

THE LOGISTICAL AND ETHICAL DIFFICULTIES OF INFORMING JUVENILES ABOUT THE COLLATERAL CONSEQUENCES OF ADJUDICATIONS

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Within the last several years, legal scholars, policy analysts, legal practitioners, bar organizations and advocates have begun to devote substantial energy to the collateral consequences of criminal convictions. In contrast to direct consequences, which are defined as the immediate and automatic effects of criminal convictions,¹ collateral consequences are defined as the indirect sanctions that result from criminal convictions. Some of these consequences, such as ineligibility for public benefits² and the denial of voting rights,³ are imposed automatically upon the conviction. Others, including some employment-related restrictions, are imposed at the discretion of agencies that are independent of the criminal justice system. Regardless of their source, these consequences affect numerous aspects of the individual's life and, as a result, often outlast the direct consequences.⁴

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¹ These immediate and automatic effects include the minimum and maximum sentence and, in some jurisdictions, parole eligibility and the imposition of fines. See, e.g., *Duke v. Cockrell*, 292 F.3d 414, 417 (5th Cir. 2002) (imposition of fine is a direct consequence of criminal conviction); *Michel v. United States*, 507 F.2d 461, 463 (2d Cir. 1974) (holding that defendant must be advised of the parole term that automatically attaches to sentence).

² See 21 U.S.C. § 862a (2000).

³ Voting restrictions are matters of state law. For a comprehensive description of each state's laws, see SENTENCING PROJECT, FELONY DISENFRANCHISEMENT IN THE UNITED STATES (2005), <http://www.sentencingproject.org/pdfs/1046.pdf>.

⁴ See JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 63 (2005) ("Although these criminal sanctions are not as obvious as some others, they may in fact be more pernicious because they make it more difficult for ex-felons to gain a foothold in free society."); Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1705 (2003) (observing that collateral consequences extend long past the imposed sentence).

Commentators have analyzed collateral consequences within the traditional theories of punishment,⁵ argued that they are overly broad and non-individualized,⁶ and critiqued the lack of information provided to criminal defendants regarding these consequences prior to their onset.⁷ As a result, a number of legal scholars, legal organizations and policy analysts have urged that these consequences be narrowed so that only those that relate directly to the underlying conviction attach.⁸ Many of these commentators have also argued that defense attorneys and/or trial courts have constitutional and/or ethical obligations to inform and educate defendants about these consequences.⁹ In addition, because collateral consequences are dispersed throughout federal and state statutes and regulations—therefore making it virtually impossible to marshal the collective consequences that attach to particular convictions—bar associations, public defender offices and at least two law school programs have begun to assemble and catalog the collateral consequences that attach in their respective jurisdictions.¹⁰ The aim of these organizations is to educate various constituencies about the existence and scope of collateral consequences.

⁵ See, e.g., Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 26 (Marc Mauer & Meda Chesney-Lind eds., 2002) (opining that collateral consequences seem consistent with deterrence, retribution, prevention, and incapacitation, but arguing that any efforts to test the effects of these obstacles in the context of these theories would be stymied by “the paucity of relevant data” regarding the reach of these consequences); see generally Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 *STAN. L. & POL’Y REV.* 153 (1999) (generally analyzing these consequences in the context of punishment theories).

⁶ See, e.g., Christopher Mele & Teresa A. Miller, *Collateral Penalties as Techniques of Social Policy*, in *CIVIL PENALTIES, SOCIAL CONSEQUENCES* 10 (Christopher Mele & Teresa A. Miller eds., 2005) (arguing that “new[er] and harsher collateral civil penalties . . . are grossly disproportionate and noticeably disconnected from the felony crimes committed”); Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons’ Challenges to Disenfranchisement and Employment Discrimination*, 56 *STAN. L. REV.* 1597, 1598-99 (2004) (observing that non-violent, first-time offenders often confront the same collateral consequences as those with more severe criminal records).

⁷ See generally Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 *CORNELL L. REV.* 697 (2002) (critiquing case law holding that defendants need not be advised of collateral consequences).

⁸ See, e.g., ABA Standards for Criminal Justice (third edition) Collateral Sanctions and Discretionary Disqualification of Convicted Persons Standard 19-2.2 (2004) [hereinafter ABA Standards on Collateral Sanctions] (collateral consequences should not be imposed upon an individual “unless [the legislature] determines that the conduct . . . provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified”).

⁹ See Chin & Holmes, *supra* note 7, at 704 (arguing that defense attorneys should inform their clients about collateral consequences); Priscilla Budeiri, Comment, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 *HARV. C.R.-C.L. L. REV.* 157, 192 (1981) (arguing that federal trial judges should inform defendants of collateral consequences); see generally John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This be Grounds to Withdraw a Guilty Plea?*, 2003 *U. MICH. J.L. REFORM* 691 (2003) (arguing that trial court should inform defendants of possible deportation consequence).

