Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?

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FAILURE TO ADVISE NON-CITIZENS OF IMMIGRATION
CONSEQUENCES OF CRIMINAL CONVICTIONS:
SHOULD THIS BE GROUNDS TO WITHDRAW A
GUILTY PLEA?

John J. Francis***

In this Article, Professor Francis argues that non-citizen criminal defendants should be afforded greater latitude in withdrawing guilty pleas, when those pleas are made without awareness of potential immigration consequences. Moreover, the Article highlights the roles both judges and attorneys should play in ensuring that non-citizens do not enter into such uninformed pleas.

Noting that courts have characterized deportation as a collateral consequence of a criminal conviction, the article argues that deportation, following the passage of the Immigration and Naturalization Act of 1996, is unique in its severity and certainty. Many of the same due process considerations which underpin the requirement of advisement of direct consequences apply equally as strongly in the case of the collateral consequence of deportation; therefore, the Article argues, these policy considerations require that courts advise criminal defendants that if they are not citizens of the United States, entering a guilty plea may adversely impact their ability to stay in this country.

The Article proposes that bar associations develop universal standards requiring attorneys to determine the immigration status of all clients and to properly advise non-citizen clients of deportation risks of convictions. Further, failure to comply with these minimum standards should constitute the basis of an ineffective assistance of counsel claim. Finally, the Article calls on Congress and state legislatures to amend criminal procedural rules to require that all criminal defendants be advised that if they are not United States citizens, entering a plea of guilty or no contest to crimes may adversely impact their immigration status.

A man enters a courtroom in which a criminal docket is being called. The man is there to answer a complaint charging various offenses stemming from an alleged domestic violence incident. When the man's case is called, the judge notes that the man is not

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represented by counsel. As is done in courts throughout the country, the judge appoints an attorney who is present in the courtroom and passes the case to later in the day so that the new attorney and client can discuss a plea arrangement that the prosecution has offered. Before passing the case, the judge notes that the defendant speaks with a foreign accent and asks where the man is from. "Kenya," the man responds.

After the man and his new attorney speak for a few minutes about the plea offer, the case is recalled. The man accepts the prosecutor's proposal, agreeing to plead "no contest" to one count of Domestic Battery, and one count of Endangering a Child. Both offenses are misdemeanors. In exchange for the plea, the prosecutor agrees to dismiss the remaining counts and to recommend a probationary sentence with no jail. On the record, the court enters the defendant's plea and sentences him in accordance with the prosecutor's recommendation.

Over one year later, the man, who had entered the United States on a student visa, is placed in deportation proceedings and held in custody by the INS. Under immigration laws passed in 1996, the offenses to which the man pled no contest render him deportable. He remains in immigration detention, fighting deportation for a period longer than the maximum jail penalty of the offenses for which he was convicted. He fights to stay because he has a son born in this country.

Even though the court that accepted the man's pleas one year earlier established that he is from another country, neither the court nor the man's attorney informed him that entering these pleas could adversely impact his ability to stay in the United States if he was not a citizen. The man moves to withdraw his no contest pleas, stating that had he known he could be deported, he would not have entered the no contest pleas. The trial court denies the motion. Upon appellate review, relief is denied. The state's high court rules that deportation is merely a "collateral consequence" of a criminal conviction. Under these circumstances, neither the man's attorney nor the court was required to inform him that these

pleas could have immigration consequences. The man is eventually deported to Kenya.⁶

**INTRODUCTION**

Since passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)⁷ and the Antiterrorism and Effective Death Penalty Act (AEDPA),⁸ non-citizens who are convicted of criminal offenses, sometimes relatively minor in nature, often find themselves subject to deportation. For non-citizens, deportation is often a more serious consequence than the maximum statutory penalty of a criminal offense.⁹ However, all too often, non-citizen defendants are not advised of possible immigration consequences prior to entering a plea of guilty or "no contest" to a crime.¹⁰ In most jurisdictions, neither the court nor defense counsel is required to inform non-citizen criminal defendants that conviction for many crimes can lead to deportation proceedings.¹¹ Without knowing all the consequences of a guilty plea, it is difficult for a defendant to make an informed decision of whether to fight a case at trial or to plead guilty. Plea offers that initially appear attractive, requiring no incarceration, can lead to deportation and extended exclusion from the United

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⁶ This scenario is based upon the facts of *Muriithi*. While these facts are derived from a particular case, similar situations regularly unfold in criminal courts across the country; The author of this Article was the supervising attorney for the Washburn Law Clinic interns who wrote the brief on *Muriithi* and argued the case on behalf of Muriithi before the Kansas Supreme Court.


¹¹ See infra notes 105-06, 198-99 and accompanying text.
States. This raises the question of whether pleas taken under such circumstances are knowingly and voluntarily entered.\(^{12}\)

Jurisdictions are divided on how to address this issue. Currently, eighteen states and the District of Columbia require that prior to entering guilty pleas, either the court or defense counsel must advise alien defendants that the ensuing convictions may impact their immigration status.\(^{13}\) More than half the population of the United States resides in these nineteen jurisdictions.\(^{14}\) However, to date no federal circuit has ruled that failure to advise a non-citizen of potential deportation is grounds for withdrawing a guilty plea.\(^{15}\) The main reason for denying such relief is that deportation is a collateral rather than a direct consequence of a criminal conviction.\(^{16}\) Historically, collateral consequences do not provide a basis to overturn guilty pleas.\(^{17}\) While deportation and exclusion from the

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15. See infra note 106 and accompanying text; see infra note 198 and accompanying text.


17. Sanchez v. United States, 572 F.2d 210 (9th Cir. 1977) (a defendant needs to be advised of the direct consequences of his plea but he need not be informed of all collateral consequences); Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir.), cert. denied, 414 U.S. 1005 (1973) (failure to inform of separate civil proceedings against defendant for commitment to a mental health facility does not render a plea invalid); Hutchison v. United States, 450 F.2d 990, 931 (10th Cir. 1971) (per curiam) (failure to advise that plea will result in loss of good time credit does not render plea invalid); United States v. Vermeulen, 436 F.2d 72, 75 (2d Cir. 1970), cert. denied, 402 U.S. 911 (1971) (omitting discussion on the record about possibly imposing consecutive sentences did not render the plea defective);
United States may not fit the technical definition of a direct consequence of a conviction, I8 IIRIRA and AEDPA render deportation a near certainty for convictions of a broad class of offenses. 19

Practice and training manuals used by the criminal defense bar consistently advise of the necessity to inform non-citizen clients of potential immigration problems that may result from convictions. 20 However, practitioners do not universally heed that message. The United States Supreme Court in I.N.S. v. St. Cyr, 21 noted that competent defense counsel will advise clients of relevant provisions of immigration law that may be impacted by plea agreements. 22 Nevertheless, most courts will not consider failure to do so ineffective assistance of counsel. 23 Consequently, such an omission by an alien's attorney will not be grounds for withdrawing a guilty plea that leads to deportation proceedings. 24

To address these problems, Part One of this Article examines how current immigration law impacts non-citizens facing criminal charges. Analyzing the history and evolution of immigration policy leading up to IIRIRA as well as post-September 11th considerations places this discussion in context. Part Two of this Article analyzes the policy behind current criminal procedures requiring the court and defense counsel to advise defendants of the direct consequences of guilty pleas. Although courts have not held that deportation fits the technical definition of a direct consequence, this Article observes that many of the same policy reasons requiring warnings of direct consequences also exist for immigration consequences stemming from convictions. The Article proposes that these shared policy underpinnings require that courts advise criminal defendants that if they are not citizens of the United

Meaton v. United States, 328 F.2d 379 (5th Cir. 1964) (per curiam), cert. denied, 380 U.S. 916 (1965) (court's failure to advise that a conviction would result in deprivation of rights to vote and to travel abroad did not make plea invalid); United States v. Cariola, 323 F.2d 180 (3d Cir. 1963) (failure to inform of loss of the right to vote did not render the plea unknowing).

18. A direct consequence has a "definite, immediate and largely automatic effect on the range of the defendant's punishment." United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000). See infra note 109 and accompanying text.


21. Id.

22. See supra note 20.

23. See discussion infra Part IV.B.


25. Kincade v. United States, 559 F.2d 906, 909 (3d Cir. 1977) (holding that deportation is not directly part of the sentence for the criminal offense).
States, entering the plea may adversely impact their ability to stay in this country.

Part Three of this Article considers the standards of competent advice and representation in the criminal defense community. Recognizing that the United States is historically a nation of immigrants, changes in the economy have brought many non-citizen residents to portions of the country not traditionally considered ports of entry. Consequently, defense attorneys unaccustomed to representing foreign-born clients are increasingly confronted with advising non-citizens of the benefits and detriments of plea offers. As such, the defense community must develop more consistent standards of practice requiring attorneys to advise alien clients of potential immigration consequences stemming from guilty pleas. Moreover, this Article urges courts to recognize that a lawyer's failure to conform to these standards constitutes ineffective assistance of counsel, permitting withdrawal of the plea. At a time when immigration authorities are more aggressively enforcing even minor infractions of immigration requirements, it is particularly important for attorneys to conform to vigilant and standard practices in this area.


28. For example, the INS recently jailed six Middle Eastern students studying in Colorado because they were enrolled in too few credits. One of the students was just one hour under a full load. Under enrollment is a technical violation of student visas. None of the students is suspected of any other offense. Cable News Network, Non-U.S. Students Jailed Over Class Load, (Dec. 27, 2002), available at http://www.cnn.com/2002/EDUCATION/12/27/foreign.students.ap/index.html. According to the director of International Programs at Colorado State University, most of these students had legitimate reasons for carrying a lighter credit load. Cable News Network, University Plans Workshop After INS Arrests, (Dec. 29, 2002), available at http://www.cnn.com/2002/EDUCATION/12/29/ins.student.arrests.ap/index.html.

Note that in 2003, the INS was reorganized into two agencies under the authority of the Department of Homeland security. The two agencies, the Bureau of Citizenship and Immigrations Services (BCIS) and the Bureau of Immigration and Customs Enforcement (BICE), have recently been re-named. They are respectively known as U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE). See http://uscis.gov/graphics/index.htm and http://www.ice.gov/graphics/index.htm.
I. IMPACT OF IMMIGRATION LAW ON NON-CITIZENS CONVICTED OF CRIMES

A. History and Evolution of IIRIRA and AEDPA

An evolution in immigration law, resulting in current IIRIRA and AEDPA legislation, was driven by Congress’ concern over an increase in the number of non-citizens entering the nation’s prisons. Movement in the direction of IIRIRA began in 1985 at the behest of New York Senator Alphonse D'Amato, who asked the Government Accounting Office (GAO) to investigate INS handling of “criminal aliens” in the New York City area. Attempts to address the perceived problem initially focused on improving the efficiency of the INS operations. For example, the Anti-Drug Abuse Act of 1986 directed the INS to “begin any deportation proceeding [against a criminal alien] as expeditiously as possible after the date of the conviction.”

