consequences.

Padilla also presents a debate between Justice Stevens in the majority and Justice Alito in the concurrence over the role of the defense attorney in securing this new type of bargain. In fact, much of the discussion in *Padilla* is about how, when, and whether defense attorneys are already advising their clients about immigration issues and incorporating these concerns into their plea practice. As Stevens opined, the decision would likely have little impact on practice because “[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.”⁵¹ Relying on the publicly available policies of large defender organizations and ABA Standards, the majority surmised that defense attorneys were actually already providing immigration advice to their clients.⁵² The concurrence disputed this, noting that guideline mandates do not always equal on-the-ground compliance: “[W]e must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.”⁵³

B. Measuring Practice and Pleas

Padilla then leaves us with two questions, first a question of practice, and second a question of measurement. The practice question is whether or not attorneys were or are actually advising clients about potential immigration or other collateral

exposure from [fifty-five] to forty-five years. That dismissal, coupled with the government’s implicit agreement to forego additional substantive charges . . . gave Petitioner the certainty that he would not receive a sentence greater than forty-five years. Given his age and life expectancy, that concession was not insignificant, as it gave Petitioner the hope that he might at least not die in prison.”); *Colbert v. United States*, No. 3:10-CR-151-R, 2014 WL 5437072, at *6 (W.D. Ky. Aug. 22, 2014) (stating that to show ineffective assistance during plea bargaining, “defendant “also must show that there is a reasonable probability that but for these errors by [his] attorney . . . , the government would have entered into the proposed plea agreement, the agreement would have been accepted by the Court, *which would have imposed a more favorable sentence pursuant to the agreement than the one imposed following [defendant’s] unsuccessful jury trial*” (emphasis added)). Although this is not always the case. Two states, Colorado and New Mexico, already held that an attorney could violate the Sixth Amendment by failing to inform a client about deportation risks or other collateral consequences of a guilty plea. *People v. Pozo*, 746 P.2d 523, 527–29 (Colo. 1987); *State v. Paredez*, 101 P.3d 799, 805 (N.M. 2004).

51. *Padilla*, 559 U.S. at 372.

52. “The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.” *Id.* at 367 (citing, among other documents, NAT’L LEGAL AID AND DEFENDER ASSN., PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 6.2 (1995); OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, STANDARDS FOR ATTORNEY PERFORMANCE D10, H8–H9 (2000); AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 197 (3d ed. 1993); AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 116 (3d ed. 1999)).

53. *Padilla*, 559 U.S. at 377 (Alito, J., concurring in judgment).

consequences,⁵⁴ which is intimately connected to a broader concern about effective assistance of counsel.⁵⁵ As Justice Alito noted, this question is separate and apart from the written standards and policies that dictate how lawyers should behave.⁵⁶ The profession has aspirations, but what is the reality?

The second question is, what makes a good bargain? How do we measure whether a defendant has received a good deal? Relatedly, how do we measure whether a defense attorney is getting a good deal for his client? And how can one use analytic data review to answer these questions when there is no uniform understanding of a “good deal”?

These are the sorts of questions that scholars and defender offices have been grappling with.⁵⁷ Both groups have started to embrace analytic data review to figure out the answer. Data analysis has become increasingly influential in all areas of criminal justice reform,⁵⁸ including in the assessment of public defenders. There is,

54. Although I use *Padilla* as a jumping off point to think about how we define successful practice and pleas, my scope goes beyond immigration consequences. While the *Padilla* decision was limited to immigration consequences, the issues that *Padilla* raises are relevant to all collateral consequences. In fact, some courts have applied *Padilla* to consequences other than immigration. See *supra* note 19. And whether it is overtly stated, attorneys are viewing their role as extending beyond advisement on immigration to a broader set of categories. See *infra* Part IV.B.

55. See Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650 (2013) (arguing that *Padilla* supports a right to effective assistance of counsel at plea bargaining); Todd A. Berger, *After Frye and Lafler: The Constitutional Right to Defense Counsel Who Plea Bargains*, 38 AM. J. TRIAL ADVOC. 121, 132 (2014) (arguing that, considering the nature of the modern criminal justice system and following the Supreme Court’s decisions in *Frye* and *Lafler*, “the Sixth Amendment’s guarantee of effective assistance of counsel imposes upon defense attorneys an obligation to pursue a beneficial plea bargain, when doing so is in the defendant’s best interest”).

56. *Padilla*, 559 U.S. at 377.

57. Jennifer E. Laurin, *Gideon by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense*, 12 OHIO ST. J. CRIM. L. 325, 335–36 (2015).

58. Data review gained public recognition in the criminal field with the development of Compstat, a data-driven model for detecting high crime areas that was first used by the New York City Police Department but was later adopted by many jurisdictions around the country. Compstat was hailed for its ability to point law enforcement to hot spots of criminal activity. It was also the source of significant criticism. See generally *Floyd v. City of New York*, 959 F. Supp. 2d 540, 592–94 (S.D.N.Y. 2013) (examining the history of Compstat and how its use, or abuse, put an emphasis on the number of stops made by New York City police officers, not on the quality of the stops, contributing to what the court found to be an illegal and unconstitutional practice of stop and frisks). As any fan of *The Wire* will remind you, Compstat is susceptible to officers who want to “game” the numbers. *The Wire: Time After Time* (HBO television broadcast Sept. 19 2004); see also Radley Balco, *The Other Broken Windows Fallacy*, REASON.COM (Mar. 8, 2010), <http://reason.com/archives/2010/03/08/the-other-broken-window-fallacy> [https://perma.cc/LL6Q-GNRC] (noting that “[o]ne of the central themes of the critically acclaimed HBO series *The Wire* was the pressure politicians put on police brass, who then apply it to the department’s middle management, to generate PR-friendly statistics about lowering crime and increasing arrests”). But some police departments are also turning to big data to try to identify and then intervene early with “bad cops.” Kimbriell Kelly, *Can Big Data Stop Bad Cops?*, WASH. POST, (Aug. 21, 2016),

understandably, a desire to figure out what makes a good public defender (and a bad one) and, relatedly, what makes for good client outcomes. Even before the move to wide-scale data review in the criminal system, scholars have been trying to measure the success of public defenders for decades,⁵⁹ particularly whether they are achieving better outcomes than their private counterparts.⁶⁰ Many of these studies have focused on measuring the final sentence that the defendant received. As Wright and Peebles note, the studies that focused on sentencing are premised on the idea that “[i]f two clients are convicted of the same crime, despite the efforts of equally active and empathetic defense lawyers, the client who receives the lower sentence would presumably rate that attorney more highly.”⁶¹ But the results of these studies have often been in conflict. Some have found that private attorneys are more effective than public defenders and some have not. Some concluded that experience makes for better criminal defense lawyers and others have not.⁶²

It is no surprise then that an interest in more complex, nuanced data analysis has now come to public defense, even if, as Jennifer Laurin notes, public defense is late to the “data game.”⁶³ In their piece *Defending Data*, Pamela Metzger and Andrew Ferguson make a compelling case for incorporating data collection and review into public defense assessment.⁶⁴ They advocate for a systems approach, like the ones used in medicine and aviation, which “looks to larger organizational systems for both cause and cure [for error].”⁶⁵ They rightly note that defenders now exist in a “data-less” environment in which there are few mechanisms to track positive and negative

https://www.washingtonpost.com/investigations/can-big-data-stop-bad-cops/2016/08/21/12db0728-3fb6-11e6-a66f-aa6c1883b6b1_story.html [<https://perma.cc/RJK7-C83F>]. And big data may help alleviate discriminatory policing practices. Sharad Goel, Maya Perelman, Ravi Shroff & David Alan Sklansky, *Combating Police Discrimination in the Age of Big Data*, 20 NEW CRIM. L. REV. 181 (2017).

59. For studies on public defense from the 1970s to the 1990s, see generally Ronald F. Wright & Ralph A. Peebles, *Criminal Defense Lawyer Moneyball: A Demonstration Project*, 70 WASH. & LEE L. REV. 1221, 1237–39, nn.61, 63 (2013).

60. See, e.g., N.C. OFFICE OF INDIGENT DEF. SERVS., FY07 NORTH CAROLINA PUBLIC DEFENDER AND PRIVATE ASSIGNED COUNSEL COST ANALYSIS 2–3 (2008), <http://www.ncids.org/Reports%20&%20Data/Prior%20Publications/fy07%20pd%20pac%20cba%20final%20report.pdf> [<https://perma.cc/UPF4-U95B>] (comparing costs and outcomes between public defenders and private counsel); Joyce S. Sterling, *Retained Counsel Versus the Public Defender: The Impact of Type of Counsel on Charge Bargaining*, in THE DEFENSE COUNSEL 151, 160–62 (William F. McDonald ed. 1983) (comparing outcomes between public defenders and retained counsel); Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Bargaining*, 17 J. CRIM. JUST. 253, 258 (1989) (comparing the outcomes at plea bargain between private and public defenders).

61. Wright & Peebles, *supra* note 59, at 1238 (discussing the studies that focus on the length of prison or jail sentence as a measure of attorney quality).

62. *Id.* at 1240 (discussing the various conflicting studies on public defenders over the last few decades).

63. Laurin, *supra* note 57, at 336–37.

64. Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057 (2015).

65. *Id.* at 1063.

outcomes.⁶⁶ Their solution is for public defender organizations to begin the wide-scale collection of data.⁶⁷ While they recognize many of the pitfalls of using data analysis to measure public defense,⁶⁸ they argue that the analysis of a range of data will improve client outcomes.⁶⁹

This call has been echoed by practitioners, other scholars, and state oversight committees. For instance, in 2014, the National Legal Aid and Defender Association published *Basic Data Every Defender Program Needs To Track: A Toolkit for Defender Leaders*.⁷⁰ The “toolkit” encourages organizations to track a wide variety of data about cases, clients, and defenders, partly to evaluate case outcomes.⁷¹ The list of suggested data to collect includes the cases handled by the office, defendant characteristics, case events, and case dispositions, among others.⁷² Interestingly, it does not mention collateral consequences.

As states have begun to implement oversight committees to track the work and spending of public defender offices, a focus on data analysis has become increasingly relevant to policy decisions on indigent defense.⁷³ In 2012, as Missouri public defenders refused to take on additional cases because of case overload, a state auditor argued that the public defender’s estimate of the appropriate caseload was unsupported by any data.⁷⁴ The use of data analysis to evaluate public defenders was also, under President Obama, a federal priority. President Obama’s 2015 budget called for funding to “launch statistical collections which examine public defender agencies, programs and operations,” among a limited number of other criminal justice priorities.⁷⁵

66. *Id.* at 1066.

67. *Id.* at 1097.

68. *Id.* at 1073. For instance, as Metzger and Ferguson note, particular issues of uniform data collection at public defender offices depend on the state and county where the office is located. *Id.* at 1074. In addition,

[s]ome defender systems provide ‘horizontal’ representation, [where a defender represents a client at a particular stage of the proceedings,] some ‘vertical,’ [where a defender represents the client from start to finish of the proceedings,] some ‘holistic.’ Some indigent defense systems are staffed by full time lawyers, others by part-time attorneys, still others by contractually assigned counsel.

Id.

69. *Id.* at 1082–84.

70. MAREA BEEMAN, NAT’L LEGAL AID & DEF. ORG., *BASIC DATA EVERY DEFENDER PROGRAM NEEDS TO TRACK: A TOOLKIT FOR DEFENDER LEADERS* (2014), <http://www.nlada100years.org/sites/default/files/BASIC%20DATA%20TOOLKIT%2010-27-14%20Web.pdf> [<https://perma.cc/3NW7-QVER>]; see also Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1323 (2013).

71. BEEMAN, *supra* note 70, at 5.

72. *Id.* at 8–9

73. For an overview of the state oversight committees in New York, North Carolina, and Texas and their use of data, see Laurin, *supra* note 57, at 338–54.

74. THOMAS A. SCHWEICH, MO. STATE AUDITOR’S OFFICE, *MISSOURI STATE PUBLIC DEFENDER 10* (2012), <http://app.auditor.mo.gov/Repository/AnnualReport/2012annualreport.pdf> [<https://perma.cc/R7TT-WL55>].

75. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *FISCAL YEAR 2015*,

In addition, scholars have proposed that criminal justice actors begin to collect data in a systematized way, particularly public defenders. The Albany Law Review recently published an issue dedicated to the exploration of how data can be used more effectively to evaluate indigent defense.⁷⁶ In the issue, scholars discussed, among other topics, tools for assessing holistic defense offices⁷⁷ as well as the results of research on public defense made possible by funding from the National Institute of Justice.⁷⁸ Others have noted that the lack of data in the public defense field represents a problem seen throughout the criminal justice system.⁷⁹

These calls for data collection and reporting are important and timely. As Samuel Wiseman points out, currently there is minimal data collected within the criminal justice system, particularly in comparison to other areas of the law, where robust datasets have been developed and used.⁸⁰ There is tremendous value to collecting and analyzing data. But as the system turns towards data collection, it is critical to keep in mind that publicly available data may not reflect the full range of decision making at the plea bargain stage. There is much that goes into a plea that is never put down on paper, including the many collateral consequences that may be a priority to the client. This makes it difficult to account for the factors that lead to the plea decision and to measure the outcome. What makes a good defense attorney and what makes a good plea are complicated questions in the era of collateral consequences. Further, how defenders think about collateral consequences when negotiating pleas depends on many moving pieces: the initial charge, the prosecutor assigned to the case, the judge in the courtroom on the day of the plea, and, most importantly, the individualized needs of the client. As I discuss below, my findings have broad implications for the way we think about plea bargaining in the era of collateral consequences.

ANALYTICAL PERSPECTIVES, BUDGET OF THE U.S. GOVERNMENT 294 (2015), <https://www.gpo.gov/fdsys/pkg/BUDGET-2015-BUD/pdf/BUDGET-2015-BUD.pdf> [<https://perma.cc/MK8J-LB5Z>].

76. SPECIAL ISSUE ON RESEARCH IN INDIGENT DEFENSE (Albany Law Review ed., 2015); Andrew Lucas Blaize Davies, Editor's Introduction, *How Do We "Do Data" in Public Defense?*, 78 ALB. L. REV. 1179, 1183 (2015).

77. Cynthia G. Lee, Brian J. Ostrom & Matthew Kleiman, *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALB. L. REV. 1215 (2015).

78. Nadine Frederique, Patricia Joseph & R. Christopher C. Hild, *What Is the State of Empirical Research on Indigent Defense Nationwide? A Brief Overview and Suggestions for Future Research*, 78 ALB. L. REV. 1317 (2015).

79. For instance, Samuel Wiseman argues for a federal platform that would allow local courts to uniformly collect a wide range of data, including demographic information about the defendant and information about the case from arraignment to sentence. Samuel R. Wiseman, *The Criminal Justice Black Box*, 77 OHIO ST. L.J. (forthcoming 2017). He notes that the collection of bulk data could help identify constitutional violations at the local level—for instance whether certain jurisdictions are not providing legal counsel to defendants or providing counsel very late in the criminal process. *Id.* Jason Kreag proposes mandatory collecting and reporting of data about prosecutors in order to learn how prosecutors make charging and plea bargaining decisions. Kreag, *supra* note 15.

80. Wiseman, *supra* note 79.

II. THE RESEARCH METHODOLOGY

I have used a qualitative empirical approach to explore these questions about pleas and practice. I suspected that there were subtleties to measuring the value of a plea that may not be explained through quantitative methods. My suspicion that quantitative data was not ideal for discovering how public defenders negotiate around collateral consequences was borne out in these interviews. For instance, as one public defender told me, they might negotiate for a plea that seems good “on paper” but might carry very negative immigration consequences for the client.⁸¹ Having never shared the client’s immigration status with the court or the district attorney, this plea might seem, from an outsider’s perspective, like a “good deal,” but is actually a nonoptimal outcome for the client.

I am also following in the tradition of Albert Alschuler, who, in a trio of articles from the late 1960s to the mid-1970s, explored the role of the defense attorney, the prosecutor, and the judge at plea bargaining through the use of interviews.⁸² The present study is an attempt to identify how a particular legal historical moment—*Padilla* and the ascendance of the collateral consequence—impacted plea bargaining. It is also an effort to continue weaving a thread that Alschuler began nearly half a century ago. I am also intrigued by the insights of modern scholars in the field who have used interview techniques to understand how and why lawyers make decisions. For instance, Ronald Wright and Kay Levine, in their piece on how prosecutors develop professionally throughout their careers, show the sort of depth a researcher can achieve through interviewing.⁸³

I spoke to twenty-five public defenders⁸⁴ in interviews ranging from twenty-five minutes to two hours.⁸⁵ All interviews were confidential so that the interviewees would feel comfortable talking about how they make decisions that are very often

81. Interview 15.

82. Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059 (1976).

83. Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065, 1080 (2014) (finding that over the course of their careers prosecutors often become more balanced in their perspective on their jobs).

84. See JESSICA SILBEY, *THE EUREKA MYTH* 290 (2015) (“In qualitative fieldwork studies, there is no easy way to determine how many interviews are needed for the set. Some social scientists recommend between twenty and fifty, depending on the dimensions of the phenomena, including, for example, the logical variation in the subject of study.” (endnote omitted)).

85. The interview protocol was reviewed by and received permission from the Stanford Institutional Review Board (IRB). Interviews occurred in person, via phone, or via Skype. In some in-person interviews, defenders opted to be interviewed together. The interviews were semi-structured. Interviewees were asked a series of questions, but their particular answers often led to follow-up questions specific to the particular interview. All interviews were recorded in handwritten notes and, where allowed by the interviewee, with an audio recording. Two interviewees opted not to have the interview recorded. Due to technical difficulties, one interview was not recorded in its entirety.

private and shared only with their clients and colleagues.⁸⁶ This was also to ensure that they felt safe discussing where they get things right and where they might get things wrong.⁸⁷ Because of this promise of confidentiality, I use the pronoun *they*, rather than *he* or *she*, when discussing what a particular public defender told me.⁸⁸ In the attached appendix, I also list the location of practice and number of years within a time frame (for instance, zero to three years, four to seven years, etc.) that each defender has practiced criminal defense.

I picked two locations on the East Coast, one on the West Coast, and one in the western region of the country. Different jurisdictions take different approaches to plea bargaining. On one end of the spectrum is New York City, where many defenders felt comfortable bringing up collateral consequences in conversation with both district attorneys and judges.⁸⁹ On the other end was Colorado Springs, Colorado, where public defenders seemed loath to bring up immigration consequences, even in off-the-record conversations.⁹⁰ Though there were differences specific to each place, generally, there were recurring themes among the responses from which it is possible to draw some generalizable conclusions, particularly about the nature of plea bargaining and the concerns public defenders face about collateral consequences. Demographic details about the participants of the study can be found in the Appendix.

The reader will notice—and may be troubled by—the absence of any discussion about how defendants think about pleas. This is an article about public defenders. I am interested in the role of the defense attorney as a repeat player, who negotiates hundreds, perhaps thousands, of pleas in his or her career.⁹¹ Because of this repetition

86. For this reason, citations to particular interviews are listed by interview number. For the corresponding location and number of years in practice for each interviewee, refer to the Appendix. In addition, to ensure confidentiality, all interviewees were assured that both the written notes and audio recordings of the interviews would be destroyed after the completion and publication of the research.

87. Public defenders are often overworked and I did not want these conversations to feel like an accounting of the quality of their work. Rather, I wanted them to be honest about the nature of their work.

88. This is particularly important since, interestingly, of the twenty-five interviews I conducted, only three were with men. In general women were much more responsive to my requests for interviews. Whether this was simply chance or reflects that female public defenders were predisposed to assist a female researcher is not clear. Given, however, this imbalance in the gender of my subjects, I am particularly careful not to identify the gender of the interviewee via pronouns.

89. For more, see *infra* Part III.B.2; see also Altman, *supra* note 16.

90. See *infra* Part III.B.2.

91. There are limits to this qualitative research method. Interviewees varied in their responsiveness to questions, and there is the risk of bias and self-interest in these interviews. This was not a randomized sample. Nor was it a random sample of locations. Interviewees came to me through word of mouth and therefore there was self-selection among those public defenders who agreed to speak to me. I recognize also that those who agreed to speak to me may also be those who already have a practice that addresses collateral consequences. As a result, the findings I discuss here are emergent trends in the practice of public defense but may not represent the practice of all public defenders across the country, or even across a particular state.

and because defendants do not negotiate their own pleas, the defense attorney is better able to evaluate the quality of a deal and to explain the decisions that went into the negotiation of the deal. I am also interested in providing context for the way attorneys make decisions and so I want to understand what lawyers are doing on the ground.

This Article, though, is also about how public defenders interact and negotiate with judges, district attorneys, and, most importantly, their clients. The relationship between clients and defense attorneys is one of the most sacred in our legal system. Trust between the two contributes to the legitimacy of the criminal process.⁹² In theory, public defenders speak for their clients.⁹³ The reality is, of course, more complex. This Article does not address whether clients actually feel that their public defenders have achieved their desired results. Rather, I examine the ways in which public defenders themselves perceive their clients' priorities and how they achieve goals based on those priorities. I recognize that there can be a mismatch between client goals and the defender's perception of those goals.⁹⁴ For the most part, however, the defenders I interviewed responded in ways that made clear their commitment to do right by their clients.⁹⁵

92. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 286 (2011) (“[T]he relationship between a person charged with a misdemeanor and defense counsel is a meaningful part of the overall experience that person has with the criminal justice system. . . . Inadequate assistance of counsel in criminal cases affects both the individual’s and the public’s perception of the criminal justice system’s legitimacy, which may undermine future willingness to obey the law.”).

93. For a powerful critique of this general rule, see generally Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005).

94. For a discussion of the barriers to communication between defenders and their clients, see Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and Brady in the Balance*, 28 GEO. J. LEGAL ETHICS 1, 27–29 (2015).

95. The reader will also notice that federal public defenders and private defense attorneys are missing from the sample. I was interested in examining how defenders working under pressure in difficult conditions negotiate, given the number and variety of collateral consequences they have to deal with in what is generally a short time frame. That defenders triage cases is a well-known and controversial reality of the job. John B. Mitchell, *In (Slightly Uncomfortable) Defense of “Triage” by Public Defenders*, 39 VAL. U. L. REV. 925 (2005). Does the triage of cases affect which collateral consequences defenders devoted time to reviewing with the client? Or does it influence how they asked questions in a hurried arraignment shift?

In 2013, a report by the New York Office of Indigent Legal Services found that the average caseload of public defenders in upstate New York had been 719, and attorneys for six New York State public defender offices averaged 1200–1600 cases. OFFICE OF INDIGENT LEGAL SERVS., AN ESTIMATE OF THE COST OF COMPLIANCE WITH MAXIMUM NATIONAL CASELOAD LIMITS IN UPSTATE NEW YORK 10 (2013), <https://www.ils.ny.gov/files/Estimate%20of%20Upstate%20Cost%20of%20Compliance%20Report%20Nov%202013.pdf> [https://perma.cc/7RMX-LLNY]. Attorneys at one provider averaged more than 1600 cases per year. *Id.*

I was also interested in hearing from defenders who carry caseloads of misdemeanors, or relatively low-level crimes. My research, and the research of others, demonstrates that misdemeanors provide much greater leverage for plea bargaining than felonies. See, e.g., Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L.

This work is the beginning of a larger project. These interviews lay the foundation for future work, particularly survey work with a much larger sample population.⁹⁶ As Jessica Sibley notes about her qualitative work, “[w]hen the purpose of an empirical study is exploratory and hypothesis generating . . . qualitative methods are useful to ‘develop insights about the underlying forms and dynamics of the phenomenon under study.’”⁹⁷ These interviews have developed just such a rich underlying base. They give us grounds for future exploration in the area.

III. CREATIVE PLEA BARGAINING AND COLLATERAL CONSEQUENCES

What public defenders consider a “collateral consequence” is broad. Immigration came up most often, but housing and employment consequences also featured prominently in these interviews. There were other consequences that lawyers raised as well: loss or restriction of a driver’s license, sex-offender registration, and probation and parole consequences. Interviewees considered giving someone a criminal record for the first time a collateral consequence.⁹⁸ This is especially true since a criminal record might create all manner of collateral consequences down the road, including making it more difficult to negotiate in any future criminal cases.⁹⁹ As one public defender noted, the “stigma” of a client having a record is a collateral consequence that they worry about every day in practice.¹⁰⁰

Which consequences matter in a particular case is client-specific. The goal of the plea bargain depends on the client.¹⁰¹ While many clients want the lowest sentence or least serious charge possible, others want something outside the scope of the

REV. 9, 28, 37 (2007) (noting that on felony charges, prosecutors tend to avoid offering misdemeanors, seeing a misdemeanor offer, instead, as a “last resort”). Since misdemeanor caseloads tend to be much higher, in this sense the strategies of lawyers who carry large misdemeanor caseloads tell us more about creativity in plea bargaining than those of lawyers who handle more serious felony cases.

I also did not focus on private defense attorneys, as they only represent 17.6% of felony defendants in the seventy-five largest counties in the US. CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), <http://www.bjs.gov/content/pub/pdf/dccc.pdf> [<https://perma.cc/UEM5-6H8T>] (noting also that in U.S. district courts, private attorneys represent 33.4% of felony and 18.7% of misdemeanor defendants); see also Hannah Levintova, Jaeah Lee & Brett Brownell, *Charts: Why You’re in Deep Trouble if You Can’t Afford a Lawyer*, MOTHER JONES (May 13, 2013, 6:00 AM), <http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts> [<https://perma.cc/ES57-BC4Y>]. Exploring how private defense attorneys differ from public defenders in their thinking about plea bargaining and collateral consequences would be a fascinating avenue of exploration for further research but is beyond the scope of this Article.