Congressional attention to the issue continued for the next two years, when Senator Lawton Chiles of Florida organized hearings to investigate INS procedures for removing aliens who have engaged in criminal conduct. The hearings spotlighted problems that the INS


30. Peter H. Schuck & John Williams, Removing Criminal Aliens: The Pitfalls and Promises of Federalism, 22 Harv. J.L. & Pub. Pol’y 367, 425 (1999). The General Accounting Office (GAO) reported that the INS failed to deport most of the aliens who were arrested on felony charges. Id. (citing U.S. GEN. Acct. Off., CRIMINAL ALIENS: INS INVESTIGATIVE EFFORTS IN THE NEW YORK CITY AREA 2, 31 (1986)). Moreover, the report stated that the INS failed to prevent re-entry into the U.S. of those few it did remove. Id. (citing U.S. GEN. Acct. Off., CRIMINAL ALIENS: MAJORITY DEPORTED FROM THE NEW YORK CITY AREA NOT LISTED IN INS’S INFORMATION SYSTEMS 8 (1987)). During 1986, the media spotlighted the inability of INS to adapt to the rising number of aliens charged with crimes. Id. Pointing to reports, Senator D’Amato opined that criminal aliens were “‘savaging our society.’” Id. at 426. He cited a report documenting that over a fifteen-month period, over 12,000 non-citizens had been arrested for felony charges in New York City, yet only 304 had been deported during 1985. Id. (citing UPI, Mar. 23, 1986).

31. The INS issued a written plan, the Alien Criminal Apprehension Program (ACAP), which contained a strategy for the next decade. The report recognized a need to improve methods of identifying, apprehending, and detaining non-citizens charged with crimes. The plan included a proposal for coordinating efforts with local law enforcement agencies. The plan also recognized that the INS did not at that time have the resources to implement the plan it had outlined. Id. at 427-28.

32. Id. at 429 (quoting IRCA § 701 (codified at 8 U.S.C. § 1252 (i) (1994))).

33. Id. at 430 (citing Illegal Alien Felons: A Federal Responsibility: Hearing Before the Subcomm. on Federal Spending, Budget, and Accounting of the S. Comm. on Governmental Affairs, 100th Cong. 2 (1987) (statement of Sen. Lawton Chiles)).
encountered in their removal system. These deficiencies were magnified by the INS’ attempts to implement two new programs under the umbrella of the Immigration Reform and Control Act (IRCA). One of these two programs penalized employers who hired undocumented employees. This was designed to reduce jobs available to illegal immigrants, thereby reducing a draw for illegal immigration. The second program implemented an amnesty plan for millions of aliens who were illegally in the country. However, allocation of INS assets to these programs siphoned resources away from deportation efforts.

Frustrated by persistent INS inefficiency, Congress turned its attention from improving Service efficiency to diminishing the procedural rights of non-citizens charged with criminal offenses. The Anti-Drug Abuse Act of 1988 introduced the classification of “aggravated felon” for non-citizens charged with certain offenses. Once convicted of an offense classified as an aggravated felony, non-citizens had fewer forms of relief available in deportation procedures. Moreover, non-citizens falling into this category were presumed to be deportable, were not eligible for voluntary departure, and were not allowed to return to the United States for ten years after their removal. Implementation of this Act was the first significant step toward curtailing the options of aliens convicted of crimes.

Steps were taken on other fronts to limit options that had long been available to convicted non-citizens fighting deportation. Since 1917, judges in criminal courts who sentenced aliens for deportable “crimes of moral turpitude” possessed statutory power to recommend against their removal from the country. These “judicial

34. The hearings revealed problems with identifying aliens who had committed crimes. These problems were due to poor coordination between the INS and local law enforcement, inadequate INS detention facilities, computer system incompatibilities between the INS and the FBI and resource shortages. See id.
37. Id.
38. Id.
39. Id.
40. Id. at 433.
42. Schuck & Williams, supra note 30, at 434, 434 n.327 (citing ADAA of 1988 § 7347(c), 8 U.S.C. §§ 1105(a), 1252(a) (1994)).
43. See Anti-Drug Abuse Act of 1988 §§ 7343(b), (c), 7349, 8 U.S.C. §§ 1105(a), 1182(a)(17), 1252(a) (1994).
44. Former 8 U.S.C. § 1251(b) (1988) read in pertinent part:
recommendations against deportation" (JRADs) were binding on the INS, preventing them from using that particular conviction as the basis for deportation proceedings. However, in 1990, Congress took this power away from sentencing judges. This move characterized a policy shift away from evaluation of deportation cases based upon the facts and circumstances unique to each case in favor of a one-size-fits-all classification. With this stroke of the legislative pen, a powerful means for non-citizens to have mitigating circumstances evaluated in deportation decisions was taken away.

The provisions of subsection (a)(4) [which addressed crimes of moral turpitude] respecting the deportation of an alien convicted of a crime or crimes shall not apply

(2) if the court sentencing such alien for such crimes shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported.

45. Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986) (stating that the JRAD provision of 8 U.S.C. 1251(b)(2) granted "the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation"). See Taylor & Wright, supra note 19 (arguing that sentencing judges in most criminal cases should also make the deportation decision since, among other reasons, they have access to the facts and circumstances of the criminal act).


47. The elimination of JRADs parallels the retreat away from judicial discretion in favor of the mandatory criteria imposed under the United States Sentencing Guidelines. Reformers who lobbied for establishment of the sentencing guidelines sought to rid the sentencing process of judicial discretion and "other presumed sources of sentencing disparity." Kate Stith & Steve Y. Koh, The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines, 28 WAKE FOREST L. REV. 223, 231 (1993). Discretion in sentencing has recently been further reduced with enactment of the so called "Feeny Amendment." Prosecutor Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650 (2003). Enacted on April 30, 2003, the Feeny Amendment, which was added onto the "Amber Alert Bill," reduces the already limited circumstances in which federal judges may depart downward from the sentencing guidelines. Douglas A. Kelley, Federal Judge Draws Congressional Ire, 60 BENCH & B. MINN. 22, 25 (July, 2003). The amendment prohibits downward departures predicated upon "youth, physical impairment, gambling dependency, aberrant behavior, family ties and responsibilities, military service and good works, and diminished capacity." Id. Moreover, under the amendment, the chief judge of each district must report departures to the Guidelines Commission and the attorney general must report downward departures to the Judiciary committees of the House and Senate. Id.

48. Based upon this author's personal experience as an attorney with the NYC Legal Aid Society, Criminal Defense Division, JRADs were commonly sought for clients who might otherwise run afoul of immigration laws based upon a criminal conviction. Legal Aid attorneys were trained to seek JRADs when a conviction might give rise to immigration problems for a client.
Notwithstanding these aggressive steps, the perception persisted that aliens who committed crimes presented a significant problem to our society. During the ensuing years, the number of non-citizens entering our penal system continued to rise. This increase fueled ongoing congressional concern, demonstrated by several Congressional reports.

While the number of foreign-born persons entering the prison system did indeed rise, the numbers of those incarcerated from the general population also increased dramatically. Between 1972 and 1997, incarceration rates across the country rose five times over. The number of non-citizens in prison rose along with many other demographic groups. Nevertheless, this increase, along with the ominous shadow caused by the 1993 terror attack on the World Trade Center and the 1995 bombing of a federal building in Oklahoma City, motivated Congress to make the sweeping changes heralded by IIRIRA.

Exercising the JRAD power permitted sentencing judges, who were in a position to evaluate whether circumstances of a case merited relief from potential deportation, to make that decision.  


50. Morawetz, supra note 9, at 1944 n.49.  


52. Morawetz, supra note 9, at 1944 n.49.  

53. Congressional attention focused on the apparent increase in the number of foreign-born people incarcerated in federal prisons. Id. Indeed, in September, 1998 people born outside the United States made up 29% of the federal prison population while constituting only 9.3% of the general population. Id. However, this number is somewhat misleading unless viewed in the context of state prison populations. Foreign born residents made up only 7.6% of the state prison population. Id. When the 1998 statistics for the state and federal prisons populations are combined, foreign-born inmates made up 9.3% of the combined populations. Id. This is the same number as their percentage of the general population. Id.  

54. Emanuel Gross, The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001, 28 N.C. J. INT'L L. & COM. REG. 1, 15 (2002); Although the perpetrator of the Oklahoma City attack was an American citizen, early theories opined that the attack had been carried out by someone who was not an American citizen. Indeed, early speculation theorized that the bomber(s) had Middle Eastern origin. Bryan Sierra, Congress Reacts to Oklahoma Bombing, UPI, Apr. 20, 1995, LEXIS, Nexis Library, UPI File (reporting on an interview given by Senator James Inhofe, of Oklahoma, to NBC's "Today" show in which he stated there was a likelihood the bomb originated with a Middle Eastern organization and that he favored retaliation against any nation found to have sponsored the terrorist act.).  

Prior to enactment of IIRIRA, deportation procedures applicable to permanent resident aliens convicted of criminal offenses typically operated in two stages. At the first stage, an immigration judge determined whether the person was deportable. If so, the deportable non-citizen could seek relief from deportation based upon her individual facts and circumstances.\footnote{Morawetz, \textit{supra} note 9, at 1938-39. \textit{See}, In re Marin, 16 I. & N., Dec. 581, 584 (B.I.A. Aug. 4, 1978) (describing a procedure at which the non-citizen appellant first conceded deportability, but then applied for relief from deportation under 212(c) of the Immigration and Nationality Act. This determination was made by balancing the “alien’s undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country.”).} Since enactment of IIRIRA, many more people are presumed deportable in the first step. Meanwhile, relief previously available in the second stage has been all but eliminated.\footnote{Morawetz, \textit{supra} note 9, at 1939. \textit{See also INS v. St. Cyr}, 533 U.S. 289 (2000) (discussing the impact of IIRIRA’s elimination of relief under section 212(c)).}

A significant reason more people are deportable in the first step is attributable to the change in the definition of “aggravated felony.”\footnote{Morawetz, \textit{supra} note 9, at 1939. \textit{See also INS v. St. Cyr}, 533 U.S. 289 (2000) (discussing the impact of IIRIRA’s elimination of relief under section 212(c)).} A major factor in determining whether an offense qualifies as an “aggravated felony” is the duration of the prison sentence.\footnote{See 8 U.S.C. § 1101(a)(43) (1994) (amended 1996) (defining “aggravated felony”); \textit{see also} Melinda Smith, \textit{Comment, Criminal Defense Attorneys and Noncitizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in Those Laws May Affect Your Criminal Cases}, 33 AKRON L. REV. 163, 199-201 (1999).} The 1996 changes to the Immigration and Nationality Act (INA) reduced the qualifying time period from a minimum five-year prison sentence down to one year.\footnote{Morawetz, \textit{supra} note 9, at 1939.} Indeed, even a one year suspended sentence can meet this threshold.\footnote{\textit{See} infra notes 60-61.} Consequently, offenses classified as misdemeanors or violations in state penal codes can be classified as aggravated felonies under the INA.\footnote{\textit{See infra} notes 60-61.}

Not only do crimes with shorter sentences now qualify as aggravated felonies, but the category of offenses falling under this new definition has expanded. For example, money laundering and tax


evasion of amounts as low as $10,000, now qualify as aggravated
felonies.\(^{65}\) The qualifying amounts for these offenses were reduced
from $100,000 and $200,000, respectively.\(^{64}\) Crimes of violence, in-
cluding simple assault, for which imprisonment of one year or
more is imposed, qualify as aggravated felonies.\(^{65}\) Crimes of theft,
including petit larceny, for which imprisonment of one year or
more is imposed, also qualify under the new definition for aggra-
vated felonies.\(^{66}\) Most drug offenses now meet the definition, as
well.\(^{67}\) Once a non-citizen is saddled with an "aggravated felony"
conviction, she is not eligible for "cancellation of removal" or dis-
ccretionary relief from deportation.\(^{68}\) The classification essentially
makes an individual per se deportable.

Notably, after a non-citizen has been convicted of a deportable
offense, even after completing an incarceratory sentence for the
crime, the individual can permissibly be held in custody pending
departure. The U.S. Supreme Court approved this practice in

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       (amended 1996).
       (amended 1996). A case that drew national media attention, that of Mary Ann Gehris, illus-
       trates this point. Ms. Gehris was adopted from Germany when she was fifteen months old. Her
       parents did not naturalize her. At the age of 23, Ms. Gehris received a conviction for an inci-
       dent in which she pulled another woman's hair. She received a suspended sentence of one
       year. Years later, due to retroactive crime classifications created by the 1996 immigration laws,
       Ms. Gehris, who is married, has a child with cerebral palsy, and no ties to her country of birth,
       faced deportation to Germany. See Lea McDermid, Comment, *Deportation is Different: Noncitizens
       and Ineffective Assistance of Counsel*, 89 Cal. L. Rev. 741, 741-43 (2001); Brad Dixon, *GA State in
       Gehris' eleven-year-old criminal case, although a misdemeanor under the Georgia Penal code,
       retroactively qualified as an aggravated felony since it was technically a crime of violence with
       a sentence of at least one year. This not only made her deportable, but also barred her from
       relief from deportation. Id.; Morawetz, *supra* note 9, at 1943. See infra notes 89-90 and ac-
       companying text for discussion of the problems created by retroactive application of new
       immigration laws.
       offenses traditionally considered minor in nature can render a person deportable. Such
       offenses include shoplifting, subway turnstile-jumping, and possession of small personal-use
       amounts of drugs. Bruce Robert Marley, Comment, *Exiling the New Felons: The Consequences of
       the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, 35 San
       n.222 (noting that with the exception of personal use marijuana cases involving 30 grams or
       less, a conviction for any controlled substance charge will result in deportation even if it falls
       outside the definition of "aggravated felony").
68. See INA § 240A(a)(3) (eliminates "cancellation of removal" for aliens convicted of
       an aggravated felony); IIRIRA § 304(b), Pub. L. No. 104-208, 110 Stat. 3009-597 (1996)
       (repealing INA § 212(c)), 8 U.S.C. 1182(c) (1994) (repealing the authority of the Attorney
       General to grant discretionary relief to lawful permanent residents who become excludable
       from the country).
its recent decision of *Demore v. Kim.*\(^6^9\) The most significant aspect of the *Kim* decision was that the Attorney General would be permitted to detain a convicted non-citizen pending removal without any individualized finding regarding risk of flight or danger to the community.\(^7^0\) The Court justified this position by observing that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."\(^7^1\)

The escalating nature of immigration consequences was underscored by the Supreme Court when it stated that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."\(^7^2\) The Court clearly indicated that in waging the War on Terror, the government may amend policies regarding the manner in which non-citizens are treated. The irony of the *Kim* case is that the respondent, Hyung Joon Kim, was not from a country that is a focus of the War on Terror. Rather, Kim is a South Korean national who entered the United States in 1984 at the age of six. Kim became a lawful permanent resident two years after entering this country.\(^7^3\) In 1996, Kim was convicted of first-degree burglary in California state court. One year later, he was convicted of petty theft.\(^7^4\) The combination of these two offenses rendered Kim deportable. Kim sought release on bond pending adjudication of the removal proceedings.\(^7^5\) This claim was rejected by the Supreme Court, which reasoned that even though he was a legal permanent resident, under section 1226(c) Kim was not entitled to have his individual circumstances evaluated in determining whether he was

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70. Id. at 1720.
71. Id. at 1716 (citing Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).
72. Id. (citing 426 U.S. at 81 n.17 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952))).
73. Id. at 1712. Kim did not maintain ties to Korea, nor is he sufficiently fluent in the Korean language to secure gainful employment if he is ultimately deported there. Charles Lane, *High Court Upholds Immigrants’ Custody,* WASH. POST, Apr. 30, 2003, at A2.
74. 123 S. Ct. at 1712.
75. The United States District Court for the Northern District of California granted Kim's Habeas Corpus petition, ordering the INS to conduct a prompt individualized bond hearing based upon risk of flight and danger to the community. After doing so, the INS released Kim on $5,000 bond. Id. at 1713. The Court of Appeals for the Ninth Circuit affirmed the District Court decision, rejecting the notion that mandatory detention under § 1226(c) is justified to ensure that aliens show up for removal proceedings and to protect the public. Id.
a flight risk or a danger to the community. Interestingly, the INS did not argue that detaining Kim was necessary to ensure he appeared for removal. This decision illustrates yet another potential pitfall to non-citizens who are convicted of crimes.

Recent immigrants to the United States are at particular risk. A non-citizen who commits a “crime of moral turpitude” for which a sentence of one year could be imposed, faces mandatory deportation. While under some circumstances, relief from deportation is available after accruing seven continuous years in the country, any deportable offense occurring within seven years of entry stops the clock for purposes of calculating continuous residency. Since there is no statute of limitations on deportation proceedings, individuals acquiring such convictions during their first years in the country are subject to deportation for the rest of their lives.

A troubling aspect of the 1996 INA provisions is that operative definitions of terms used in criminal courts do not necessarily apply in the immigration context. As observed, the term “aggravated felony” can have one meaning under a state’s penal code and have an entirely different meaning under the INA. Another critical example is the definition of “conviction.” In some states, a Youthful Offender adjudication is not considered to be a conviction. Many states have diversion provisions in their criminal procedure codes which permit defendants to resolve cases without obtaining a conviction on their records. However, interpretations

76. “Detention during removal proceedings is a constitutionally permissible part of that process.” Id. at 1721-22.
77. Id. at 1727 (Souter, J., dissenting).
78. See INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (Supp. II 1996); Morawetz, supra note 9, at n.34 (observing that a person falling under this provision will not be eligible for relief because they will not have accumulated the necessary seven years to qualify for such relief. Moreover, prior to 1996, a single conviction for a crime of moral turpitude did not render an individual deportable unless the sentence actually imposed was at least one year of incarceration). Significantly, even a suspended sentence can render an individual deportable. For example, a Cambodian refugee who arrived in the United States as a teenager, Sokhom Oeur, used a weapon to defend himself when threatened by a group of young men. He was ultimately convicted of assault. Even though he received a suspended sentence, he faced deportation. Kathleen O’Rourke, Deportability, Detention and Due Process: An Analysis of Recent Tenth Circuit Decisions in Immigration Law, 79 Denv. U. L. Rev. 353, 355 (2002) (citing Terry Coonan, Dolphins Caught in Congressional Fishnets—Immigration Law’s New Aggravated Felons, 12 Geo. Immigr. L.J. 589 (1998)).
79. Morawetz, supra note 9, at 1941.
80. Id. at 1942. Morawetz observes that under these provisions, young people who immigrate with their families and get into minor trouble that is not uncommon for teens can be rendered deportable. Offenses such a petit larceny will be sufficient to cause deportation. This can result in permanent separation from family.
81. See, e.g., N.Y. CRIM. PROC. LAW. § 720.10 (McKinney 2002).
of IIRIRA can deem both of these types of dispositions to be convictions.  

C. The Impact of the USA PATRIOT Act

Recent legislation passed in response to the tragic terror attacks of September 11, 2001 further expand the list of offenses that can result in deportation and exclusion from the United States. The USA PATRIOT Act, an acronym for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism," renders excludable any person who has engaged in or is engaging in any offense relating to money laundering. The USA Patriot Act contains provisions that facilitate the removal of non-citizens with criminal histories through technological improvements in the exchange of information between law enforcement agencies and immigration authorities. Specifically, Section 403 authorizes the State Department and immigration authorities to obtain access to the FBI's National Crime Information Center's Interstate Identification Index for the purpose of screening immigration applicants. Other provisions also assist identifying removable aliens from the United States. The War on Terror may yield legislation that further curtails the ability of non-citizens who are convicted of crimes to remain in this country.

83. Under IIRIRA, a conviction includes "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where . . . (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." INA § 101(a)(48)(A). See McDermid, supra note 65, at 772.


85. INA § 212(a)(2)(I). Indeed, any person whom a consular officer or the Attorney General knows or has reason to believe will engage in such an offense is excludable. Id.


87. Id. at 292. The Act directs the Attorney General to implement an entry and exit data system, to attempt to use biometric technology in doing so, to develop tamper-resistant immigration documents, and to ensure that this system can interface with law enforcement databases. Id. Additionally, the foreign student monitoring program must be expanded to include vocational schools, language training schools and flight schools, rather than only higher education institutions. Id.

88. On February 7, 2003, the PBS news program, NOW with Bill Moyers, broke a story about a draft version of legislation created by the Justice Department designed to follow up
As alluded to earlier, another critical feature of amendments to the INA is that many of the new classifications apply retroactively to offenses committed prior to the amendment.\textsuperscript{89} This development makes immigration law a moving target for non-citizen criminal defendants and for their attorneys. Even those attorneys who researched deportation consequences for their clients and advised them accordingly may find out years later that well-reasoned decisions at the time of entering a plea to criminal charges did not protect their clients from removal.\textsuperscript{90} This raises the question of

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\textsuperscript{90} An example of the potentially disastrous consequences of retroactivity upon an immigrant who had made a life in this country occurred in the case of Jesus Collado. Morawetz, supra note 89, at 115-17. Mr. Collado entered this country in 1972 as a teenager. While still a teenager, he engaged in a sexual relationship with his girlfriend, a minor four years his junior. Collado entered into an agreement in which he pled guilty to sexual abuse in the second degree but received no incarceration. At the time he entered his plea, this conviction did not lead to deportation. He would only have been deportable for this crime of moral turpitude if he had served one year of incarceration. Over the next two decades, Collado married, had children and managed a restaurant. In 1997, when returning from a visit to the Dominican Republic, he was placed in deportation proceedings. The retroactivity of IIRIRA rendered his sole criminal conviction, which occurred while he was a teen, a deportable offense. Id. (citing Mirta Ojito, Old Crime Returns to Haunt an Immigrant, N.Y. TIMES, Oct. 15, 1997, at B1). After Collado received an adverse ruling from the Board of Immigration Appeals, the INS ultimately changed its position, resulting in dismissal of the case. See Siskind’s Immigration Bulletin, Collado Case Dismissed by Court (Aug. 21, 2003), available at http://www.visalaw.com/98sep/19sep98.html. While this case was ultimately dismissed, it highlights the possibility that non-citizens may enter into pleas that effectively navigate
what a criminal defense attorney needs to know to competently represent a non-citizen client charged with a crime. This also raises the questions of whether an alien defendant who enters a guilty plea without knowing the immigration consequences does so knowingly and voluntarily. Indeed, can any immigrant enter a plea knowingly and voluntarily when she cannot know whether future legislation affecting that plea will apply retroactively?

II. CRIMINAL PROCEDURE REQUIRES THAT PLEAS BE ENTERED KNOWINGLY AND VOLUNTARILY

The founding principles of the American justice system provide that no person shall be deprived of certain rights or privileges without due process of law. The Fourteenth Amendment states, "nor shall any State deprive any person of life, liberty, or property without due process of law . . . ." To this end, it is a well settled matter of criminal procedure that pleas of guilty entered in criminal cases must be knowing and voluntary. The landmark case of Boykin v. Alabama held that in order for a plea to meet constitutional standards, the record must demonstrate that "the defendant voluntarily and understandingly entered his plea[]." The defendant must make the decision to plead guilty with knowledge of the "relevant circumstances and likely consequences" of that plea. This is satisfied by an inquiry demonstrating that the "defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences." Indeed, this concept is so important that it has been codified into Federal Rule of Criminal Procedure 11, which reads in pertinent part:

Before the court accepts a plea of guilty . . . , the court must address the defendant personally in open court . . . the court must inform the defendant of, and determine that the defendant understands, the following: . . . the nature of each charge to which the defendant is pleading; any maximum

around immigration consequences, only to have retroactive application of IIRIRA render the offenses deportable.