96. For an example of the benefits of survey work in getting to questions of attorney practice, see generally Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016).

97. SILBEY, *supra* note 84, at 287 (quoting PAMELA STONE, OPTING OUT: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME 243 (2007)).

98. Interview 8.

99. Interview 7; Interview 8.

100. Interview 8.

101. Interview 1; Interview 20.

criminal case—staying in the country (legally or not), keeping a job or Section 8 housing, or maintaining a student loan so they can stay in school. Figuring out what the client wants and how to achieve that goal is a large part of the role of the public defender. And meeting that goal takes a fair amount of elbow grease and ingenuity.

The data demonstrates the ways in which public defenders view their jobs as a creative enterprise that often revolves around the plea bargain. Lawyering has always been a creative field,¹⁰² but much of the focus on creativity in criminal law has been on the dashing trial lawyer, whose imaginative and inspired performance in a courtroom wins the day. New conceptions of creativity are emerging that focus instead on problem solving, particularly the ability to generate multiple solutions to a problem.¹⁰³ These interviews paint a picture of public defense that involves defenders using limited resources in innovative ways and expanding the bucket of options that are available to their clients.

A. Plea Bargain Strategies

Lawyers usually identify collateral consequences early in the process, at a client interview post-arrest. In many ways, this identification takes the form of a law school issue-spotting exam. A lawyer gets basic facts about the client's life and the charges against him and begins to identify potential issues.¹⁰⁴ Sometimes the client shares specific concerns right away.¹⁰⁵ For the most part, the lawyer is on a hunt for those major collateral consequences that are relevant to the client's life. Is the client in public housing? Or currently paying for college with loans? Does the client have a specific type of government job, which she will lose with a criminal conviction? And, of course, is the client a citizen?¹⁰⁶

102. See generally Samantha A. Moppett, *Lawyering Outside the Box: Confronting the Creativity Crisis*, 37 S. ILL. U. L.J. 253, 263–74 (2013) (discussing the creative aspects of legal practice). It is also of note how many famous artists, writers, and musicians have legal training, or worked in legal practice. Cézanne, Handel, and Flaubert all studied law before pursuing their art full time. Matisse finished law school, passed the bar, worked as a court administrator and as a law clerk. Tchaikovsky studied law and music and worked as a government legal clerk. Robert Louis Stevenson graduated law school and was admitted to the bar in Scotland. Wassily Kandinsky, one of the founders of abstract expressionism, studied law at the University of Moscow and even taught as a professor at the university in the 1890s until he took up painting in his 30s. See generally DANIEL J. KORNSTEIN, UNLIKELY MUSE: LEGAL THINKING AND ARTISTIC IMAGINATION 183 (2010).

103. See generally Moppett, *supra* note 102, at 263–74 (giving a broad picture of the field of creativity and discussing the facets of creativity).

104. Interview 1 (noting that they “look for flags” and that sometimes you get a “red flag,” like the client is a teacher or a security guard).

105. Interview 20 (noting that clients are often aware of their own specific situations and bring up areas of concern early).

106. Although I do not discuss it here, there are naturally issues with clients sharing all relevant information with their attorneys. Clients may not trust their attorneys or may not be able to identify relevant information that needs to be shared with the attorney. See generally Johnson, *supra* note 94, at 25–27.

Some offices provide a checklist that allows attorneys to go through the major areas of concern.¹⁰⁷ These checklists make sure that the attorney asks some very basic questions of their clients. Not all attorneys use the checklist faithfully, finding that they have developed a rhythm for these early interviews.¹⁰⁸ But the development of such checklists indicates that public defender offices are aware that there are certain key collateral consequences that are relevant to many clients and should be on the public defender's radar.

Almost all public defenders reported that they begin the interview with an early question intended to get at the client's immigration status. The most common form of the question is, where were you born?¹⁰⁹ Other questions follow that continue to assess the client's situation outside of the criminal case. Many defenders reported asking about probation or parole status, whether the client lives in public housing, or what the client does for work. Again, this questioning is facilitated by prepared office-wide checklists, a memorized set of questions, or, in the case of New York, a bail recommendation form that is filled out prior to arraignment by the Criminal Justice Agency.¹¹⁰ The result is that public defenders are taking a great deal of time reviewing personal information with a defendant before even turning to the arrest

107. Interview 5; Interview 6; Interview 16; Interview 22.

108. Interview 5 (has a checklist, but uses their own questions); Interview 19 (no checklist but always begins interview with a series of questions that includes inquiries into the client's work, marital status, number and type of dependents, and immigration status).

109. With fourteen public defenders indicating that "Where were you born?" is among the first questions they ask. Other defenders may also ask, "Are you a citizen of the United States?" Interview 19. These sorts of questions can be met with some resistance by the client. One public defender explained that these early questions can make a client suspicious and this means you have to explain why you are asking these questions. Interview 8.

110. N.Y.C. CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2015 (2016), http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=1577&doc_name=doc [<https://perma.cc/UYZ7-RACM>]. To assist with bail decisions, the Criminal Justice Agency (CJA) in New York City is tasked with interviewing each defendant who is processed through Central Booking after an on-line arrest (as opposed to those defendants who are given Desk Appearance Tickets to return at a later date). CJA is an offshoot of a pilot project by the Vera Institute of Justice. In order to facilitate bail decisions, CJA interviews defendants before they are brought before a judge and asked a series of questions that are supposed to be dispositive of their risk for not returning to court. These questions include the defendant's address, who the defendant lives with, whether the defendant has a working telephone number, whether the defendant is employed, the employer's address and contact, the defendant's hours worked per week and salary, among other questions. *Operation's Pretrial Services and Special Programs*, N.Y.C. CRIM. JUST. AGENCY (2016), <http://www.nycja.org/operations-pretrial-services-and-special-programs/> [<https://perma.cc/6F37-FJW6>]. Whether the answers to these questions help determine the defendant's flight risk is recently a matter of debate. See, e.g., Shaila Dewan, *Judges Replacing Conjecture with Formula for Bail*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html> [https://web.archive.org/web/20170228061439/https://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html?_r=0] (highlighting a "big data" study by the Arnold Foundation that found that the only reliable indicators for whether a defendant flees are his prior criminal record and any prior warrants for not returning to court). The benefit, however, of this prescreening is that many of these questions also help public defenders identify key areas of trouble for the client down the road.

charge and the factual and legal issues they need to develop for investigation and litigation of the case.

For most public defenders, identifying the major collateral consequences has become rote (this is not true for those unseen collateral consequences that are hidden from easy detection or will not come up until down the road for the client).¹¹¹ At plea bargaining, mitigation of these collateral consequences often becomes a goal of the plea process. Over and over again, defenders defined the goal of a plea bargain, or their role more generally, as meeting the specific needs of their clients. Here are just some examples:

We're trying to resolve the case in a way that does least damage to our client's life.¹¹²

[My job is] to implement my client's goals.¹¹³

So much of the job ends up being helping the client get what it is that is most important to him or her.¹¹⁴

I always ask my clients: What is your goal here? If your goal here is to say I didn't do anything wrong and I want to prove that, then you want to go to trial. If your goal here is to, let's say, preserve your job, then that might be finding the plea that best works with your job. If your goal here is preserve your driver's license, then that might be a different plea. If your goal here is to preserve your immigration status that might be a different plea. So prioritize for me—what is your goal? And from there we can work on what works best for you.¹¹⁵

[To plead effectively] a public defender . . . needs to know what your client's objective is.¹¹⁶

[I am trying to achieve] the best scenario for the client.¹¹⁷

These varied client goals¹¹⁸ are most often met through the negotiation of a plea.

111. One example of a consequence that was not apparent until after a plea was entered was brought to light in *Commonwealth v. Abraham*, 996 A.2d 1090 (Pa. Super. Ct. 2010), *rev'd* 62 A.3d 343 (Pa. 2012). A teacher who paid a student to have sex with him was allowed to retire with his pension. *Id.* at 1091. He was also charged criminally and, on his lawyer's advice, pleaded guilty to corruption of a minor and indecent assault, both misdemeanors, and was sentenced to three years' probation. *Id.* Neither charge carried the requirement of sex-offender registration, but after the plea was entered, the indecent assault conviction resulted in the automatic forfeiture of the defendant's pension, his primary source of income. *Id.*

112. Interview 3.

113. Interview 18.

114. Interview 14.

115. Interview 15.

116. Interview 17.

117. Interview 25.

118. *But see* Interview 11 (the goal is "to get less jail").

1. Negotiating for Higher Sentences or Charges

During bargaining, the negotiation of the charge and sentence is certainly still very much a part of the process. But, more frequently, minimizing the sentence does not account for a variety of individualized client needs. Instead, the defender attempts to bargain “around” the collateral consequence, which may involve a trade for a higher sentence or higher charge if the defender can secure some alternatively favorable outcome for the client.

For instance, one public defender described an example in which the defendant opted for fifteen months in jail—a much longer prison sentence than usual for the type of the case—to avoid sex offender registration.¹¹⁹ Less time or no time in prison would seem like the better option. Why have the client spend time in prison if there is an option for him or her not to? Looking at this plea on paper, though, tells us nothing about the intricate and individualized decision making that the public defender undertook to come to this conclusion. In fact, on paper, the plea—in light of the typical offer—looks deeply problematic. And there would be no way to understand the logic behind the plea without poring through the case with the public defender.

This is the trouble with looking at plea bargains on the surface, especially in the age of collateral consequences. As many attorneys noted to me during our conversations, they are willing to give up quite a bit on both sentencing and charging in exchange for immigration-safe pleas. This means, for instance, piling on community service for a crime that usually carries a sentence of “time served.” Or, perhaps, it means swapping in an immigration-safe charge and different form of punishment than the charge and sentence currently on the table. As one public defender in El Paso County, Colorado, noted, the key is to find a “different label [for the] exact same punishment.”¹²⁰

This is true not just of immigration, but of other consequences as well. Lawyers and their clients are often particularly concerned about avoiding sex offender registration, which can last twenty-five years or more and comes with a multitude of onerous requirements that makes it difficult to find housing and employment.¹²¹ A

119. Interview 16. Ethically, the attorney would have to discuss this decision with the client, particularly since the daily deprivations of jail are also a severe consequence. *See e.g.*, AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-3.1(a) (3d ed. 1993), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf [<https://perma.cc/3GQF-KJ4F>] (“Defense counsel should seek to establish a relationship of trust and confidence with the accused . . .”); *id.* Standard 4-5.2(a) (discussing the defendant’s decision to plead guilty or go to trial after a “full consultation with counsel”). The news coverage of the abuses at Riker’s Island in New York gives some sense of the horrors of jails. Michael Winerip & Michael Schwartz, *Rikers: Where Mental Illness Meets Brutality in Jail*, N.Y. TIMES (July 14, 2014), <http://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html> [<https://perma.cc/WUQ6-YSBF>].

120. Interview 20.

121. *See* Julie Bosman, *Teenager’s Jailing Brings a Call To Fix Sex Offender Registries*, N.Y. TIMES (July 4, 2015), <http://www.nytimes.com/2015/07/05/us/teenagers-jailing-brings-a-call-to-fix-sex-offender-registries.html> [<https://perma.cc/BTY8-G2CZ>] (“[T]he nearly 800,000 people on registries in the United States go beyond adults who have sexually assaulted

New York attorney recalled a conversation with a client in which they discussed taking an additional year and a half in prison on an attempted murder charge to avoid the sex offender registration that came with the accompanying rape charge.¹²² The willingness to accept additional prison time becomes a powerful bargaining chip for public defenders.¹²³

Interestingly, sometimes bargaining around sentences works in the opposite way as well, when there is no escaping the collateral consequences of the conviction. A defender may, for instance, ask the district attorney for a ninety-day jail sentence, rather than the usual offer of six months, arguing that the client's mandatory deportation at the end of sentence should earn the client some benefit in sentencing length.¹²⁴

2. "Sterilizing" the Record

Where a plea cannot be negotiated down or around, sometimes defenders are left to "sterilize"¹²⁵ the record as much as possible to avoid later consequences for the client, particularly at immigration hearings. In Washington and Colorado, judges are required to have the defendant provide a recitation of the facts at the time of the plea for all cases.¹²⁶ Because key language may be used against the client at immigration proceedings, defense lawyers often try to scrub the record of any particularly damaging language or admissions, while still figuring out how to have the client admit to the crime at hand.¹²⁷ For instance, a public defender in El Paso County told

other adults or minors."); *see also* Kelsie Tregilgas, Comment, *Sex Offender Treatment in the United States: The Current Climate and an Unexpected Opportunity for Change*, 84 TUL. L. REV. 729, 730–43, 749–50 (2010) (examining the harshness of sex offender restrictions and suggesting that legislators seize the need for state budget cuts to also cut back on overly restrictive registration regulations).