93. Id. at 244.
95. Boykin, 395 U.S. at 244 n.7.
possible penalty, including imprisonment, fine, and term of supervised release; any mandatory minimum penalty; any applicable forfeiture; the court's authority to order restitution; the court's obligation to impose a special assessment; the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

Rule 11 requires the court to "conduct a searching inquiry into the voluntariness of a defendant's guilty plea." One of the "core concerns" underlying this rule is that defendants "know and understand the consequences of his guilty plea." If the court fails to address one of the "core concerns," then the plea is invalid. Looking at the specifics embodied in Rule 11, it is clear that importance is placed on individuals understanding the possible consequences of their pleas prior to foregoing the ability to fight the accusations through the trial process. Recent amendments to these advisories cover more than just potential incarceration. They also cover possible forfeiture, restitution and assessments. Possessing information about consequences stemming from the conviction will clearly guide the decision of whether or not to waive the Sixth Amendment right to trial. The recent amendments to Rule 11 reflect concern over issues beyond merely terms of incarceration and parole.

96. FED. R. CRIM. P. 11(b)(1). Note that in the 2002 amendments, the Committee expanded on the list to include "advice as to the maximum or minimum term of imprisonment, forfeiture, fine, and special assessment, in addition to the two types of maximum and minimum penalties presently enumerated: restitution and supervised release." FED. R. CRIM. P. 11 advisory committee's note.
97. United States v. Siegel, 102 F.3d 477, 481 (11th Cir. 1996) (citing United States v. Stitzer, 785 F.2d 1506, 1513 (11th Cir. 1986)).
98. Id. (citing United States v. Hourihan, 936 F.2d 508, 511 n.4 (11th Cir. 1991)). Two of the other core concerns are: "(1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges." Id.
99. Stitzer, 785 F.2d at 1513.
100. United States v. Guerra, 94 F.3d 989, 995 (5th Cir. 1996) (informing the defendant that the maximum sentence was 60 years, when in actuality, it was 30, was not harmless. Possessing incorrect information as to the actual sentence rendered the waiver of the Sixth Amendment right to trial unintelligent and therefore invalid. Had the defendant known he was actually facing half of what he was informed, it might have changed his decision to enter a plea of guilty.).
101. See supra note 96.
102. See supra note 100.
A. Direct and Collateral Consequences of Criminal Conviction

The criminal justice system clearly recognizes the necessity that people be informed of direct consequences likely to result from a conviction. As such, it seems paradoxical that there is no universal belief that non-citizens must be informed of the immigration consequences stemming from their pleas. Under IIRIRA, a host of deportation consequences to guilty pleas are certain and almost automatic. Nevertheless, Rule 11 places no obligation on judges to determine whether defendants are aware of potential immigration penalties of convictions. Such an admonition is omitted under the reasoning that the immigration consequence is not actually punishment imposed by the criminal court and that it is therefore collateral in nature. Courts have also proposed that since there are so many potential collateral consequences to guilty pleas, requiring such admonitions would work a hardship on the court. "The collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant of such a consequence as [deportation] would impose an unmanageable burden on the trial judge."

103. See supra note 96.

104. IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546. Under IIRIRA, the INS has no discretion to grant relief from deportation for certain crimes.

105. Fed. R. Crim. P. 11; see also Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976) (stating that Rule 11 does not require the court to inform a defendant about immigration consequences of a plea because deportation is "not the sentence of the court which accepted the plea but of another agency over which the trial judge has no control and for which he has no responsibility." ) (quoting Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974)).

106. See United States v. El-Nobani, 287 F.3d 417, 421 (6th Cir. 2002) ("[I]t is clear that deportation is not within the control and responsibility of the district court, and hence, deportation is collateral to a conviction.") (citing United States v. Romero-Vilca, 850 F.2d 177, 179 (3d Cir. 1988) ("[W]e hold that potential deportation is a collateral consequence of a guilty plea."); United States v. Quin, 836 F.2d 654, 655 (1st Cir. 1987) ("[D]eportation...is generally regarded as a collateral consequence."); United States v. Campbell, 778 F.2d 764, 767 (11th Cir. 1985) ("[D]eportation is a collateral consequence of a guilty plea."); United States v. Russell, 686 F.2d 35, 39 (D.C. Cir. 1982) ("It [is] well settled...that Rule 11 does not require informing a defendant of the possibility of deportation."). Relying on this reasoning, the El-Nobani court concluded that lack of awareness of deportation consequences resulting from a guilty plea does not render the plea "unknowing or involuntary." El-Nobani, 287 F.3d at 421. See also, U.S. v. Amador-Leal 276 F.3d 511 (9th Cir. 2002) (stating that Rule 11 does not require the court to inform defendants of immigration consequences because they are collateral to the conviction).

The rationale behind such a position is that the defendant need only be aware of direct consequences of a plea. \(^{108}\) "Direct consequences" have been defined as consequences that have a "'definite, immediate and largely automatic effect on the range of the defendant's punishment.'" \(^{109}\) There is no constitutional obligation to inform a "defendant of all the possible collateral consequences of the plea." \(^{110}\) However, for the broad class of offenses encompassed by the post IIRIRA definition of "aggravated felony," one can hardly term deportation as a speculative possibility. It is a near certainty. Notwithstanding the fact that the deportation procedure can cause an individual to experience conditions as damaging to one's life as most serious criminal sentences, the federal court system holds to a view that deportation's collateral nature is settled due to the fact that a court other than the sentencing court imposes the sanction. The certainty and severity of deportation are trumped by this circumstance.

Supporting this view is the fact that deportation proceedings are traditionally held to be civil proceedings. In 1893, the United States Supreme Court noted:

[Deportation] is in no proper sense a trial and sentence for a crime or offence . . . The order of deportation is not a punishment for a crime . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority . . . has determined that his continuing to reside here shall depend. \(^{111}\)

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108. See King v. Dutton, 17 F.3d 151, 153 (6th Cir. 1994).
109. United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000); Torrey v. Estelle, 842 F.2d 234, 236 (9th Cir. 1988) ("The distinction between a direct and collateral consequence of a plea "'turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.'") (citing George v. Black, 732 F.2d 108, 110 (8th Cir. 1984) (quoting Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364, 1366 (4th Cir.), cert. denied, 414 U.S. 1005 (1973))); see also United States v. Lambros, 544 F.2d 962, 966 (8th Cir. 1976).
110. King v. Dutton, 17 F.3d 151, 153 (6th Cir. 1994).
111. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). See also Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (holding that ex post facto prohibitions do not apply to deportation legislation because it is not punishment for a crime but rather a civil penalty). However, note that the dissent in *Fong Yue Ting* stated:

[I]t needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property; and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel.
Nevertheless, the technical distinction between collateral and direct consequences ignores the punitive nature of the consequence.\textsuperscript{112} There have been some occasional attempts to reassess this approach, however, the prevailing view remains that deportation proceedings stemming from convictions are collateral to the criminal proceeding.\textsuperscript{115}

\textbf{B. Past Treatment of Immigration Consequences Bore Characteristics of Direct Consequences}

Further characteristics exist demonstrating that immigration consequences are not truly collateral to criminal proceedings. In addition to the punitive and direct nature of deportation caused by conviction, Congress has, in the past, vested criminal judges with power over deportation by establishing the JRAD. Extending the power to prevent deportation to criminal judges seems at odds with the notion that deportation is a civil penalty.\textsuperscript{114} The manner in which JRADs were determined amplifies this point. Granting this relief did not generally turn upon matters of immigration law. Instead, it focused on facts of the case, the defendant's criminal record, and family and community ties.\textsuperscript{115} Whether a JRAD was granted was generally discussed as a sentencing matter by the

\textit{Fong Yue Ting}, 149 U.S. at 740 (Brewer, J., dissenting).

\textsuperscript{112} A novel argument has been made that, under the reasoning stated in \textit{Fong Yue Ting}, even imprisonment does not qualify as a direct consequence. It is argued that the proceeding to determine incarceration “is in no proper sense a trial and sentence for a crime or offense.” Robert Pauw, \textit{A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply}, 52 ADMIN. L. REV. 305, 307-308, n.7 (2000) (citing \textsc{Stephen H. Legomsky}, \textsc{Immigration and Refugee Law and Policy} 45 (2d ed. 1997)). The argument also criticizes the \textit{Fong Yue Ting} court's characterization of deportation as “merely removing individuals who are undesirable.” \textit{Id.} This depiction fails to explain how deportation is not punishment since the purpose of punishment in the criminal context is “the separation of an undesirable person from society.” Pauw, \textit{supra} note 112, at 308 n.7 (citing \textsc{Stephen H. Legomsky}, \textsc{Imigration and the Judiciary: Law and Politics in Britain and American} 208-09 (1987)).

\textsuperscript{113} See e.g. Pauw, \textit{supra} note 112, at 308-09 nn.8-10. It is interesting to note that the Supreme Court has held that some civil sanctions can be considered punishment. United States v. Halper, 490 U.S. 435 (1989). In \textit{Halper}, a defendant was convicted of submitting false claims for medical expense reimbursement totaling $585. In a related civil proceeding, he was assessed a civil fine of $130,000. The Supreme Court held that the disproportionate nature of the fine to the amount of the false claim rendered it punitive. \textit{Id.}

\textsuperscript{114} See Taylor & Wright, \textit{supra} note 19, at 1145.

\textsuperscript{115} \textit{Id.} In this author's personal experience, discussions with the court when seeking JRADs focused exclusively on facts of the case and circumstances of the defendant's life. Intricacies of immigration law were not part of the discussion.
judge and the attorneys. The view that a JRAD is a component of sentencing obtained judicial support. In *Janvier v. United States*, the Second Circuit ruled that the JRAD determination "is part of the sentencing process, a critical stage of the prosecution to which the Sixth Amendment safeguards are applicable." In reaching this conclusion, the *Janvier* court examined the legislative history of the JRAD. This examination revealed that the 1917 Congress considered deportation to be punishment for a crime. Consequently, the sentencing judge should have the power "to make the total penalty for the crime less harsh and less severe when deportation would appear to be unjust." Thus, Congress, to which the courts have repeatedly deferred on immigration matters, has considered deportation commenced as a result of a guilty plea to be a sentencing matter. If it was a sentencing matter, it was not collateral to the conviction.

The United States Justice Department has also engaged in practices which seem inconsistent with the view that deportation is totally separate from criminal proceedings. Former Attorney General Janet Reno, in a 1995 memo, encouraged federal prosecutors to make deportation issues part of the plea bargaining process, offering more lenient sentences in exchange for stipulations not to contest deportation. In fact, the Reno Memo encouraged federal prosecutors to seek removal in all cases involving deportable aliens, not just those involving deportable crimes. When incorporated into a negotiated agreement, the non-citizen defendant would accept the deportation order at the time of sentencing after the court confirmed alienage, deportability, and waiver of the right to a hearing before an immigration judge and judicial review of the

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116. *Id.*
117. 793 F.2d 449, 455 (2d Cir. 1986).
118. *Id.* at 453.
119. *Id.* at 453-55.
120. *Id.* at 453 (citing 53 Cong. Rec. 5169-74); *Taylor & Wright, supra* note 19, at 1146.
121. *Pauw, supra* note 112, at 311 (stating that "under the traditional view, legislative control over immigration matters is plenary"); *Fong Yue Ting*, 149 U.S. at 711, 713 (1893) ("The power to exclude or expel aliens, being a power affecting international relations, is vested in the political departments of the government."); *Harrisades*, 342 U.S. 580, 588-89 (1952) ("policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.").
122. *Taylor & Wright, supra* note 19, at 1160.
Deportation order. Deportation conditions were often written into supervised release orders issued as part of the sentence. After completion of the criminal sentence, the INS executed the order. In exchange for consenting to deportation, prosecutors characteristically recommended downward departures of one or two offense levels from that prescribed by the sentencing guideline for the offense. By engaging in this policy, the U.S. Attorneys Office made immigration consequences of criminal convictions part and parcel of the criminal court process. Although federal prosecutors no longer follow this policy, this past practice strains the view that deportation is collateral to a criminal conviction.