122. Interview 1; *see also* Interview 16 ("Sometimes I take harsher penalties in order to avoid collateral consequences like immigration or sex offense."). *But see* Interview 17 ("I can think of only one case where I was successful at plea bargaining around a sex conviction. . . . For the most part, the case that has the potential to require someone to register . . . those cases we end up holding out for trial . . .").

123. Although not always. A defender in El Paso County, Colorado, told me about a client who was willing to serve additional jail time to protect his immigration status. The district attorney, however, was not sympathetic and refused to strike a deal. Interview 23.

124. Interview 1

125. Interview 18.

126. For instance, WASH. SUPER. CT. CRIM. R. 4.2(d) provides that "[t]he court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." This factual basis must be put on the record at the time of the plea.

127. Interview 18. In her article, Eagly discusses this phenomenon from the other end. Eagly, *supra* note 16. In Maricopa County, Arizona, prosecutors have been trained by ICE officials to make sure that the factual record at trial is developed in such a way that there will be no issues deporting the defendant in a later immigration case. *Id.* at 1220–21. As she notes, "ICE teaches prosecutors about the technical immigration meaning of local criminal statutes" and advises attorneys on what the factual record must reflect in order to secure removal in a later immigration hearing. *Id.* The public defenders I spoke to did not seem to come across prosecutors who made these same types of demands. It is clear though that the "sterilization"

me that they were advised by the central immigration attorney for the office that, for immigration purposes, a noncitizen in deportation proceedings will not be automatically deportable for a conviction for a single marijuana offense for a single occasion of marijuana use.¹²⁸ In trying to make sure the record reflected a single occasion of marijuana use, the defender described to me their efforts to have their client only stipulate to one-time marijuana use during the “factual basis” portion of the plea.¹²⁹ Because the district attorney would not agree to this stipulation, the defender negotiated a plea to a different charge that would have the client only admitting to “inhaling toxic vapors” on the record.¹³⁰ This was a safe plea for the client if he ended up in immigration proceedings down the road.¹³¹

3. Pleading to a Different State of Mind or Criminal Act

Many times, defenders attempt to figure out a way to plead to a different state of mind requirement or a differently defined criminal act. For instance, defenders will negotiate for a plea to a charge that involves a “reckless” rather than “intentional” state of mind. This can happen during the recitation of the factual record.¹³² It can also happen by picking a particular subsection in the criminal code and switching it for the charged subsection.¹³³ Alternatively, a defender may choose to plead to a subsection of a crime that covers a different criminal act. For instance, as one public defender noted, since manufacture of a false ID is a deportable offense, they will often try to plead to possession of a false ID, which is not.¹³⁴ In New York, individuals and their families can be excluded from public housing where one person on the lease is convicted of a drug charge.¹³⁵ This can make even low-level marijuana

technique will not be effective in all jurisdictions.

128. Interview 20.

129. *Id.*

130. *Id.*

131. As Brandon Garrett notes in *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1439–41 (2016), part of the problem with viewing guilty pleas as confessions is precisely because there are collateral consequences tied to many convictions and a plea may not reflect the actual facts of a case but only the legal elements.

132. Interview 23.

133. Interview 18.

134. Interview 25. In addition, Altman, in her article *Prosecuting Post-Padilla*, notes that many of these techniques are specifically used by prosecutors and defenders to shape immigration-safe pleas. Altman, *supra* note 16, at 23. She outlines three major ways in which prosecutors might help achieve these pleas: (1) the prosecutor can make an offer under a different criminal statute that is of a similar nature but that will not trigger deportation; (2) the prosecutor can attach a certain sentence to the plea offer—for instance, offering 364 days rather than 365 days, which also triggers removal in certain circumstances; (3) the prosecutor can customize the language that will end up in court documents and on the record, so the defendant is protected in a later immigration hearing. *Id.* at 23–25. I discuss the role of prosecutors in the process later in the Article, *see infra* Part III.B.2, but note here that the limits of the creative plea bargain are shaped by the prosecutor on the other side of the aisle.

135. In New York State, a conviction for PL 221.10, “[c]riminal possession of marihuana in the fifth degree,” a B misdemeanor with a maximum sentence of three months in jail, N.Y. PENAL LAW § 221.10 (McKinney 2008), makes an individual ineligible for New York City

charges extremely dangerous for defendants and so defenders will try to find either noncriminal charges for their clients to plead to or different charges for which they may not have been originally charged.¹³⁶

The pleas described above are examples of what can be described as “fictional pleas.” As in literature, the fictions created in courthouses during the plea phase are often the result of tremendous creativity. The authors of the fictitious plea tend to be the public defenders, who have to figure out the nuances of the law to carve out “safe” pleas for their clients.¹³⁷

4. The Importance of Trial Skills to Negotiation

There are, of course, instances where pleading around the collateral consequences of a case is not possible.¹³⁸ It is at this stage, when a “safe” plea is not possible, that public defenders have to assess how important the potential or certain collateral consequence is to the client.

All defenders still receive trial skills training.¹³⁹ Most first-year attorneys will be trained in effective cross-examination techniques, the best way to perform a closing argument, and how to select a jury. These skills remain critical. Some attorneys report that they may go to trial in cases where collateral consequences, particularly

public housing for three years after completion of the sentence. *Collateral Consequences Calculator—New York State*, COLUM. L. SCH., <http://calculator.law.columbia.edu/> (select “221.10 Criminal Possession of Marihuana in the fifth degree” from the menu on the left) (last updated May 10, 2012, 11:27 PM) [<https://perma.cc/4236-9VDE>]. PL 221.10 was the fifth most frequent charge at arraignments in New York City in 2014 with nearly 25,000 arrests in that year alone. LISA LINDSAY, CRIMINAL COURT OF THE CITY OF N.Y., 2014 ANNUAL REPORT 31 (Justin Barry ed., 2015), http://www.nycourts.gov/COURTS/nyc/criminal/cc_annl_rpt_2014.pdf [<https://perma.cc/4QCV-4ASD>].

136. Interview 25.

137. Prosecutors may often be partners in this creative endeavor and may in fact be required to engage in creative problem solving. The U.S. Attorneys’ Manual has an exhaustive list of considerations related to charging and pleas. The Manual puts an emphasis on an openness to noncriminal alternatives where they are available. U.S. ATTORNEYS’ MANUAL § 9-27.250, <http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution> [<https://perma.cc/NQ76-S7W7>] (“Non-Criminal Alternatives to Prosecution”). In addition, the ABA’s Prosecution Function Standards require prosecutors to consider noncriminal alternatives and to be familiar with social agencies that may assist the prosecutor in the evaluation of the case. These are advisory but are considered influential. AM. BAR ASS’N, *supra* note 119, Standard 3-3.8 (“(a) The prosecutor should consider in appropriate cases the availability of noncriminal disposition, formal or informal, in deciding whether to press criminal charges which would otherwise be supported by probable cause; especially in the case of a first offender, the nature of the offense may warrant noncriminal disposition. (b) Prosecutors should be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.”). But for reasons I explain below, *see infra* Parts III.A & B, it is defenders who are generally juggling the most moving pieces during the plea phase.

138. Interview 19.

139. Very rarely, however, do they receive training in negotiation. In the first study of its kind, Jenny Roberts and Ronald Wright survey public defenders about their training for plea bargaining and find that most defenders are not trained in the art of negotiation. Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445 (2016).

immigration consequences, are grave and no favorable plea is forthcoming.¹⁴⁰ These tend to be cases that would otherwise plead out if there were no collateral consequences but instead are tried in the hope of an acquittal.¹⁴¹ This, of course, is a risky move and one that defense attorneys generally want to avoid. But it is also where trial skills come into play. As one attorney noted, the way to make trial a viable threat to your opponent is to be an attorney who can and will go to trial.¹⁴² That means having solid trial skills and being knowledgeable about the substantive and procedural law, particularly the rules of evidence, and not being afraid of a courtroom.

B. The Boundaries of Pleading

1. Pleading Down and Pleading Up: Misdemeanors and Felonies

Whether or not a defender can plead “around” the consequences of the crime has a lot to do with the crime itself. All crimes are not, of course, equal. Felonies generally carry much heavier sentences than misdemeanors (although not always).¹⁴³ Defenders tend to be more preoccupied with the sentence when the potential sentence is long, even where the charge itself may result in any number of other consequences for the client. In addition, many attorneys noted that it is easier to plead away the collateral consequences on a misdemeanor than on a felony. Plea bargains are dependent on the level of the crime and it is clear that Justice Stevens’ call to plea bargain “creatively” is not an easy task on felony charges.

This is not to say that there is not extensive plea bargaining that occurs in felony cases. As Ronald Wright and Rodney Engen have found, felonies often plead down in charge bargaining—the movement from higher to lower charges that occurs in plea bargaining.¹⁴⁴ They found, however, that it can be difficult for a defendant to get a misdemeanor plea when the starting charge is a felony, since prosecutors see misdemeanor offers as “a least-preferred option, perhaps even . . . a last resort.”¹⁴⁵

140. Interview 23; Interview 25. *But see* Interview 10 (reporting that they have never gone to trial based on immigration issues).

141. Eagly also reports this phenomenon in Harris County, Texas, which has an “illegal-alien-punishment model” of criminal justice. Eagly, *supra* note 16, at 1170. There, “noncitizen defendants who are not offered any accommodation in the bargaining process may be disproportionately inclined to take their cases to trial. Anecdotal evidence from Harris County suggests that noncitizens may indeed be rolling the dice with juries more often.” *Id.* at 1195.

142. *See infra* note 156.

143. A misdemeanor is generally an indictable offense that carries a maximum sentence of fines or imprisonment for a year or less, or carries only a local or county jail term. A felony, by contrast, carries a longer authorized prison term. The distinction lies in the punishment that *may* be imposed. A wobbler is a crime that may be charged as a felony or a misdemeanor and its character (felony or misdemeanor) shall be determined by the level of sentence imposed. *See generally*, J.D.H., Annotation, *Character of Offense as a Felony as Affected by Discretion of Court or Jury as Regards Punishment*, 95 A.L.R. 1115 (1935).

144. Wright & Engen, *supra* note 95.

145. *Id.* at 10. In addition, as Eagly found in her conversations with district attorneys in Los Angeles, “[w]hen the crime is more significant or the circumstances less compelling, a plea deviation is unlikely.” Eagly, *supra* note 16, at 1164 (discussing how LA County district

Additionally, “the deeper the felony options available, the less likely prosecutors are to agree to a misdemeanor outcome.”¹⁴⁶ To make these findings explicit, Wright and Engen studied North Carolina and found that “88% of the assaults originally charged as Class C¹⁴⁷ felonies moved to some less serious version of assault; the same was true for 75% of the original Class E assaults and 67% of the Class F assaults.”¹⁴⁸ The structure of the criminal code and the policies of prosecutors’ offices, therefore, make it difficult to get a misdemeanor offer on a felony, although negotiating to another felony might be available.

The reality, though, is that pleas to misdemeanors do not solve the issue of collateral consequences. In fact, misdemeanors carry profound consequences.¹⁴⁹ Traffic convictions, for instance, are the largest source of criminal alien removals over the last ten years.¹⁵⁰ And the population of misdemeanor offenders is incredibly complex. The Center for Court Innovation recently conducted a study that found that misdemeanor defendants tend not to be young people getting in trouble for the first time, but rather adults who have cycled through the system before and have many other concurrent concerns apart from the criminal case.¹⁵¹

attorneys view plea bargaining).

146. Wright & Engen, *supra* note 95, at 10 (“Groups of crimes that offer deeper options to the negotiators (such as the many versions of assault) appear to produce more frequent charge movement. Conversely, crimes that present more shallow options (such as the relatively few statutory sections related to kidnapping) appear to produce fewer reductions in the original charges.”).

147. On a scale of A to E, a Class A felony is the most serious and a Class E felony is the least serious. *See id.* at 13.

148. *Id.* at 14.

149. *See supra* note 17. *See generally* Natapoff, *supra* note 24; Roberts, *supra* note 92, at 297–306.

150. Eagly, *supra* note 16, at 1218–19. Eagly obtained data from the Department of Homeland Security and determined that “the single largest source of the rise in criminal alien removals over the past decade is traffic convictions. . . . [T]he category of criminal aliens removed as a result of a traffic offense increased ten-fold over the past decade, accounting for nearly thirty percent of the overall rise in criminal alien removals.” *Id.* at 1218 (footnote omitted); *see also* Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (April 6, 2014), <http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html> [<https://perma.cc/4HUF-QDQ4>]. It is also critical to note that many traffic violations and low-level misdemeanors do not carry a Sixth Amendment right to counsel. The Supreme Court held in *Scott v. Illinois* that the Sixth Amendment right to counsel applies only to situations in which a jail sentence has *actually* been imposed. 440 U.S. 367, 373–74 (1979) (differentiating actual imprisonment from “fines or the mere threat of imprisonment”).