Notwithstanding judicial interpretation that deportation is collateral to criminal proceedings, the judiciary has issued opinions inconsistent with this notion. One such ruling occurred in the context of deciding whether judicial deportation determined during sentencing proceedings was eligible for attorney's fees under the Equal Access to Justice Act. In denying eligibility, the Ninth Circuit reasoned that since judicial deportation was a criminal proceeding, it did not qualify for fees under the Equal Access to Justice Act.

From a pragmatic and historical view, there is ample evidence that deportation is not collateral to a criminal conviction, but rather a direct and certain consequence of it. Some have argued that conclusions to the contrary are "really a judicially-created...

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124. Taylor & Wright, supra note 19, at 1163.
125. Id. at 1164.
126. Id. at 1163–64.
127. Id. at 1164.
128. Due to the increasing ease with which the INS can effect deportation of aliens with convictions, prosecutors no longer feel it is advantageous to the government to negotiate more lenient sentences in exchange for stipulated deportation. Consequently, they seek deportation during plea negotiations far less frequently. A 1997 memo to the U.S. Attorneys noted that the 1996 amendments to the removal process "reduce[] the benefit the Government derives from an alien's . . . stipulation to removal." Id. at 1166. It admonishes prosecutors not to offer downward departures “unless the Government receives an articulable benefit." Id. at 1166 n.136 (quoting U.S. DEP’T OF JUSTICE RES. MANUAL § 1999 (2000), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/asam/title9/crm01999.htm).
129. District Court judges have the power "to order deportation as part of the criminal sentencing proceeding . . . ‘a United States district court shall have jurisdiction to enter a judicial order of removal at the time of sentencing.’" United States v. Soueiti, 154 F.3d 1018, 1019 (9th Cir. 1998).
130. The Equal Access to Justice Act entitles a party who has prevailed against the government in a civil action to receive an award for attorney fees. 28 U.S.C. § 2412(d)(1)(A).
131. Soueiti, 154 F.3d 1018.
myth." As such, there is every reason to require courts to provide advisories about potential immigration consequences prior to accepting guilty pleas. Many of the same policy considerations requiring warnings for traditionally direct consequences also exist for immigration consequences.

III. CRIMINAL PROCEDURE POLICIES REQUIRING ADVISORIES FOR SENTENCING ALSO EXIST FOR IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

With one of the core concerns of the Rule 11 advisories being that defendants know and understand the consequences of their guilty pleas, it is apparent that direct or not, deportation is a consequence of such magnitude that it profoundly impacts the rest of the non-citizen defendant's life. In the dissent in Fong Yue Ting, Justice Brewer quoted President Madison saying,

If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness,—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary, kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; ... if, moreover, in the execution of the sentence against him, he is to be exposed, ... possibly to vindictive purposes, which his immigration itself may have provoked,—if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.  

132. Taylor & Wright, supra note 19, at 1174. Taylor and Wright advocate a new approach to deportation proceedings that would, in most cases consolidate the immigration and sentencing proceedings. "It is a time to rethink the fundamentals—including the notion that deportation is a civil sanction that should be separated from the criminal sentence imposed on noncitizen offenders." Id. at 1169.  
133. See supra note 98 and accompanying text.  
134. Fong Yue Ting, 149 U.S. 698, 740 (1893) (quoting 4 Elliot's Debts. 555 (statement of President Madison)). With this statement, President Madison not only observes the truly punitive nature of deportation, he also identifies the extreme manner in which it affects the life of an immigrant to this country.
The Second Circuit described deportation as "a sanction in severity [which] surpasses all but the most Draconian criminal penalties." Indeed, some trial courts recognize "that deportation consequences are often of far greater concern for legal aliens than any prison sentence they might receive.

Loss of liberty stemming from a conviction is clearly a concern addressed by constitutional protections and the Rule 11 advisements. Under IIRIRA, non-citizens can remain in pre-deportation detention for protracted periods of time while fighting removal. They can also be held in detention while waiting for a removal order to be executed. Most often, this pre-deportation detention occurs in jails that detain people held on criminal charges. Once the deportation is carried out, although no longer incarcerated in the traditional sense, a very real loss of liberty continues. If liberty is defined as freedom to move about without restriction, removal from this country certainly eliminates one's liberty. The exclusion

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135. Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977).


137. See U.S. Const. amend. V. ("No person shall . . . be deprived of life, liberty, or property without due process of law . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."); U.S. Const. amend. VIII ("[E]xcessive fines [shall not be] imposed, nor cruel and unusual punishments inflicted."); U.S. Const. amend. XIV ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person . . . the equal protection of the laws.").


140. See supra note 138. See also Wesley L. Hsu, The Tragedy of the Golden Venture: Politics Trump the Administrative Procedures Act and the Rule of Law, 10 Geo. IMMIGR. L. J. 317 (1996). A notorious example of using local jails to detain individuals awaiting INS litigation involves the asylum seekers from the Golden Venture. In 1993, over 220 Chinese nationals made a perilous journey on a rusty freighter, the Golden Venture, seeking refuge in the United States. The ship ran aground just off of Queens, NY. The passengers, many of whom jumped ship and tried to swim for shore, were detained by the INS. They were held for three years and eight months in various local detention facilities before finally being ordered released. Most of these facilities also housed people charged with and/or convicted of crimes. After release, ninety-nine of the refugees returned to China. The balance took various paths, including being sent to Latin America, obtaining asylum in the United States, and obtaining artists' visas. Some are still awaiting asylum determinations. Id. See also Marvin H. Morse & Lucy M. Moran, Troubling the Waters: Human Cargos, 33 J. MAR. L. & COM. 1, 26 (2002). See also Mae M. Cheng, Ship's Passengers Struggle On, NEWSDAY, June 2, 2003, at A4.

141. Liberty is defined as: "Freedom; exemption from extraneous control." BLACK'S LAW DICTIONARY 1064 (4th ed. 1951); Liberty is also defined: "n. the condition of being free from restriction or control; the right to act, believe, or express oneself in a manner of one's choosing. . ." THE AMERICAN HERITAGE DICTIONARY 723 (2d College Ed. 1991). "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment." Kent v. Dulles, 357 U.S. 116, 125 (1958).
that ensues from a deportation order obviously prevents one from freely or legally traveling back to the United States. Removal to some countries may mean that the deportee will lose freedom in the country of her birth. This may be due to religious or political beliefs held by the deportee or inability to travel freely may be a condition of that particular nation. In one view, the loss of liberty from deportation may cut deeper than loss of liberty from incarceration.

Losing liberty to incarceration is a core concern of Rule 11 when applied to criminal proceedings. Losing liberty to deportation, which often includes pre-deportation incarceration, has not been deemed a core concern even though it is a direct result of a criminal conviction. The rationale distinguishing these two consequences is little more than a matter of semantics. With incarceration, it is at least possible that family members may visit. However, in many circumstances, once a removal order has been executed, separation from family is complete and permanent. In some circumstances, family members of the person deported may not be able to visit the country to which their loved one is removed. Deportation results in separation from one's adopted society, from one's livelihood, but perhaps the most dire consequence is separation from one's family.

American jurisprudence has long recognized the importance of family. Even immigration law recognizes the importance of keeping families together. Most immigrant visas for lawful

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142. The United Nations Refugee Protocol recognizes that some people will lose life or liberty in their home countries due to political beliefs. See Kendall Coffey, The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy, 19 VAYLE L. & POL’Y REV. 303, 312 (2001) (citing Nicosia v. Wall, 442 F.2d 1005, 1006 n.4 (5th Cir. 1971)).

143. See Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976) (holding that Rule 11 does not require the court to inform a defendant about immigration consequences of a plea). Since Rule 11 has not been interpreted to require admonitions about possible immigration consequences, inferentially, it is not deemed to be a core concern.

144. See Morawetz, supra note 9, at 1951 (stating that as a legal matter, family members remaining behind who are citizens of the United States may not be able to immigrate to the country to which the deportee was removed).

145. Id. at 1950–54 (discussing the devastating impact that the 1996 immigration laws have on families). Due to the elimination of certain types of relief for those convicted of aggravated felonies, most often, family members do not get the chance to plead the hardship that they will encounter due to removal of their loved one. Id.

146. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (holding that restrictions on the right to marry violate the Fourteenth Amendment); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that parents may make decisions about the upbringing and education of their children free of unreasonable state interference).

permanent residents are based upon familial relationships.\textsuperscript{148} Yet the 1996 immigration amendments impose a damaging impact on many families, sometimes in a most cruel manner. There is a particularly draconian impact on children who have been adopted from overseas while very young to be raised in this country. Such children, as they mature, usually know nothing of life in the countries of their birth. They are often unfamiliar with the language and customs of those lands. It is unlikely that they will have any family, at least none they are aware of, in the countries in which they were born. For every practical purpose, the countries from which they were adopted are totally foreign lands to them. Nevertheless, some individuals who have been raised as American children have found themselves facing deportation for relatively minor criminal offenses.\textsuperscript{149} There is little logic in deporting such members of our society. Their personalities, cultural identities and lives were established in the United States. Their criminal conduct should be handled in the same manner as that of citizens.\textsuperscript{150} There is no remedial objective achieved by banishing them from the only home they have ever known.\textsuperscript{151}

Deportation resulting from criminal convictions is a consequence of the nature addressed by Rule 11 advisements. A

\begin{itemize}
  \item \textsuperscript{148} Morawetz, supra note 9, at 1950–51 (citing IMMIGRATION AND NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, Annual Report: Legal Immigration, Fiscal Year 1998, at 7 (1999)).
  \item \textsuperscript{149} See supra note 65. John Gaul was adopted from Thailand at the age of three and raised in Florida. His adoptive parents mistakenly thought the adoption made him an American citizen. Gaul was convicted for his role in forging checks and stealing a car. After completing twenty months incarceration, due to new deportation laws, he was deported to Thailand. Morawetz, supra note 9, at 1952.
  \item \textsuperscript{150} Morawetz, supra note 9, at 1961 (quoting President’s Comm’n on Immigration & Naturalization, Whom We Shall Welcome 202 (1953). “Their formative years were spent in the United States, which is the only home they have ever known. The countries of their origin which they left—in two cases during infancy, in another, at the age of 5 years—certainly are not responsible for their criminal ways. . . . If such a person offends against our laws, he should be punished in the same manner as other citizens and residents of the United States and should not be subject to banishment from this country.” Id. The Commission recommended modifying deportation laws to preclude deportation based upon any criminal conviction for anyone who lawfully entered the United States before the age of sixteen or had lived in this country for twenty years).
  \item It should be noted that with respect to children adopted from other countries, the Child Citizenship Act has achieved some of these objectives. The Act provides that as of February 27, 2001 a child under the age of 18 years automatically acquires United States citizenship if: (1) at least one parent of the child is a citizen of the United States, by birth or naturalization, and (2) the child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful entry for permanent residence. This Act specifically applies to children adopted by United States citizens. The Child Citizenship Act of 2000, Pub. L. No. 106-395, § 320, 114 Stat. 1631 (codified at 8 U.S.C. § 1431).
  \item \textsuperscript{151} One reason deportation is considered a civil, rather than criminal sanction is that it is purportedly a remedial measure and not punishment. See Pauw, supra note 112, at 331.
\end{itemize}
conviction resulting from a non-citizen’s waiver of a trial without an understanding of the resulting immigration consequences would not seem to conform to the requirements of *Boykin* and *Brady*. Nevertheless, amidst continuing challenges and criticism, federal appellate courts hold fast to the view that deportation is merely a collateral consequence of a criminal conviction. Accordingly, warnings about this consequence have not thus far been required by due process or by Rule 11. States have taken a mixed approach to this issue. Of the states that require advisories, the vast majority have done so through legislative action rather than a judicial determination that deportation is a direct consequence of a conviction.

The courts’ continuing position that deportation is collateral to criminal convictions fails to acknowledge that the 1996 amendments to the INA make deportation a near certainty for non-citizens convicted of certain crimes. Controlling authority on this point rests primarily upon case law generated prior to the enactment of the 1996 amendments to the INA. Although some jurisdictions have visited the collateral consequence issue since 1996, they have largely made only passing references to the impact that IIRIRA and AEDPA have upon the certainty of deportation for non-citizens convicted of aggravated felonies. Significantly, these jurisdictions continue to base their decisions on authority that defined deportation as a collateral consequence before the 1996 INA amendments. Such decisions provide the superficial appearance of constitutional compliance while failing to address the substantial impact that such convictions have on the deportability of non-citizens.

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155. See infra note 161.
156. See supra notes 105-06 and accompanying text.
157. See supra note 13.
158. See supra note 13.
159. See United States v. Amador-Leal, 276 F.3d 511, 516 (9th Cir. 2002) (discussing how IIRIRA and AEDPA make removal “virtually certain” for non-citizens convicted of aggravated felonies); See also El-Nobani, 145 F. Supp. 2d at 911-912, (N.D. Ohio 2001) (discussing how IIRIRA and AEDPA expand the class of offenses that render a non-citizen deportable and how elimination of relief under § 212(c) of the INA makes deportation automatic for many aliens convicted of crimes), rev’d, 287 F.3d 417, 421 (6th Cir. 2002).
160. See supra note 106, and infra note 198.
161. In United States v. Gonzalez, 202 F.3d 20, 28 (1st Cir. 2000), the First Circuit rejected the notion that the 1996 amendments to the INA had changed the relationship between conviction and deportation in a manner that required revising the prior holdings determining the matter. Supporting its ongoing position that deportation is a collateral consequence of a criminal conviction, the court cited to Durant v. United States, 410 F.2d 689, 692, (1st Cir. 1969), United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982), Cordero v. United States, 533
of considering the drastic impact that IIRIRA and AEDPA have upon non-citizens convicted of crimes without doing so in a meaningful way.

It is clear that the judiciary is unwilling to budge from the position that deportation is merely a collateral consequence simply
because the criminal court does not actually impose deportation. Courts hold firm to this view even though removal is now an almost certain consequence of certain criminal convictions and is a most severe consequence. Since attempts to convince courts that immigration matters are properly classified as direct consequences have so far been unsuccessful, perhaps advocates should give up trying to move courts from this semantic trap and concede the label. Instead, advocates might concede that deportation technically fits the narrow, currently-held definition of a collateral consequence. However, they should then assert that due to the certainty and seriousness of the consequence, the Constitution, as interpreted by Boykin and Brady, requires trial courts to give advisories about deportation consequences before accepting a guilty plea. Issuing such advisories is the only way to ensure a knowing and voluntary plea from a non-citizen. To do otherwise ignores reality in favor of a technical word game, perpetuating an analytical construct that is no longer adequate to evaluate immigration consequences of criminal convictions.

There may be concern that this approach will open the floodgates to require advisories for all manner of collateral consequences. However, this need not be. Among various collateral consequences of convictions, deportation stands alone in its detrimental impact, separating families, impeding liberty, and eliminating much of what makes one’s life precious. There is no other collateral consequence that possesses the panoply of sanctions accompanying deportation. Whether imposed by a criminal court or a sure and certain consequence actually executed by another authority, a defendant must be made aware of this consequence by the trial court in order for a plea of guilty to be truly knowing and voluntary.

162. See Morawetz, supra note 9, at 1940; El-Nobani, 145 F. Supp. 2d at 913–914 (stating that “deportation is often a direct and inevitable result of an alien defendant’s conviction.”), rev’d, 287 F.3d 417, 421 (6th Cir. 2002).

163. See discussion of Boykin and Brady, supra Part II, pp. 707–08.

164. “The collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant of such a consequence as [deportation] would impose an unimaginable burden on the trial judge....” Fruchtman v. Kenton, 551 F.2d 946, 949 (9th Cir. 1976). Such other consequences include loss of good time credit, deprivation of the right to vote and travel abroad, possible undesirable discharge from the military, civil forfeiture, disqualification from public benefits, ineligibility to possess firearms, loss of business license, professional license and driver license, among others. Gabriel J. Chin & Richard W. Holmes, Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 705–706 (2002).
IV. RESPONSIBILITY OF COUNSEL TO ADVISE OF IMMIGRATION CONSEQUENCES

While due process should require courts to warn non-citizen defendants of immigration consequences of guilty pleas, the court is not the only avenue through which defendants receive information about pleas. Defense attorneys have an independent responsibility to non-citizen clients to inform them of immigration consequences. This duty transcends that of the trial court. Nevertheless, non-citizens seeking to withdraw guilty pleas based upon lack of advice of counsel have largely bumped into the "collateral consequences" logjam as well. The majority of courts have held that the collateral consequences doctrine extends to claims of ineffective assistance of counsel.

A. Standards for Effective Assistance of Counsel

The Sixth Amendment entitles all criminal defendants to a trial with the assistance of counsel. The Supreme Court has interpreted this right to require that assistance of counsel be "effective." Effective-ness is measured by the standard set forth in Strickland v. Washington, which established a two-prong test to determine whether counsel's actions rise to a level of incompetence such that it violates the defendant's Sixth Amendment rights. The first prong requires a demonstration that counsel's performance fell below an objective standard of reasonableness. The second prong requires a showing of prejudice such that had counsel been effective, there would have been a different outcome. The defendant has the

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165. McDermid, supra note 65, at 754 (noting that it is the defense lawyer, not the judge who must bring suppression motions). "Defense counsel is in a much better position to ascertain the personal circumstances of his client so as to determine what indirect consequences the guilty plea may trigger. Rule 11... was not intended to relieve counsel of his responsibilities to his client." Id. (quoting Michel, 507 F.2d at 466).
166. See, e.g., McDermid, supra note 65, at 758 nn.69, 81.
168. McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel.").
170. Id. at 687-88 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").
171. Id. at 687.
The burden of proving both prongs in order to set aside a plea of guilty or no contest. However, in the context of guilty pleas, this second prong is established by a showing "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have instead insisted on going to trial."

With respect to the first prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." However, critics have argued that the standard by which ineffectiveness is measured "is itself ineffective, allowing even the most egregious lawyering to pass muster." The Supreme Court has rejected adoption of detailed rules specifying what constitutes reasonable performance under the first prong. It has, however, identified "[p]revailing norms of practice" as a guide to what is reasonable. These norms are "reflected in American Bar Association standards and the like." Currently, there are several bar associations setting forth professional standards or the equivalent, practice manuals and training programs.

The American Bar Association (ABA) Defense Function Standards, as described by the Supreme Court, establish general standards for the function of defense counsel in criminal cases. As a starting point, "[d]efense counsel should conduct a prompt investigation of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." Clearly, this establishes a general norm that attorneys make inquiries into the facts that may impact consequences flowing from a possible conviction. However, the ABA Standards for Criminal Justice amplify on this point. "To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the collateral consequences that might ensue from entry of the contemplated plea." Under the guidance from this standard, even if an attorney did not consider removal a "penalty", counsel would still be obligated to discuss immigration as a collateral matter. To remove any ambiguity, the Comment for this standard specifically addresses immigration issues, stating that when a defendant faces deportation as a result of a conviction,

172. Id.
174. Strickland, 466 U.S. at 689.
175. McDermid, supra note 65, at 749.
176. Strickland, 466 U.S. at 688-89.
177. Id. at 688.
178. Id. The Court stresses, however, that such standards are only a guide. Id.
179. ABA DEF. FUNCTION STANDARD § 4-4.1(a) (1993).
180. ABA STANDARDS FOR CRIMINAL JUSTICE § 14-3.2(f) (1997).
defense counsel “should fully advise the defendant of these consequences.”\textsuperscript{181}

The ABA Model Rules of Professional Conduct also suggest that competent representation requires an attorney to investigate potential immigration consequences for their clients.\textsuperscript{182} To comply with this professional responsibility, some public defense agencies conduct training and continuing education programs for their staff attorneys to educate them about immigration consequences for their clients.\textsuperscript{183} For those not affiliated with a large public defense office, continuing legal education programs are available on this important aspect of defense practice.\textsuperscript{184} Beyond such programs, many practice manuals are available to defense practitioners.\textsuperscript{185} One such practice manual, was cited by the United States Supreme Court in \textit{INS v. St. Cyr}\textsuperscript{186} in noting that “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.”\textsuperscript{187} The Supreme Court went a step further, acknowledging in a footnote that “competent defense counsel, following the advice of numerous practice guides” would advise clients of issues impacting immigration status.\textsuperscript{188} While this footnote has not been interpreted as setting a standard of competence in this area, it is a tacit nod to the ABA Model Rules of Professional Conduct, which require attorneys to attain competence in the field of law being practiced through “necessary study” or through “the association of a lawyer of established competence.”\textsuperscript{189}

Recently, \textit{The Champion}, a magazine published by the National Association of Criminal Defense Lawyers (NACDL) ran a two part series delving into immigration issues that arise when practicing

\textsuperscript{181} Id. at § 14-3.2, cmt. 75 (2d ed. 1982).
\textsuperscript{182} ABA MODEL RULES OF PROF’L CONDUCT R. 1.1 (1984).
\textsuperscript{183} This author’s personal experience with the New York City Legal Aid Society, Criminal Defense Division included training and continuing education regarding changes in immigration law affecting non-citizens charged with crimes. \textit{See also} Brief of Amici Curiae National Association of Criminal Defense Lawyers et al., 2000 U.S. Briefs 767 at 9, INS v. St. Cyr, 533 U.S. 289 (2000) (No. 00-767) (describing the training programs at the Legal Aid Society, programs conducted by the California Bar Association, Criminal Law Section, and training for federal defenders conducted by the Federal Judicial Center, among others).
\textsuperscript{184} Id.
\textsuperscript{187} Id. at 322.
\textsuperscript{188} Id. at 323 n.50.
\textsuperscript{189} ABA MODEL RULES OF PROF’L CONDUCT R. 1.1 (1984).
The article cites the ABA Criminal Justice Standards, advising practitioners to "fully advise the defendant[s] of [immigration] consequences." It warns of the importance to determine the citizenship of every client, rather than assume merely because a client speaks English without an accent or has a surname that does not sound as though it is of foreign origin that she is a United States citizen. It goes on to warn practitioners that it is "widely recognized as a violation of an attorney's professional duty to her client not to advise her of the immigration consequences of a plea or conviction." The article also provides substantive information on immigration status, types of adverse immigration actions, grounds for deportation and inadmissibility, and specifics about aggravated felonies. With this and other readily available resources, attorneys conforming to the professional standards of the ABA Model Rules of Professional Conduct have ample information easily accessible to educate themselves on immigration issues.