151. Greg Berman, *A Surprising Portrait of the Misdemeanor Criminal*, WALL ST. J. (Nov. 9, 2014, 6:01 PM), <http://www.wsj.com/articles/greg-berman-a-surprising-portrait-of-the-misdemeanor-criminal-1415574093> [<https://perma.cc/92B8-59H7>] (noting that the average age of defendants charged with misdemeanors in Manhattan, Brooklyn and the Bronx in New York City is thirty-five, that more than half have prior misdemeanor convictions and more than a third have felony convictions, and that the population also reported issues with unemployment, mental health issues, drug use, and abuse).

Significantly, this means that creative and effective lawyering at the misdemeanor level is much more important than courts, scholars, and advocates often assume. As Jenny Roberts notes, the

primary focus of misdemeanor defenders, and the institutions that set standards for effective representation, should . . . be the high collateral costs of lower court convictions. In this light, standards for the type and quality of misdemeanor defense counsel assistance are critical and may be different from standards in serious felony cases.¹⁵²

The defenders I spoke to seemed to understand that the need to negotiate is no less pressing at the misdemeanor phase, but they found that the latitude for negotiation is wider. These lawyers noted that much of their creative bargaining happened when they were younger attorneys, starting out with high misdemeanor caseloads.¹⁵³ It was at the misdemeanor level that they felt they could take more chances and get bigger concessions on the collateral consequences front. One public defender found that it was much more common for them to bring up immigration consequences with the district attorney—and for the district attorney to be receptive—in their misdemeanor practice.¹⁵⁴

Part of this freedom comes from the relatively lower jail sentences that accompany misdemeanors. A misdemeanor can carry up to one year in jail—not an insignificant amount of time. As we know from the recent attention to bail, even a small amount of time spent in jail can impact, for instance, a person’s ability to keep a job and housing.¹⁵⁵ But the reality is that misdemeanors often do not result in jail time—or at least not much of it—and are often resolved through fines or supervision.¹⁵⁶ Shorter sentences and more jail alternatives provide some leeway in negotiation. As a public defender in Colorado Springs put it bluntly, a defendant should take two weeks in jail if it means he can work in the medical field and he wants to be a nurse. But if he has a felony and he wants to be a nurse, he may be out of luck.¹⁵⁷

With misdemeanors, it is also particularly important that public defenders be ready to go to trial. As one defender observed, a good misdemeanor attorney has to

152. Roberts, *supra* note 92, at 302.

153. Interview 14 (noting that immigration issues come up frequently in misdemeanor practice, whereas they have not had immigration consequences affect the decision to take a felony plea).

154. Interview 23.

155. JAMIE FELLNER, HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 32 (2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf [https://perma.cc/L25Z-KQEJ].

156. Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 374 (2013).

157. Interview 18.

be willing to go to trial, and this is most important because of collateral consequences.¹⁵⁸ As in all cases, having the reputation of being a good trial attorney secures better plea outcomes.¹⁵⁹

As Jenny Roberts argues, though, and as many of the defenders I spoke to acknowledged, “misdemeanors are the usual training ground for new attorneys.”¹⁶⁰ The problem is that the legal and practice matters at the misdemeanor level are often incredibly complex.¹⁶¹ In addition, misdemeanor courts are mills that churn out convictions. Because of the desire to achieve the fast resolution of cases—on the part of judges, prosecutors, court staff, and defense attorneys—guilty pleas are encouraged at the misdemeanor level early and often.¹⁶² And by putting new and inexperienced attorneys in this position, it sends the message that the consequences of misdemeanors are less critical.

It is particularly critical that new and inexperienced defenders are supported, given the tremendous impact of misdemeanor convictions. Creative plea bargaining, which occurs most frequently in the world of misdemeanors, takes time, knowledge, and resources. An understanding of the plea-bargaining process on the ground is critical to support the reform that scholars like Roberts advocate.

2. The Relationship with District Attorneys

I have argued that public defenders are the architects of plea bargains, but their craft occurs in a cooperative environment. This is not to say that lawyers always cooperate in harmony with other players in the system. But the reality of public defense is interaction with others—with clients, for one, but also with judges¹⁶³ and district attorneys. The techniques for finding the right plea that I describe above are limited by the prosecutor—both by the formal and informal policies of the prosecutor’s office, and by the personality of the individual line prosecutor who has the case.¹⁶⁴ Part of the plea process for defenders, then, is understanding both the local district attorney’s office and their individual adversary.

158. Interview 18.

159. See *infra* Part III.A.4.

160. Roberts, *supra* note 92, at 303.

161. *Id.* at 303–06 (noting that apart from collateral consequences, there are issues of suppression, expert testimony, *Crawford*/Confrontation Clause issues, and other constitutional issues that confront the average misdemeanor attorney in practice; these legal issues are on top of the other daily requirements of “interviewing and counseling the client, negotiating with the prosecution, and conducting factual investigation and legal research”).

162. *Id.* at 307–08 (noting, among other examples, a particularly troubling system in Broward County, Florida, where one courtroom was handing out forms to defendants “explaining how the fee for court-appointed attorneys was \$50 for a plea entered at arraignment, and \$350 for a plea after arraignment”).

163. My focus here is on the interaction between defenders and prosecutors, but judges play a role too in setting boundaries on the plea process, of course. In fact, since *Padilla* many public defenders I spoke to have found that judges have become more active in the plea phase of the trial.

164. This is the view of most of the public defenders I spoke to. As Jenny Roberts and Ronald Wright note in *Training for Bargaining*, though, the perception that the ability to negotiate is entirely defined by the parties is incorrect under negotiation theory. Roberts &

Darryl K. Brown predicted after *Padilla* that there would be limits on the use of plea bargaining to achieve optimal outcomes for noncitizen defendants because prosecutors do not have incentives to make good offers to noncitizens.¹⁶⁵ This prediction is borne out both in my research and in the work of other scholars who are focusing on how prosecutors envision their role post-*Padilla*.

Ingrid Eagly studied how local government policy shapes the response to noncitizens in far-ranging and varied ways from state to state.¹⁶⁶ She finds that prosecutors in certain jurisdictions are driven by what she calls an “alienage-neutral” model, in which “criminal justice actors endeavor to make decisions that limit the potential effects of immigration status and enforcement on criminal adjudication.”¹⁶⁷ In Los Angeles, for instance, prosecutors take into account immigration issues when deciding plea offers in low-level cases.¹⁶⁸ They also take into account other collateral consequences, like the loss of a job or a professional license, for defendants in these cases.¹⁶⁹ The Los Angeles model “weigh[s] collateral consequences on a ‘sort of sliding scale.’”¹⁷⁰

On the other end of the spectrum is Maricopa County, Arizona, which has an “immigration-enforcement” model.¹⁷¹ In Maricopa County, prosecutors consider immigration consequences as a means of enforcing federal immigration law.¹⁷² For instance, prosecutors will charge defendants in state court with crimes that qualify as aggravated felonies or crimes of moral turpitude under federal immigration law in order to increase the chances that the noncitizen defendant will be deported in a later immigration proceeding.¹⁷³

Heidi Altman has also given us a window into how prosecutors think about immigration consequences by surveying 185 district attorneys in Brooklyn, New

Wright, *supra* note 139, at 1466–69. In fact, if defenders were trained to negotiate, they may actually be able to achieve results with a range of prosecutors.

165. Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1399–1407 (2011). Brown argues that a number of factors make *Padilla* unlikely to change plea bargaining outcomes. *Id.* First, he contends that substantive criminal law and procedural structures make it difficult to craft bargains that would avoid deportation; that is, even if a prosecutor wanted to prevent immigration consequences, this might really be beyond her power. *Id.* Brown also argues that prosecutors generally lack incentives to bargain around deportation; *Padilla*'s directive focuses on defense counsel, and prosecutors might see value in deporting defendants rather than incarcerating them in state-funded prisons. *Id.*

166. Eagly, *supra* note 16, at 1126.

167. *Id.* at 1157.

168. *Id.* at 1163–64. In fact, as Eagly notes in a separate article, Los Angeles County has a written policy that “explicitly allow[s] prosecutors to consider the adverse immigration consequences of deportation in arriving at an appropriate case disposition.” Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 266 (2016).

169. Eagly, *supra* note 16, at 1164 (noting that collateral consequences do not come into play, however, when dealing with more serious crimes).

170. *Id.* (quoting an interview with a high-ranking prosecutor in the L.A. County District Attorney's Office).

171. *Id.* at 1180.

172. *Id.* at 1180–81.

173. *Id.* at 1187–88.

York.¹⁷⁴ She found that, although over half of the district attorneys surveyed believed that it was sometimes appropriate to modify a plea to mitigate negative immigration consequences, less than half actually did refashion pleas in practice for this purpose.¹⁷⁵

In my conversations with defenders, they revealed that effectively dealing with prosecutors was the most critical part of plea bargaining. This makes sense, as prosecutors hold much, if not all, of the power.¹⁷⁶ It is prosecutors who make the decisions about how to charge crimes, and those charging decisions impact the boundaries of the negotiation.¹⁷⁷ As a result, knowing the prosecutor can be just as important as knowing the law.

Defenders reported that prosecutors are not equally open to discussion on all collateral consequences. For many defenders, particularly those in Brooklyn, the Bronx, and Manhattan, discussion about immigration consequences with prosecutors is commonplace, even if that discussion does not lead to any positive results for the client.¹⁷⁸ In Manhattan and the Bronx, for instance, most attorneys felt comfortable generally discussing immigration consequences with most prosecutors.¹⁷⁹ However, one defender in Manhattan noted that attempts to convince prosecutors that *Padilla* created affirmative duties for them to bargain around immigration consequences had mostly fallen on deaf ears.¹⁸⁰ In Brooklyn, the defenders I interviewed indicated that district attorneys generally go out of their way to reach immigration-friendly resolutions.¹⁸¹

The defenders I interviewed in Washington and Colorado were less likely to discuss immigration consequences openly with prosecutors, instead figuring out ways to get prosecutors to agree to alternative pleas without explaining why they were seeking such pleas. As one defender noted, they would never want information on a client's status to get into "the wrong hands," and for that reason there is a real

174. Altman, *supra* note 16, at 28.

175. *Id.* at 29.

176. *See supra* Part III.B.2.

177. Judges also have a role to play. In jurisdictions with indeterminate sentencing, a judge may accept a plea to the top charge and then sentence the defendant to the lowest sentence within the range if he or she chooses.

178. Interview 6 (noting that district attorneys can be receptive to immigration consequences when the crime is not serious but that in general district attorneys in Manhattan are not generous in this regard).

179. Interview 4; Interview 21.

180. Interview 1.

181. For example, one defender described a case in which the prosecutor worked with the defender to reach five separate immigration-safe pleas for one client, who was facing multiple charges. Interview 14. This perception by defenders in Brooklyn is particularly interesting given Altman's findings that less than half of the Brooklyn district attorneys she surveyed report making offers based on the risk of these penalties. Altman, *supra* note 16, at 29. In their piece on pre-plea discovery, Jenia Turner and Allison Redlich also find that there is sometimes a mismatch between prosecutor and defense attorney perception on the same issue, which in their study was the definition of "exculpatory evidence." Jenia I. Turner and Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 333 (2016).

hesitation to ever share this information with district attorneys.¹⁸² A defender in Washington recounted a case in which a local district attorney reported one of the defender's clients to ICE, resulting in his in-court arrest by the federal agency.¹⁸³ This was despite the fact that most district attorneys in the county are, according to the defender, "liberal" and open to discussing immigration and other consequences in plea negotiations.¹⁸⁴ It was particularly important to many defenders that information about immigration consequences never make it onto the formal record.¹⁸⁵

When it came to other collateral consequences, defenders typically reported that district attorneys did not care much about housing, employment, sex offender registration, probation and parole,¹⁸⁶ and other consequences facing their clients. In fact, many defenders expressed a particular concern with what they viewed as the hard-heartedness of district attorneys when dealing with clients.¹⁸⁷ One public defender noted that it can be shocking how unsympathetic DAs are to collateral consequences.¹⁸⁸ This was a sentiment that was expressed repeatedly by defenders across the survey.¹⁸⁹ Many public defenders throughout the sample also reported a belief that prosecutors do not get as much training on collateral consequences, even immigration consequences, and therefore do not recognize them nearly as well as defenders or understand how they can affect the lives of defendants.¹⁹⁰

182. Interview 19; *accord* Interview 24 (noting that they encountered DAs who want to punish defendants more because they are undocumented and others who are sympathetic in the same situation).