B. Courts’ Views of Whether Attorneys Must Advise of Immigration Consequences

Even though there are materials and programs readily available to educate attorneys about the impact of immigration law on criminal defense practice, and even though national organizations have established standards of practice addressing this issue, nationwide there remains a wide range of conduct that technically complies with judicially enunciated standards for "effective counsel." Courts generally approach this issue from one of three perspectives. The first, and most widely held view, is that attorneys are not required to address immigration consequences with their clients at all. The second view is that although attorneys have no affirmative duty to investigate and advise clients on such matters,
they must not misinform their clients of immigration consequences. The third view essentially adopts the standards articulated by the ABA and other professional organizations, holding that criminal defense attorneys must affirmatively investigate and advise clients of immigration consequences.

Of the courts in the first group, relief is generally denied to defendants whose attorneys have failed to advise them of deportation risks based upon the rationale that removal is a collateral consequence. By adopting the same reasoning courts apply to themselves in Rule 11 type cases, courts fail to recognize that attorneys have a duty to their clients that transcends that of the court. Sadly, this widely followed view holds attorneys to an unacceptably low standard of practice that is inconsistent with the ABA standards and runs contrary to the practices defined as the "professional duty"

196. Id.
197. Id.
198. See United States v. Gonzalez, 202 F.3d 20, 25 (1st Cir. 2000); United States v. Quin, 836 F.2d 654, 655 (1st Cir. 1988); United States v. Santelises, 509 F.2d 703, 704 (2d Cir. 1975); United States v. DeFreitas, 865 F.2d 80, 82 (4th Cir. 1989) (holding that "[a]lthough, ideally, counsel will inform the client of the possible consequences, failure to do so does not rise here to a level of unreasonableness"); United States v. Banda, 1 F.3d 354, 355 (5th Cir. 1993) ("We hold that an attorney's failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel."); United States v. George, 869 F.2d 333, 337 (7th Cir. 1989) (stating "[w]hile the Sixth Amendment assures an accused of effective assistance of counsel in 'criminal prosecutions,' this assurance does not extend to collateral aspects of the prosecution[such as deportation]"); Varela v. Kaiser, 976 F.2d 1357, 1357 (10th Cir. 1992) (stating that failure to advise a client that deportation, a collateral consequence, may result from guilty plea does not constitute ineffective assistance of counsel); United States v. Campbell, 778 F.2d 764, 768 (11th Cir. 1985); Oyekoya v. State, 558 So. 2d 990 (Ala. 1990); Tafoya v. State, 500 P.2d 247, 252 (Alaska 1972) ("Superficially, there may appear to be an anomaly in holding both that defense counsel has the burden of informing his client of collateral consequences and that failure to inform of such consequences does not constitute denial of the effective assistance of counsel. The appearance of anomaly results from the collateral character of the consequence of deportation."); State v. Rosas, 904 P.2d 1245, 1247 (Ariz. Ct. App. 1995) (holding that defense attorneys are not required to inform defendant of the collateral possibility of deportation arising out of entry of plea); Matos v. United States, 631 A.2d 28, 31-32 (D.C. 1993); Mott v. State, 407 N.W.2d 581, 583 (Iowa 1987); Daley v. State, 487 A.2d 320, 322-23 (Md. App. 1985); State v. Chung, 510 A.2d 72, 76-77 (N.J. Super. Ct. App. Div. 1986); State v. Dalman, 520 N.W.2d 860, 863-64 (N.D. 1994) (failure to advise of the effect of collateral consequences does not constitute ineffective assistance of counsel); Commonwealth v. Frometta, 555 A.2d 92 (Pa. 1989); State v. McFadden, 884 P.2d 1303, 1305 (Utah App.1994); People v. Boodhoo, 191 A.D.2d 448 (N.Y. App. Div. 1993); State v. Santos, 401 N.W.2d 856, 858 (Wis. Ct. App. 1987).

199. See supra note 165 and accompanying text. Notwithstanding the various approaches taken by different courts, the Supreme Court has twice declined to address the issue of whether a defense attorney has a duty to inform a non-citizen client of immigration consequences. Rodrigues v. State, 572 N.E.2d 961 (Ill. 1991), cert. denied, 502 U.S. 1066 (1992); Varela v. Kaiser, 976 F.2d 1357 (10th Cir. 1992), cert. denied, 507 U.S. 1039 (1993).
of defenders. It effectively relieves attorneys of the responsibility to address an issue that may be of the greatest interest to some clients.

The second group, prohibiting misinformation about immigration consequences, could be best characterized as a "don't ask—don't tell" policy. Attorneys are under no affirmative obligation to inform clients of immigration consequences, but if they do offer advice, it must not mislead the defendant. While this is an improvement on the first position in that it recognizes that the attorney bears some responsibility, it is still inadequate. This second position is flawed for two reasons.

First, as a matter of policy, this approach discourages attorneys from offering advice on a matter of critical importance to many clients. Imagine the following scenario. An attorney knows she is not required, on her own initiative, to offer her non-citizen client advice about deportation consequences of a potential criminal conviction. While she wishes to advise her client on these issues, she knows that if her advice turns out to be incorrect, her representation may be deemed "ineffective." Such knowledge will naturally create a chilling effect on the attorney's decision to offer advice.

The second problem with this approach is that it places an affirmative duty to discern complex legal issues on a class of clients least able to handle that duty. Clients rely on attorneys' expertise to spot and address legal issues that arise during representation. This logically includes consequences that flow from pleas. Insisting that the defendant spot legal issues for the attorney turns the attorney-client relationship on its head. This is particularly true for foreign-born defendants. Requiring a class of defendants, who may have the least amount of familiarity of all defendants with the American legal system, to identify legal issues on behalf of the professional on whom they are relying to do just that is an obfuscation of professional duty.

200. See supra note 193 and accompanying text.

201. See supra note 187 and accompanying text.


203. See Brief of Appellant at 18, State v. Muriithi, 46 P.3d 1145 (Kan. 2002) (No. 01-87213-A). See also McDermid, supra note 65, at 754 (asserting that requiring non-citizen clients to raise the question to their attorneys creates disparate treatment for them compared to citizen defendants and should be considered discrimination based upon alienage).
The third group establishes a better standard of representation for criminal defense attorneys. Under this view, attorneys have an affirmative duty to offer advice about immigration consequences flowing from criminal convictions. Nevertheless, within this group, there is some variance concerning attorney's advisory responsibilities. For example, California courts have established a high standard, holding that even a generic warning to a non-citizen client is insufficient counsel. Under *People v. Soriano*, once an attorney is aware of the alienage of her client, she has a duty to investigate how immigration law will bear upon the criminal case. Failure to do so will render the attorney's conduct unreasonable and will satisfy the first step of the *Strickland* test. In Oregon, that state's high court determined that deportation is a "legal consequence" of a guilty plea within the meaning of the state constitution. While holding that the trial court was not required to issue any specific advisory of these consequences, the court in *Lyons v. Pearce* held that defense counsel must. The court reasoned that failure to do so deprived the defendant of effective assistance of counsel and violated an Oregon statute governing the lawyer's role in advising clients about criminal pleas.

Within this third category, the Colorado courts accept a lesser standard. The obligation to advise of immigration consequences is conditioned upon the attorney's knowledge that the defendant is not a citizen. The case of *People v. Pozo* held that when an attorney "is aware that his client is an alien, he may reasonably be required to investigate relevant immigration law." The standard of

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205. *See id.* at 335–336 (1987). ("Defendant received only a pro forma caution from his attorney about the deportation consequences of his guilty plea. Furthermore, whatever advice his counsel did give him was not founded on adequate investigation of federal immigration law. Because he was not adequately advised of the immigration consequences of his plea defendant has been prejudiced by the institution of deportation proceedings against him. We conclude that defendant was deprived of effective assistance of counsel in entering his guilty plea and should be allowed to withdraw that plea.").
207. *Id.* at 974 (interpreting OR. REV. STAT. § 135.385(2)[d] (1999) to mean that although the trial court does not have to issue an oral admonition, it must be satisfied that the defendant has been informed of potential immigration consequences of a plea).
208. *Id.* at 976 (citing OR. REV. STAT. § 135.425 (1985)). The statute codified established professional ethics regarding the role of defense attorneys when counseling about plea options. However, failure to conform to this statute, by itself, was not sufficient to give rise to relief. Relief was granted due to counsel's failure to provide constitutionally required effective assistance. "One function a criminal defense attorney performs for a client is to disclose the consequences of a guilty plea and conviction. For non-citizen defendants, awareness of the possibility of deportation is necessary to an informed plea." *Id.* at 977.
knowing whether the client is an alien is evaluated by whether there was "sufficient information to form a reasonable belief that the client" was not a citizen.\textsuperscript{210}

The shortcoming of limiting advice to instances in which attorneys know or should know whether the defendant is a non-citizen is that the attorney should always know, except in instances in which the client has supplied inaccurate information. Determining citizenship of clients is not only a good practice for criminal defense attorneys, it should be a required practice. As mentioned, on occasion people who are presumed to be United States citizens are not. The only reliable way to make this determination is for the attorney to inquire. Given that criminal defense organizations promote this practice,\textsuperscript{211} coupled with the magnitude of the consequences that can arise from failure to ask into a client's immigration status, failing to inquire is reckless.

Another shortcoming of this approach comes with application of this standard on review. Courts applying this standard have found that the attorney did not have reason to know the client's alienage when the record demonstrates there was ample reason to inquire. \textsuperscript{212} Additionally, relieving the attorney of the duty to inquire about citizenship status once again presumes that a non-citizen

\begin{footnotesize}
\textsuperscript{210} Id. \\
\textsuperscript{211} See supra notes 190-93 and accompanying text. In People v. Soriano, 240 Cal. Rptr. 328, 335 (Cal. Ct. App. 1987), the court noted with approval the "Minimum Standards Practice" of Amicus Brief submitter, San Francisco Public Defender, which requires its staff attorneys to ascertain "what the impact of the case may have on [the client's] immigration status in this country." Id. (citing San Francisco Public Defender, MINIMUM STANDARDS OF PRACTICE). Additionally, when this author was trained at The New York City Legal Aid Society, Criminal Defense Division the standard policy was to determine citizenship of every client. See also Mojica v. Reno, 970 F. Supp. 130, 177 (E.D.N.Y 1997); Taylor & Wright, supra note 19, at 1174 n.147, 1178 n.165.

\textsuperscript{212} See State v. Muriithi, 46 P.3d 1145 (Kan. 2002). In Muriithi, the Kansas Supreme Court held that the record did not demonstrate that the defense attorney "knew or should have known" that the defendant was an alien even though the judge ascertained in open court that the defendant was from Kenya. Id. at 1151. However, the Kansas Supreme Court was swayed by the fact that the defendant did not specifically mention citizenship. Although the defense attorney was present in the courtroom when the defendant had this exchange with the trial judge, the Kansas high court held "it may not be concluded from the record that the courtroom exchange should have alerted defense counsel to make her own inquiry about Muriithi's citizenship." Id. It is important to note that the Kansas Supreme Court's written opinion states that although defense counsel was present in the courtroom, she was not yet appointed to represent the defendant and had not necessarily heard the exchange. Appellate counsel submitted a motion to correct the decision, arguing that the record clearly demonstrated that defense counsel was appointed immediately before, not after, the defendant's exchange with the court. See Appellant's Motion for Modification, State v. Muriithi, 46 P.3d 1145 (Kan. 2002) (No. 01-87213-AS) (on file with the Kansas Supreme Court). The court denied the motion without elaboration. See State v. Muriithi, No. 01-87213-AS (Kan. Sup. Ct. July 11, 2002) (order denying rehearing or modification).
\end{footnotesize}
client will have the savvy to appreciate the significance of the criminal case upon his immigration status without being asked. 213

Opponents of mandating that attorneys inquire regarding the immigration status of their clients argue that doing so requires unpleasant determinations as to what ethnic and stereotypical attributes create reason to question alien status. 214 The basis of this argument is that it is repugnant to assume that one person may not be a citizen while assuming that another is. This criticism is easily deflected by requiring that attorneys determine the citizenship status of all clients, as urged by the NACDL. 215 In this manner, attorneys neither engage in repugnant generalizations nor do they omit important advice by making incorrect assumptions.