183. Interview 18.

184. *Id.*

185. *E.g.*, Interview 3; Interview 19; Interview 20.

186. Interview 4.

187. Although it is beyond the scope of this Article, it is critical to note that defenders feel under attack by many players in the system, particularly prosecutors and judges, and that can impact their ability to negotiate effectively. As one defender put it, you have to be "okay with people hating you . . . our judges hate us, a lot of our clients hate us, the prosecutors definitely hate us." Interview 23. There may be a problematic overlay about what this sort of hostility does to the balance of power in the negotiation. Researchers at the University of Pennsylvania found that anxious negotiators "had lower expectations, made lower first offers, responded more quickly to offers and exited the bargaining sooner," resulting in worse outcomes. Alison Wood Brooks & Maurice E. Schweitzer, *Can Nervous Nelly Negotiate? How Anxiety Causes Negotiators To Make Low First Offers, Exit Early, and Earn Less Profit*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 43, 47 (2011). Furthermore, feelings of negativity about the job, might impact the defender's ability to be creative, which is critical to negotiation. Kimberlyn Leary, Julianna Pillemer & Michael Wheeler, *Negotiating with Emotion*, HARV. BUS. REV., Jan.-Feb. 2013, at 96, 101.

188. Interview 19.

189. Interview 9 (noting that district attorneys tend not to understand the immigrant experience and that "they don't understand what it's like to be on a probationary period at a job"); Interview 8 (district attorneys tend to come straight through from college and are therefore "sheltered").

190. Interview 14; Interview 9 ("What training are they getting? It seems counter to the training we're getting.").

Some defenders, though, noted particular success with using the loss or suspension of a driver's license in negotiations. This was more often true in the areas where people have to drive to get to work (Colorado¹⁹¹ and Washington) than where they generally do not (New York and Boston). This ability to negotiate around license suspension is partly due to the range of sentencing options available in most driving cases. Many defenders noted the ability to plead to a particular section of a driving offense that allowed them to get a shorter license suspension or a deferred sentence that would eliminate the suspension.¹⁹²

The most common thread, though, seemed to be the lack of uniformity in experiences with the members of the county district attorney's office. Whether a defender will bring up immigration and other collateral consequences is incredibly dependent on the specific prosecutor rather than on any policy articulated by the county office.¹⁹³ Therefore, a surprisingly large part of the job of a defender is deeply understanding the adversary. That includes appreciating what type of consequences the adversary will be open to discussing. Many defenders talked about the creativity and work that went into leading district attorneys to the right plea.¹⁹⁴ Others discussed how critical it is to make the district attorneys care about this one defendant, often out of the hundreds before them.¹⁹⁵ In New York, a defender explained that one of the most important traits of a public defender is creativity because "you are asking the same district attorney to make an exception five times a week."¹⁹⁶ They continued, "How to make people special to the government is the challenge."¹⁹⁷

There are other ways that defenders attempt to get what they want out of district attorneys. Here is just one example of all the ways that a public defender in the Bronx achieves results:

I mean I will use definitely a wide variety of tools. Like it depends on the situation. Usually, I start off being kind of mean to the prosecutor because usually the ones who are calling me to negotiate are like the baby DAs¹⁹⁸ who don't know that you don't really need to do that or whatever. So sometimes I'm kind of more of a bully to them. Sometime I'm much nicer, if it's like a tougher case, so [] more delicate. And there sort of have been times when I have thrown my client under the bus to the DA to try to get them that offer. And there's other times when I've just developed a good relationship with the DA and so I joke around with them and [] suck up to them or whatever and over time they give me better offers. So there's a lot of that ego-stroking type stuff. And you know, sometimes . . . I guilt them . . . like with a client's sob story . . . I think there've probably even been times where I've like brought up another case where maybe I felt like they got the upper hand in the end and try to like guilt them that way. Because, you know, we're repeat

191. Interview 19 (DAs "much more open" to negotiating around licensing issues).

192. *Id.*

193. *E.g.*, Interview 10; Interview 16; Interview 17; Interview 19; Interview 24.

194. Interview 20.

195. Interview 17.

196. Interview 1.

197. *Id.*

198. "Baby DAs" refers to junior district attorneys.

players. So I mean there certainly . . . things I will not stoop to, but [] I will do a lot of these other things. . . . Obviously . . . investigating a case and [] telling them . . . or implying that [] they're not going to be able to prove it at trial, or talk to their witnesses and digging up dirt on them. Usually, that type of dirt on the complainant I won't reveal—except in the vaguest of ways—to get a plea because I don't like to tip my hand that much with that. And then like legal issues . . . like sometimes I'll make like hay out of a nothing-nothing stupid legal issue, you know, just to try to get them to be scared into . . . like they're going to lose on a suppression issue or whatever issue. Or paper them to death.¹⁹⁹

Although it is clear that prosecutors still have the upper hand in plea bargaining, there are many ways in which defenders incorporate creative measures into the process to achieve results for their clients.

IV. THE INFLUENCE OF COLLATERAL CONSEQUENCES ON PUBLIC DEFENSE

These findings have broad implications for how to think about public defense going forward. I argue that there are three main lessons to draw from these interviews. First, attempts to measure public defender performance are limited by the unavailability of data that accounts for all the factors that go into the plea decision. Evaluation and accountability by offices and individual defenders are critical. But how we evaluate public defenders, particularly young defenders, must account for how they negotiate around the collateral consequences that their clients prioritize. Second, determining prevailing professional norms under the ineffective assistance of counsel inquiry is a complicated task in an age of collateral consequences. Defenders may pursue different goals and different strategies in similar cases. The deeply contextual nature of lawyering makes it more difficult for courts to answer the question, what is a good lawyer? Finally, this work also serves as a renewed call for state and local governments to fund holistic public defense. Public defenders should be given sufficient resources to make sure they are prepared to deal with the varied collateral consequences that come up in practice. We now know that public defenders are the front line, not only for the criminal case, but for so much that flows from the criminal case. And improving the way that public defenders advise and negotiate around collateral consequences should be a priority for criminal justice reform.

A. Public Defense and the Trouble with Measuring Outcomes

To assess public defenders, we must evaluate the success of the plea bargain. In doing so, however, we have to define the meaning of success. The definition of success should involve not only the negotiation of the sentence and charge but also the negotiation of any collateral consequences that the client prioritizes. These client needs, however, can be difficult concepts to quantify, as are the lawyering skills that are needed to identify and meet these needs. As a result, as we move towards incorporating data collection and analysis tools in public defender office evaluations,

199. Interview 21.

we need to understand the complexity of the plea negotiation. I echo the call by Metzger and Ferguson and others for defender offices to begin collecting data. Part of the challenge is determining the goal of data collection.²⁰⁰ If the goal of collecting data is to evaluate the individual defender, then all their work must be captured. There are, however, barriers to that collection.

Much of what happens in plea bargaining will never be formally recorded,²⁰¹ especially sensitive information on immigration status. As Metzger and Ferguson point out, many defenders would have legitimate concerns about memorializing a client's immigration status in a computer system, particularly for the use of wide-scale collection and analysis.²⁰² Even less sensitive information about the client—for example, a strong desire to hold on to a job—may be kept close to the vest during negotiations but have an impact on the defender's actions and ultimate outcomes. These sorts of facts may be brought up in off-the-record conversations between the defense attorney and the prosecutor, but more likely than not, they remain in the private files of the defense attorney. These limitations must be acknowledged when measuring public defender effectiveness at securing outcomes.

In addition, even when these particular factors, such as immigration status, can be accounted for, there are still questions as to what is the best outcome for any individual client. Perhaps the client wants to get out of jail at any cost, even if it means risking his ability to remain in the country. His goal may be a shorter sentence, rather than protecting his status in the country, and he is therefore willing to take a plea that is unsafe for his immigration status. The very next client may make the opposite decision.²⁰³ As one public defender put it, "I don't always like my client's math"²⁰⁴—referring to the client's decision to get out of jail when a better offer may be shortly forthcoming—but they still have to accept the client's calculation. Defenders are playing a card game during these negotiations in which they show some of their cards but not others. But all of the cards matter in determining whether a defender is performing effectively. Whether a sentence or charge is reduced will not always tell us whether the defender has played his cards well.

Another barrier is the ethos of public defenders themselves. As Ferguson and Metzger point out, there are also problems with getting underfunded, overworked, and notoriously anti-authoritarian public defenders to collect data on their cases and clients.²⁰⁵ In the few states that have tried to gather data on public defenders,

200. If the goal is to offer a summary report of the work of the institution of the public defender, then the data now publicly available may be sufficient to understand a basic picture of what the public defender achieves.

201. It is not easy to find data about criminal court matters in the first place. Metzger & Ferguson, *supra* note 64, at 1076; Wright & Peeples, *supra* note 59, at 1232 (noting the issues with collecting data in a world in which courthouses often keep outdated computer systems and where much of the data is recorded only by hand).

202. Metzger & Ferguson, *supra* note 64, at 1103.

203. Much of what happens at the plea phase also depends on the prosecutor on the other side of the negotiation. *See supra* Part III.B.2.

204. Interview 1.

205. Metzger & Ferguson, *supra* note 64, at 1077–78; Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 132 (2004) (noting the anti-authoritarian bent of public defenders and the

researchers reported that public defenders have been resistant to such efforts.²⁰⁶

Much of this collection will have to be done internally within defender offices because they have access to many data points about a case that the outside world does not.²⁰⁷ This means that case management systems will have to allow for the collection of an array of variables that went into the plea. Understanding the imperative to collect internal data, the National Legal Aid and Defender Association has already made a push to encourage local offices to begin collecting and organizing data.²⁰⁸ But their list of potentially collectible data does not include information about collateral consequences. Without this information, critical data about the plea process will be missing.

This is not to say, of course, that we should abandon efforts at data collection and analysis. Meaningful evaluation is missing in many defender offices.²⁰⁹ The result can be that many public defenders who are performing poorly, sometimes dramatically so, can fall through the cracks.²¹⁰ Even well-meaning defenders can and do perform inadequately.²¹¹ Evaluation is an essential check on this behavior. Public

difficulties that this personality type raises for supervisors in public defender offices).

206. Laurin, *supra* note 57, at 360.

207. There have, though, been calls for federal court monitors to oversee the work of failing public defender offices. In cases like this, the internal documents of the office would likely be open to outside reviewers. In 2013, the Justice Department called for federal oversight of two cities' public defender organizations in Washington State. Mike Carter, *Judge: Mt. Vernon, Burlington Failing Poor Defendants*, SEATTLE TIMES (Dec. 4, 2013, 11:46 PM), <http://www.seattletimes.com/seattle-news/judge-mt-vernon-burlington-failing-poor-defendants> [<https://perma.cc/R6BA-D2PJ>]. Judge Lasnik of the Western District of Washington required the cities of Burlington and Mount Vernon to hire an independent supervisor to monitor their public defense system. *Id.*

208. *See supra* note 67.

209. MARGARET A. GRESSENS & DARYL V. ATKINSON, N.C. OFFICE OF INDIGENT DEF. SERVS., THE CHALLENGE: EVALUATING INDIGENT DEFENSE: NORTH CAROLINA SYSTEMS EVALUATION PROJECT PERFORMANCE MEASURES GUIDES 1 (2012), http://www.ncids.org/systems%20evaluation%20project/performanceasures/PM_guide.pdf [<https://perma.cc/4G4J-DH7D>] (noting that many defender organizations lack a structured evaluation system).

210. A lawsuit in Washington State alleged that the cities of Mt. Vernon and Burlington extended contracts with the two attorneys handling indigent defense in those cities, despite numerous complaints that the attorneys did not meet with clients or investigate the charges against them, did not stand with and represent them in court, and did not explain the cases against them or their options or respond to client communications. *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013). According to the ACLU, which represented the plaintiffs, city officials had received complaints regarding this breakdown in indigent defense not only from the Office of Assigned Counsel but also from police officers who could not contact public defenders. *See Lawsuit Can Go Forward Challenging Shockingly Deficient Public Defense System*, AM. C.L. UNION WASH. (Feb. 23, 2012), <https://aclu-wa.org/news/lawsuit-can-go-forward-challenging-shockingly-deficient-public-defense-system> [<https://perma.cc/LJ49-L64K>]. Plaintiffs claimed the cities failed to monitor the two attorneys contracted to handle indigent defense cases, failed to adequately fund the indigent defense system, and failed to impose a caseload limit. *Id.* In 2010, these two attorneys handled more than 2100 misdemeanor cases. *Id.*

211. As Tigran Eldred has noted, public defenders can often suffer from "ethical blindness," in which the caseload pressures and other challenges of the job allow even very well-

defenders are already evaluated in certain respects—for instance, with a periodic review of their case files or with a supervisor who observes them during a trial²¹²—but a systemized mechanism for wide-scale and uniform evaluation is mostly missing from the profession.²¹³

Partly this lack of evaluation is a result of preserving the air of mystery that surrounds just the sort of creativity that goes into plea bargaining. As Jenny Roberts points out, courts avoid defining the responsibilities of defense counsel at plea bargaining because of the commonly held belief that lawyering—at plea bargaining and at trial—is an “art.”²¹⁴ As the Supreme Court notes in *Frye*, “[t]he art of negotiation is at least as nuanced as the art of trial advocacy” [Plea bargaining is] defined in substantial degree by personal style.²¹⁵ But, as Roberts argues, courts and attorneys should not forgo setting professional standards for defenders because negotiation may rely on personal style and soft skills.²¹⁶ Similarly, we should not forgo evaluation. Rather, we must acknowledge the factors that go into creative plea bargaining and be sure to account for them.

This involves clearly defining the measure of success and then collecting data accordingly. If we evaluate the success of a plea based on the length of sentence, the risk is that public defenders who are achieving results for their clients in areas outside of the sentence will appear to be performing poorly. Because the measure of a public defender, particularly a young defender, is their ability to negotiate, and because much of the information that underlies those negotiations is enclosed in the confidential file, there must be efforts to create a more robust data set to use for assessment.

As Ronald Wright and Ralph Peeples note in their piece *Criminal Defense Lawyer Moneyball*, there are ways in which defender offices can cull their own internal data set to evaluate and rank defenders in their offices.²¹⁷ While Wright and Peeples favor a “quality metric,”²¹⁸ which focuses on the sentence reduction that the attorney achieves, they note that a defender office may choose to rate attorney success based

meaning public defenders to convince themselves that they are performing to a certain level of quality when they are not. Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 368–74 (2013).

212. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 3 (2002), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet_authcheckdam.pdf [<https://perma.cc/3D42-RSVU>]; see also NAT’L LEGAL AID & DEF. ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES Guideline 5.4 (1976).

I would also argue that no matter what form evaluation takes, feedback and discussion with supervisors and senior attorneys should always be incorporated into the professional evaluations of defenders as it is essential to legal education, particularly for young attorneys.

213. Wright & Peeples, *supra* note 59, at 1230.

214. Roberts, *supra* note 55, at 2669–73.

215. *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (quoting *Premo v. Moore*, 562 U.S. 115, 125 (2011)).

216. Roberts, *supra* note 55, at 2671–72.

217. Wright & Peeples, *supra* note 59, at 1223.

218. *Id.* at 1242 (“Such a measure focuses on an outcome that matters to the defendants, and one that captures the negotiation skills that are central to modern criminal practice.”).

on “the reduction of ‘embedded consequences’ like immigration removal or loss of public housing.”²¹⁹ I argue that, indeed, these offices *must* include information on collateral consequences if they want to evaluate the success of their defenders. Because collateral consequences have become so intimately tied with the decisions that defenders make in the field, they have become part of role of the public defender.

The natural counterargument here is that the job of a defense attorney is not to achieve results on collateral consequences; it is to achieve results on the criminal case. Lawyers are not social workers and they should not be evaluated on whether they make sure the client stays in school or keeps his children. But the reality is that, for better or for worse, the criminal system has shifted public defenders into this role. As Alexandra Natapoff explains, “Public defenders have long grappled with the non-criminal needs of their clients. They find them drug treatment programs, bus tokens, and clothing for job interviews. They develop relationships with them, their families, and their children.”²²⁰ It may not be in the “written” job description, but there is much beyond the criminal case that has become part of the job. Public defenders are the front line of many client crises.

A turn to data review should not wash away the significance of the creative nature of the job. There is no one way to reach an outcome. Much of the process and end result will depend on the needs of the individual client, the personality of the prosecutor, and the judge sitting in the courtroom on the day of the plea—to say nothing of the characteristics of the defender herself. A creative and savvy public defender can account for these moving pieces, and evaluation should account for the skill that is required to see the whole board and maneuver accordingly.

This is not to overstate the skills of defenders or romanticize the position. Rather it is a reminder that creativity is part of what makes a defense attorney successful. And much of what is happening in the modern courtroom is creative work. Lawyers are not artists; they have clients and are expected to achieve results. But to get to those results, they use significant imagination and invention.

B. Changing Professional Norms and Ineffective Assistance of Counsel

The purpose of my inquiry here is not to answer the question of whether defenders are or are not pleading effectively under the Court’s ineffective assistance of counsel jurisprudence. Instead, I describe the ways in which defenders attempt to be effective in their jobs, given the pressures of collateral consequences, and I explore the ways in which this type of work will not be picked up by the typical measures of effectiveness now employed by courts and scholars.

219. *Id.* at 1250–51. Statistics may also shed light on what L. Song Richardson and Phillip Goff warn is implicit bias in the prioritizing of cases by public defenders. Data has the potential to illuminate a glaring issue that is hiding in plain sight. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 *YALE L.J.* 2626 (2013) (arguing that social science literature on unconscious bias should force legal scholars and practitioners to address how implicit bias influences public defender decision making).

220. Alexandra Natapoff, *Gideon’s Servants and the Criminalization of Poverty*, 12 *OHIO ST. J. CRIM. L.* 445, 459 (2015).

But these findings have implications for how we think about ineffective assistance of counsel claims and the definition of a “good lawyer.”²²¹ The Court indicates in *Padilla*, *Lafler*, and *Frye* that it understands that part of the definition has to include how lawyers advise clients at the plea phase. Lower courts have extended this duty to advise to other collateral consequences that are severe and clear at the time of the plea. For instance, the Eleventh Circuit granted relief to a defendant who was not advised by his lawyer that his plea carried the possibility of civil commitment as a sexually violent predator.²²² Similarly, the Michigan Court of Appeals held that a lawyer had a duty to advise his client that his plea required sex-offender registration.²²³

Interestingly, *Padilla* actually rested on the premise that lawyers were already advising their clients about the potential for deportation.²²⁴ Justice Stevens presumed that very little would change, since the decision only formalized what was already attorney practice.²²⁵ For the most part, though, the defenders I spoke to saw *Padilla* as a sea change.²²⁶ Even though some defenders reported that it has always been their practice to advise clients as to the immigration consequences of a plea, many saw *Padilla* as forcing their offices to make official what had been a largely informal process. In this sense, *Padilla* allowed defender organizations to throw themselves more fully into the project of mitigating collateral consequences. According to my interviews, *Padilla* created a sense among public defenders that they had new obligations to their clients. Proof of this shifting mindset can be found in the new training and resources that began to be diverted to immigration consequences after *Padilla*. As I describe in greater detail below, many defender offices required all attorneys to undergo intensive trainings about immigration and local and state defender offices began to hire immigration specialists.²²⁷

It was also clear in my interviews that these defenders see their *Padilla* obligations as expanding beyond the scope of Justice Stevens’s directive to only give specific advice where the law is clear and generalized advice otherwise.²²⁸ Nearly all public defenders I spoke to said that they would not advise a client that there *might* be immigration consequences to their conviction, without specifying those

221. For the purposes of this section, I will focus on the “prevailing professional norms” prong of *Strickland*. For a thorough explanation of the “prejudice” prong after *Padilla*, see MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 4:8 (2013).

222. *Bauder v. Dep’t of Corr. State of Fla.*, 619 F.3d 1272, 1275 (11th Cir. 2010).

223. *People v. Fonville*, 804 N.W.2d 878, 896 (Mich. App. 2011); *see also* *Taylor v. State*, 698 S.E.2d 384, 389 (Ga. Ct. App. 2010) (finding that *Padilla* required counsel to advise about sex offender registration requirements).

224. *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

225. *Id.* Although, as Justice Alito noted, the assumption was grounded in the aspirations laid out by the relevant professional standards and not any empirical work about real practice. *Id.* at 377 (Alito, J., concurring in judgment).

226. Except in Colorado, which, under *People v. Pozo*, 746 P.2d 523 (Colo. 1987), was one of the few states that already required attorneys to advise their clients about immigration consequences prior to *Padilla*.

227. *See infra* Part IV.C.

228. *Padilla*, 559 U.S. at 372.

consequences.²²⁹ Most of them also give follow-up advice that includes explaining to the client their potential grounds for relief if they are convicted of the crime.

But not everyone sees their duties so broadly, and for good reason. Many defenders told me that they are not immigration lawyers, just as they are not landlord-tenant or employment attorneys, and they express this to their clients.²³⁰ Other defenders made clear that getting the lowest sentence is still the most important part of their job and that it trumps concerns about collateral consequences.²³¹

This disagreement among defenders about the appropriate goal for the plea bargain is why determining prevailing professional norms is so thorny. Embedded in these post-*Padilla* cases about advice is a question about the nature of plea bargaining. When courts say that an attorney should have advised his client that he was going to face civil commitment as a sexually violent predator, they are also saying that the attorney should have attempted to achieve a different outcome—one in which he would not face the collateral consequence. In this way, creative plea bargaining is already very much a part of how courts view lawyering after *Padilla*, although it is not explicitly stated.

The issue with this view is that there remains a range of what a lawyer may be trying to achieve at plea bargaining, as well as his ability to achieve it.²³² One defender may pursue the lowest possible sentence, while another in the same position might focus on mitigating collateral consequences. Both strategies could be the thoughtful product of an effective defender or the only option available to that defender given the circumstances. As ineffective assistance jurisprudence develops in the wake of *Padilla*, *Lafler*, and *Frye*, courts and lawyers will have to grapple with the deeply contextual nature of lawyering in the era of collateral consequences. Although this Article identifies emerging trends in practice, what constitutes “prevailing professional norms” at plea bargaining is a complicated matter that will not be resolved by an expansion of defense counsel’s duty to advise. Just as the definition of a “good plea” now has a range of meanings, so too does the definition of a “good lawyer.” As a result, prevailing professional norms become more difficult to pin down.

But given the impact that *Padilla* has had on the practice of lawyering and therefore the shaping of these norms, it is worth it for courts to express that good lawyering includes bargaining creatively around collateral consequences. Such expressions strengthen the work that many defenders are already doing and put pressure on defender organizations and the local governments that fund them to focus attention on these issues. In this way, the court has a role to play in instituting reform—both directly and indirectly. The power of *Padilla* was both the formal holding that lawyers must advise their clients about immigration consequences and the acknowledgment that creative bargaining was part of the process of pleading around collateral consequences. While there is no one “right” goal for plea bargaining, courts should go further in making clear that good defense lawyering should

229. *E.g.*, Interview 1.

230. Interview 1; Interview 16.

231. Interview 11; Interview 12.

232. I discuss limits on the defender’s resources in the next section. *See infra* Part IV.C.

(and often already does) take into account a broad range of collateral consequences that may be important to the individual defendant.

C. A Renewed Call for Holistic Defense

These expanded obligations for defense counsel after *Padilla* run up against the reality of practice. It is clear that getting a good lawyer is critical to defendants in criminal court. But it is equally clear that public defenders often struggle to meet the needs of all of their clients. Deep work on one case to determine the relevant consequences and how to avoid them often means less work on another case. There are many areas of suggested reform in the criminal justice system.²³³ I argue here that high on the list must be training and resources so that defenders can mitigate collateral consequences effectively. This means that defender offices should embrace the holistic model of defense. By *holistic model*, I mean a form of public defense made popular by the Bronx Defenders in New York City,²³⁴ where a team of attorneys and social workers collaborate to meet client needs.²³⁵ The Bronx Defenders, for instance, offers immediate services for their criminal clients on a range of issues beyond the criminal case. Although there have been calls for a move to a holistic paradigm for all public defender offices, most offices are still not offering holistic services.²³⁶

As my research indicates, defenders already view themselves as serving a holistic role. The goal of the plea bargain, and of their representation more broadly, is often defined by the varied needs of the client, even where those needs stretch beyond the charge and sentence.²³⁷

There is nothing novel about the call to train public defenders about collateral consequences and provide them better resources in this area.²³⁸ The holistic defense movement is premised on giving clients wraparound services that address whatever issues stem from their interaction with the criminal system.²³⁹ *Padilla*, *Lafler*, and

233. *See supra* Part I.A.

234. None of the interviewees from New York City worked for the Bronx Defenders.

235. For a discussion of the history of client-centered and holistic defender organizations by the founder of the Bronx Defenders, see Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013). Steinberg explains the "Four Pillars" of holistic defense: "Seamless Access to Legal and Nonlegal Services That Meet Client Needs"; "Dynamic, Interdisciplinary Communication"; "Advocates with an Interdisciplinary Skill Set"; and "A Robust Understanding of, and Connection to, the Community Served." *Id.* at 987–1002.

236. Although there is increasing interest in the Bronx Defenders model, in the spring of 2013 its training and technical assistance program, the Center for Holistic Defense, reported having trained only nine other offices around the country. *Id.* at 1010.