C. Legislation Requiring Courts and Attorneys to Inform of Immigration Consequences

While courts have been considering these issues, some state legislatures have addressed the intersection of immigration law and criminal procedure, enacting laws that either require a judge to issue an advisory during the plea colloquy or require attorneys to advise non-citizen client of deportation and exclusion consequences. 216 California’s Penal Code provides a good example of a requirement that the judge admonish the defendant of immigration consequences:

§ 1016.5. Advisement concerning status as alien; reconsideration of plea; effect of noncompliance

(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States,

213. See supra note 203 and accompanying text.
215. See supra note 192 and accompanying text.
216. See supra note 13.
or denial of naturalization pursuant to the laws of the United States.

(b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after [the effective date of the statute], the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.217

Under this provision enacted in 1978, the court's failure to advise a defendant of potential immigration problems may permit the defendant to withdraw the plea under certain circumstances.218 Similarly, a Massachusetts statute requires the trial judge to issue a comparable warning on the record when accepting the plea of a non-citizen.219 If the court fails to do so, and the defendant “at any time” shows that one of the enumerated immigration conse-

217. CAL. PENAL CODE § 1016.5 (West 1985). But note that the court’s failure to advise gives rise to relief only if the defendant can demonstrate that he or she is not an American citizen. People v. Suon, 90 Cal. Rptr. 2d 1, 3 (Cal. Ct. App. 1999). Note also that subdivision (d) of the California statute specifically states the trial judge should not ask the defendant to disclose to the court whether he or she is legally in the country. Section 1016.5(d); See also FLA. R. CRIM. P. RULE 3.172(c)(8) (West 1999) (stating that the trial judge need not inquire whether the defendant is a United States citizen but rather that this admonition be given to all defendants); see also WASH. REV. CODE ANN. § 10.40.200 (West 2002) (stating “[i]t is further the intent of the legislature that at the time of the plea no defendant be required to disclose his or her legal status to the court.”).

218. CAL. PENAL CODE § 1016.5; but see N.Y. CRIM. PROC. L. § 220.50(7) (McKinney 2002) (while New York criminal procedure requires the court to advise defendants of immigration consequences, it specifically holds that failure to do so “shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it afford a defendant any rights in a subsequent proceeding relating to such defendant’s deportation, exclusion or denial of naturalization.”).

quences may occur, the court "shall" permit the defendant to withdraw the plea.\textsuperscript{220}

Minnesota's Criminal Procedure Rules place a duty, first on the defense attorney, to advise the defendant about potential immigration consequences of the conviction and then secondly on the court to inquire of the defendant if her attorney has so informed her.\textsuperscript{221}

Before the court accepts a plea of guilty, the defendant shall be sworn and questioned by the court with the assistance of counsel as to the following . . .

10. Whether defense counsel has told the defendant and the defendant understands . . .

c. That if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.\textsuperscript{222}

This rule has the benefit of ensuring that a defendant consults with her attorney before entering a guilty plea. It also recognizes that an attorney has a duty to her client on this issue.

V. PROPOSAL FOR A CONSISTENT APPROACH

While legislatures and courts have addressed this issue in a sporadic manner, a consistent nationwide standard has eluded the bar and the judiciary. Long before IIRIRA's enactment, some jurisdictions developed practices urging that competent attorneys counsel clients about potential immigration consequences of convictions. This occurred largely in locations that have long had sizable immigrant populations.\textsuperscript{223} However, there was less need for

\textsuperscript{220} Id. Unlike ineffective assistance claims, under this statute, the defendant need not establish that had he or she knew of the consequences, he or she would not have entered the guilty plea. Commonwealth v. Mahadeo, 491 N.E.2d 601, 604 (1986).

\textsuperscript{221} Minn. Rule Crim. Proc. 15.01 (2001).

\textsuperscript{222} Id.

\textsuperscript{223} For example, California, New York and Florida have long been considered ports of entry for people immigrating to this country. Marvin H. Morse & Lucy L. Moran, Troubling the Waters: Human Cargos, 33 J. Mar. L. & Com. 1, 4 (2002) (stating that since the earliest days of immigration, newcomers arrived at Ellis Island, Boston, Baltimore, Savannah, Miami,
such practices to develop in locations that were not historically points of entry into the United States. Representation of non-citizens was not a common event for criminal defense attorneys in such locations. Consequently, a consistent need to advise non-citizens about how a conviction might impact immigration status did not evolve.

Nevertheless, over the past decade, regions such as the Plains States, which have not historically been points of entry for those coming to the United States, have seen a marked increase in the number of non-citizens joining their populations. Logically, as

New Orleans, Los Angeles, San Diego, San Francisco and Seattle). These three jurisdictions developed either professional practices or legal requirements that non-citizen defendants receive adequate warnings. The San Francisco, California Public Defender has Minimum Standards of Representation requiring staff attorneys to counsel clients accordingly. People v. Soriano, 240 Cal. Rptr. 328, 335 (Ct. App. 1987). The California Penal Code had placed a similar duty on the trial court since 1978. CAL. PENAL CODE § 1016.5 (West 2000). In 1981, a Florida Appellate Court held that deportation is a consequence of such significance that counsel's failure to advise of its potential rendered a guilty plea involuntary. Edwards v. State, 393 So. 2d 337, 600 (Fla. Dist. Ct. App. 1981), rev. den., 402 So. 2d 613 (Fla. 1981). Although the holding was subsequently called into doubt, Florida recognized the importance of advising aliens of potential deportation long before IIRIRA. The Florida Bar also encouraged attorneys to educate themselves and their client about immigration repercussions arising out of convictions. Alfred Zucaro, Jr. & Beth L. Mitchell, Criminal Convictions: The Immigration Consequences, 63 FLA. B.J. 36, 36 (May 1989) (advising criminal defense attorneys that it is their duty to advise clients of immigration consequences). The New York Legal Aid Society trained attorneys to counsel clients regarding potential impact of deportation and exclusion long before enactment of IIRIRA.

224. See supra note 223.

any population experiences an increase in size, it will also increasingly have its members encounter the criminal justice system. Consequently, while attorneys in locations such as the Plains States might rarely if ever have encountered non-citizen clients decades ago, due to increased non-citizen populations, there is now an increased likelihood that they will find themselves representing aliens charged with crimes. However, without a history of attorneys representing non-citizen clients in some of these jurisdictions, standard practices have not developed requiring attorneys to advise their clients of potential immigration pitfalls.

To address this lack of uniform standards of practice regarding the role of the attorney counseling non-citizen clients, two steps should be taken. First, bar associations for federal and state practitioners should establish clear, universal standards requiring that all defense attorneys determine the citizenship of all clients and inform non-citizens of potential immigration consequences. If the attorney is not aware of those consequences, she should engage in "necessary study" or associate with a "lawyer of established competence in the field." Next, courts need to recognize that failure to conform to this practice is unreasonable "under prevailing professional norms." Such a failure should provide sufficient evidence to establish the first prong of the Strickland test for ineffective assistance of counsel. Upon a defendant's showing that she would have pled differently if counseled according to these proposed standards, the defendant should be granted relief from her plea of guilty or no contest.

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226. *E.g.*, State v. Muriithi, 46 P.3d 1145 (Kan. 2002); Choudhary v. State, No. 99-509, 2000 WL 702382, at *1 (Iowa Ct. App. May 31, 2000) (holding that immigration problems are purely collateral to a guilty plea and that failure of an attorney to advise on this issue does not give rise to an ineffective assistance of counsel claim); State v. Ramirez, 636 N.W.2d 740 (Iowa 2001) (holding that attorney for legal permanent resident had no duty to inform of deportation consequences of a guilty plea); State v. Zarate, 651 N.W.2d 215, 221 (Neb. 2002) (stating that lawyer's failure to advise of immigration consequences of a plea does not constitute ineffective assistance of counsel in that the standard to be used is whether counsel failed to perform "as well as a criminal lawyer with ordinary training and skill in the area."); Varela v. Kaiser, 976 F.2d 1357 (10th Cir. 1992) (holding, in a habeus corpus case, that a defendant need not be advised of deportation consequences of a plea in a case where the relevant standard was whether counsel's advice was "within the range of competence demanded of attorneys in criminal cases," (quoting Hill v. Lockhart, 474 U.S. 52, 56 (1985))).


229. *Id.*

230. *Id.*
Legislative action at the federal and state level is also necessary. Congress should modify Rule 11 to parallel the provisions of California Penal Code § 1016.5291 and Massachusetts General Law chapter 278 § 29D. This will require the court to provide a uniform admonition about potential immigration consequences to all defendants who appear to enter a plea. Failure to place the admonition on the record will raise a presumption that the admonition was not given by the court. If a defendant who entered the plea without benefit of the admonition shows that adverse immigration consequences may result, the defendant should be permitted to withdraw her plea. Moreover, state legislatures that have not yet implemented such laws should do so in a manner that creates a uniform standard nationwide.

CONCLUSION

Under the INA of 1996, non-citizens convicted of even minor criminal offenses can face dire consequences, often far worse than the statutory sentence for the crime. All too often, criminal defendants who are not from the United States waive their rights to a trial without knowing that an apparently attractive plea can result in deportation and exclusion from this country. Courts throughout the nation address this issue in a variety of ways. Most do not let defendants who are unaware of deportation consequences withdraw their pleas based on that reason. The overriding rationale is that deportation is a collateral consequence, of which the defendant is not required to be informed. However, deportation is unlike other collateral consequences in its severity and certainty. If courts are unwilling to view deportation as a direct consequence, then they should recognize it as a unique type of consequence, different from all other so-called collateral consequences. Moreover, courts should recognize that due to the severity and certainty of deportation, due process requires that defendants facing the possibility of immigration sanctions stemming from a plea must be advised of that possibility before they enter that plea and give up their right to trial.

231. See supra at pp. 729-30.
232. See supra notes 219-20 and accompanying text.
233. A provision similar to the Minnesota statute requiring an attorney to provide advice of immigration consequences is also desirable. MINN. STAT. ANN. § 15.01 (West Supp. 2003). However, inclusion of such a provision would be redundant if courts universally recognized that an attorney's failure to advise constitutes ineffective assistance.
In addition to this judicial action, bar associations throughout the country should develop universal standards requiring attorneys to determine the immigration status of all clients and to properly advise non-citizen clients of deportation risks of convictions. Failure to comply with these minimum standards should form the basis of an ineffective assistance of counsel claim. Finally, legislatures, including Congress, should amend criminal procedure rules to require that all criminal defendants be advised that if they are not United States citizens, entering a plea of guilty or no contest to crimes may adversely impact their immigration status.

Giving up one's right to a trial is a significant waiver of a constitutional right. It should be done only when an individual is aware of the serious consequences that may flow from it. Practices of attorneys and the courts must ensure that the accused do not waive this important right, without first knowing that doing so can separate them from their families and the country they know of as home.