237. *See supra* Part III.A.

238. *See, e.g.*, MELANCA CLARK & EMILY SAVNER, BRENNAN CTR. FOR JUSTICE, COMMUNITY ORIENTED DEFENSE: STRONGER PUBLIC DEFENDERS (2010), <https://www.brennancenter.org/sites/default/files/legacy/Justice/COD%20Network/Community%20Oriented%20Defense-%20Stronger%20Public%20Defenders.pdf> [<https://perma.cc/HX4J-GRY4>].

239. *Id.*; Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625 (2006); Steinberg, *supra* note 235.

Frye have given advocates fodder to call for greater resources.²⁴⁰ My research supports these calls for funds and attention. The data demonstrates the depth of the entanglement between the criminal case and collateral consequences in the actual practice of criminal defense. A public defender is now a provider of a range of legal services, and the way we envision public defense and fund it must catch up to the reality on the ground.

In a post-*Padilla* world, all of the public defenders I spoke to had received training on the intersection of immigration and criminal law. All defenders also reported that they had access to resources—mostly very good resources in their estimation—when it came to answering questions on immigration consequences.²⁴¹

After *Padilla*, most public defender organizations have some formalized process for training their line attorneys on how to deal with immigration consequences in practice. Some offices have in-house immigration lawyers who are readily available to attorneys for questions that come up during their day-to-day practice. The public defenders I spoke to in New York City reported that they all have nearly round-the-clock access to immigration attorneys. This is an ideal model for holistic practice, although it has not yet been adopted in all—or most—other public defense offices. In Los Angeles, for instance, there is a centrally located immigration expert available to answer questions from state public defenders,²⁴² but no embedded experts in the individual defender offices. Other public defender organizations have statewide systems, where line defenders in different counties can call or email a set of attorneys who work on immigration issues for all public defenders in that state. This is the system that the attorneys I spoke to in Colorado, Washington, and Massachusetts use. This system does not have the immediacy of the in-house system, but most attorneys report being satisfied with the timeliness and level of information they receive. Other states and counties vary.²⁴³ Some, for instance, partner with immigration law nonprofits, which provide attorneys with immigration advice.²⁴⁴

In contrast, when it comes to other collateral consequences outside of immigration, training and resources are largely hit or miss. Resources are available in a variety of places, but rarely in one centralized location. Defenders tend to cobble together information as needed to answer a particular question for a client. Some call around to social service organizations when the questions are particularly pressing.²⁴⁵

240. Vida B. Johnson, *A Plea for Funds: Using Padilla, Lafler, and Frye To Increase Public Defender Resources*, 51 AM. CRIM. L. REV. 403, 405 (2014).

241. In New York, all defenders had access to in-house immigration attorneys, who are available by phone and in person. In Washington, the Washington Defender Association and the Washington Immigration Project provide point people who are available by phone and email. In Colorado, the state defender office has a point person and each local office has one public defender who serves as the “immigration liaison.”

242. Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282, 2295 (2013).

243. Ronald F. Wright, *Padilla and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1531–34 (2011) (describing the various methods that public defender organizations use to provide immigration advice to clients).

244. Eagly, *supra* note 242, at 2295 (noting that in Arizona, the Florence Immigrant and Refugee Rights Project “serves as a statewide backup center for public defenders throughout Arizona”).

245. *E.g.*, Interview 20 (reporting that when you have a question about benefits, you call

or search the web, trying to locate the answer. Some excellent resources have developed recently to help defenders and the public identify collateral consequences,²⁴⁶ but even these resources require time and some basic knowledge (for instance, an understanding or hunch that a particular crime may lead to a particular consequence) to navigate. And yet, public defenders regularly make these efforts in order to meet client needs that are well outside of the scope of the formal criminal case. As one defender put it, they are constantly trying to access and drum up resources.²⁴⁷

Then there are the defenders who become experts in a particular area because of a chosen specialty or, more likely, the happenstance of having dealt with many cases that carry a specific consequence. Some defenders, for instance, reported that they were very knowledgeable about issues involving driver's licenses because those questions came up so frequently in practice,²⁴⁸ while others were experts in sex offender registration.²⁴⁹ Defenders who work with juveniles get to know all the potential effects that flow from a criminal case for young defendants.²⁵⁰ These defenders then become a resource for their colleagues on a certain collateral consequence.

This sort of searching around for information among defenders is clearly not ideal. It is a time drain to search for answers for these additional questions. It is no secret that most defenders are already overworked and underfunded.²⁵¹ Searching for an answer, often in the dark, takes time and energy away from other critical tasks. It also means that many of these questions fall through the cracks as defenders triage cases—an unfortunate but necessary part of the job. This method of research also does not yield optimal or even decent answers. Unlike legal research, which defenders learn to do in law school and continue to hone in practice, it is less clear how these searches are supposed to proceed. As a result, the defender may or may not get the right answer for the client.

The offices that get the best results from the defenders' perspective are, not surprisingly, the larger organizations, where there is greater access to resources, experts, and fellow defenders with prior experience. The value of large organizations is particularly clear in relation to immigration law, as defenders have access to on-call immigration lawyers, but these defenders have access to more resources and information about other types of collateral consequences as well. Those public defenders I interviewed who are practicing in New York seemed to feel the most confident about their ability to give advice on a range of collateral consequences outside

the Department of Human Resources).

246. Justice Ctr., *supra* note 4.

247. Interview 18.

248. *E.g.*, Interview 19.

249. Interview 16; Interview 17.

250. Interview 14.

251. For a fascinating interactive series that chronicles the issues of funding and excessive caseloads among public defenders, see Hannah Levintova et al., *supra* note 95.

of immigration.²⁵² It appears that, for the purposes of collateral consequences, the bigger the better.²⁵³

Public defender organizations are already growing and becoming more bureaucratic.²⁵⁴ This a good thing. The larger the organization, the more institutional knowledge to draw from and the greater the resources.²⁵⁵ As Ronald Wright notes, increased bureaucracy is a trend in the structure of legal organizations, but particularly among public defender offices.²⁵⁶ His prediction that *Padilla* would increase the size of defender organizations in certain places with a high percentage of foreign-born residents seems to have been borne out.²⁵⁷ Public defender offices in New York City have taken on many additional attorneys with a specialization in immigration law. But with the exception of those offices that provide truly holistic services, offices have yet to evolve to provide for other areas of need—namely, a full understanding of collateral consequences.

I am aware that the cost of growth is tremendous. There are other critical and immediate needs for public defender offices, including additional lawyers, better case management infrastructure, and improved investigation services. I mean here to sound the bell again that holistic services should be the future for public defense. Given the increased awareness about collateral consequences, state and county governments should embrace a holistic public defender model, where services and resources are moved in-house. We can no longer pretend that public defenders are

252. In New York, defenders felt they were never without an answer to the immigration issues that come up in practice. Although nearly all defenders voiced approval of the immigration resources provided to them.

253. The Legal Aid Society, New York City's largest public defender provider and the only office that serves all five boroughs, has "approximately 550 staff attorneys" in its practice. *Criminal Practice*, LEGAL AID SOC'Y, <http://www.legal-aid.org/en/criminal/criminalpractice.aspx> [https://perma.cc/UML7-65SB]. New York City also has a smaller alternative or secondary providers which shoulder some of the load and provides conflict service for Legal Aid. These smaller offices include Bronx Defenders, Brooklyn Defenders, Queens Law Associates, New York County Defender Services and Neighborhood Defenders of Harlem. Finally, a private attorney contract program, known as "18-B" (from the section of the New York County Law that establishes the program) provides additional conflict coverage for defendants in need of appointed counsel. King County, Washington, reports that in 2015 the Department of Public Defense represented more than 20,000 clients. *Representing Clients in Our Community*, KING COUNTY, <http://www.kingcounty.gov/courts/public-defense/About.aspx> [https://perma.cc/LP8E-G6HH].

254. Wright & Peeples, *supra* note 59, at 1229.

255. Although, it is important to note here that this move towards increased size will exclude rural areas, which in general have limited ability to increase their scope. Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 227–29 (2010) (discussing the difficulties that rural areas face in funding and developing public defender offices).

256. Wright, *supra* note 243, at 1525–26 (providing a breakdown of type of public defender office (county or state) and the median number of attorneys at each and noting that "[t]he majority of public defenders today work in large, complex organizations" and that "[a]ccording to a 2007 national census, there were 957 PD offices operating in the United States, with 427 offices funded and controlled at the state level, and 530 controlled and primarily funded at the local or county level").

257. *Id.* at 1542.

merely criminal lawyers when the system demands so much more of them and they are striving to meet those demands.²⁵⁸ This is particularly true in light of *Padilla*, *Lafler*, and *Frye*, which put the onus on defenders to effectively plea bargain. If defenders are to negotiate “creatively,” as *Padilla* instructs, then they must have the resources to do so.²⁵⁹

CONCLUSION

The data here should raise questions about the training of attorneys both in practice and in law school. We must re-envision what it means to be a criminal lawyer. The current model of legal education stresses trial skills, the rules of evidence, and the intricacies of procedure. These skills remain critical. In fact, as defenders in these interviews noted, the way many of them secure good bargains is by knowing the law and not being afraid of a trial. The power of the trial as a bargaining chip is clear. But criminal attorneys today are, more generally, negotiators. And yet, they are not getting negotiation training or a sense that negotiation is a skill that requires as much attention and practice as effectively cross-examining a police officer. We should now define good defense work as the creative resolution of client problems through negotiation.

As the role of the attorney evolves from adversarial fighter to backroom negotiator, we also must acknowledge that the culture that attends the adversarial model—two players “duking it out” to win—no longer works in a system that is based almost entirely on negotiation. While negotiation certainly has elements of tension and struggle, it also involves making compromises and finding solutions. Yet, although negotiation is the primary means by which we resolve cases in our criminal system, “winning” still dominates the culture of criminal practice. This mismatch between the professional mindset and the reality of practice creates worse outcomes for defendants and less efficiency in the system more generally. This

258. One other solution is to move some of these roles out of the public defender office. There have, for instance, been pleas to start a public defender office for immigrants in deportation proceedings, and, in New York City, the Immigrant Justice Corps is already doing this work. As Ingrid Eagly suggests in her piece, *Gideon’s Migration*, *Gideon*, which assured defendants a right to counsel in some cases, should expand to cover the defense of immigrants in removal proceedings since even very minor crimes may result in deportation. Eagly, *supra* note 242, at 2301. New York has pushed to extend *Gideon*, and the New York Assembly has increased the budget for civil legal services in the hopes of rolling out a right to counsel in civil cases where some kind of fundamental right is involved, including housing, benefits, and custody. See Joel Stashenko, *Legislature’s Resolution Supports Civil Gideon*, N.Y.L.J., June 29, 2015, <https://advance.lexis.com/api/permalink/8ff83a05-03e7-4c4c-a309-f118510c6cd5/?context=1000516> [<https://perma.cc/ZP6P-JJTK>] (reporting on New York’s massive funding increase for civil legal services in the state, with an eye toward providing representation for all litigants in “essentials of life” cases, including housing, healthcare, education, family matters, and benefits).

259. Although it is outside the scope of this Article, I also advocate for district attorneys’ offices to adopt collateral consequences plea policies—like the one in Los Angeles County. See *supra* note 168. The effect of a formal policy, however, is up in the air given the tremendous variation among how district attorneys handle cases.

research informs a new view of attorneys, but perhaps also a changing vision of the adversarial process.

APPENDIX

Table 1. Interview Number, Location, and Number of Years in Practice in Criminal Law

Interview	Location	Years
Interview 1	New York, NY	8–11 years
Interview 2	Brooklyn, NY	4–7 years
Interview 3	New York, NY	8–11 years
Interview 4	New York, NY	4–7 years
Interview 5	New York, NY	8–11 years
Interview 6	New York, NY	4–7 years
Interview 7	New York, NY	4–7 years
Interview 8	New York, NY	9–11 years
Interview 9	New York, NY	9–11 years
Interview 10	New York, NY	24–27 years
Interview 11	New York, NY	4–7 years
Interview 12	New York, NY	16–19 years
Interview 13	Brooklyn, NY	0–3 years
Interview 14	Brooklyn, NY	0–3 years
Interview 15	King County, WA	12–15 years
Interview 16	Middlesex County, MA	4–6 years
Interview 17	Middlesex County, MA	8–11 years
Interview 18	King County, WA	8–11 years
Interview 19	El Paso County, CO	0–3 years
Interview 20	El Paso County, CO	4–7 years
Interview 21	Bronx, NY	4–7 years
Interview 22	El Paso County, CO	8–11 years
Interview 23	El Paso County, CO	0–3 years
Interview 24	King County, WA	4–7 years
Interview 25	El Paso County, CO	0–3 years