¹⁰ E.g., Kimberly R. Mossoney & Cara A. Roecker, *Ohio Collateral Consequences Project: Executive Summary*, 36 *U. TOL. L. REV.* 611 (2005) (collecting the various collateral consequences of criminal convictions in Ohio); CIVIL ACTION PROJECT, *THE BRONX DEFENDERS*,

The vast majority of the literature and efforts pertaining to collateral consequences have focused on adult offenders.¹¹ Indeed, the range of collateral consequences affecting adults has broadened considerably over the past couple of decades, largely as a result of the “war on drugs” and “tough on crime” movements that flourished over that time.¹² Moreover, some commentators have noted the convergence between collateral consequences and the escalating numbers of individuals who are returning to their communities from correctional facilities.¹³ These record numbers of reentering individuals have caused various groups to focus critically on the reentry component, particularly because of the public safety concerns tied to high recidivism rates.¹⁴

Comparatively little attention has been focused on, or has even included, the ways in which collateral consequences impact juvenile offenders. However, as with adults, record numbers of juveniles—now approximately 100,000—are released each year from secure and residential facilities.¹⁵ Moreover, as with adults, these juveniles often confront an array of collateral consequences that very much impact their ability to reenter their communities productively. Although a few commentators have detailed collateral conse-

THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE: A GUIDE FOR CRIMINAL DEFENSE LAWYERS AND OTHER ADVOCATES FOR PERSONS WITH CRIMINAL RECORDS (2005), at http://www.nlada.org/DMS/Documents/1110924022.69/Consequences%20of%20Criminal%20Proceedings_Mar05.pdf; NANCY FISHMAN, NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE, BRIEFING PAPER: LEGAL BARRIERS TO PRISONER REENTRY IN NEW JERSEY (2003), http://www.njsj.org/reports/barriers_report.html; CHRISTOPHER JOHNS, COLLATERAL CONSEQUENCES OF CONVICTIONS: THE UNSEEN IMPACT ON CLIENTS, FAMILIES AND BARRIERS TO COMMUNITY REENTRY, FOR THE DEFENSE (Training Newsletter of the Maricopa County Public Defender’s Office) (2004) (on file with author); THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA RE-ENTRY PROGRAM, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN THE DISTRICT OF COLUMBIA: A GUIDE FOR CRIMINAL DEFENSE LAWYERS (2004), <http://pdsdc.org/communitydefender/collateral%20consequences%20to%20criminal%20convictions%20in%20DC.pdf>; REENTRY OF EX-OFFENDERS CLINIC, UNIVERSITY OF MARYLAND SCHOOL OF LAW, A REPORT ON THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN MARYLAND (2004, Revised and Updated 2005) (on file with author); WASHINGTON DEFENDER ASSOCIATION, BEYOND THE CONVICTION: WHAT DEFENSE ATTORNEYS IN WASHINGTON STATE NEED TO KNOW ABOUT COLLATERAL AND OTHER NON-CONFINEMENT CONSEQUENCES OF CRIMINAL CONVICTIONS (2004), <http://www.defensenet.org/SN/updatedbeyondtheconfiction.pdf>.

¹¹ The same holds true for the literature and discussions pertaining to reentry. *See, e.g.*, DANIEL P. MEARS & JEREMY TRAVIS, THE DIMENSIONS, PATHWAYS AND CONSEQUENCES OF YOUTH REENTRY 2 (2004), <http://www.urban.org/uploadedPDF/410927%5FYouth%5FReentry.pdf>. (observing that most of the attention with regard to reentry has focused on adults).

¹² *See, e.g.*, Travis, *supra* note 4, at 67-70 (illustrating that state and federal laws passed in the 1980’s and 1990’s expanded the scope of collateral consequences); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 259 (2002) (indicating that drug offenses bring about a disproportionate share of collateral consequences).

¹³ The number of adults leaving correctional facilities has increased dramatically over the past decade, now reaching 650,000 annually. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, LEARN ABOUT REENTRY, <http://www.ojp.usdoj.gov/reentry/learn.html>.

¹⁴ *See* JAMES P. LYNCH & WILLIAM J. SABOL, PRISONER REENTRY IN PERSPECTIVE 2, 14 (2001), http://www.urban.org/UploadedPDF/410213_reentry.pdf (connecting the reentry of formerly incarcerated individuals with public safety concerns).

¹⁵ BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, LEARN ABOUT REENTRY, <http://www.ojp.usdoj.gov/reentry/learn.html> (citation omitted).

quences that potentially attach to juvenile adjudications,¹⁶ the juvenile justice literature—unlike the corresponding literature on the adult criminal justice system—has not explored the ways in which lawyers and/or courts could (or should) inform juvenile defendants of these consequences.

This Article will attempt to add to the emerging literature and practices related to collateral consequences in the adult context by arguing that defense attorneys should inform juveniles of the collateral consequences of their adjudications as part of the guilty plea or sentencing process. In so arguing, however, this Article will assert that there are ethical and logistical issues unique to the juvenile justice process that present difficulties in conveying this information. Specifically, the Article will explore questions regarding the extent to which juveniles can be expected to understand the long-term effects of the collateral consequences of their adjudications, as well as the extent to which the juveniles' families should be involved in assessing plea bargains and other strategies in light of these consequences. This Article does not aim to provide concrete solutions to these ethical and logistical difficulties; rather, it seeks to stimulate discussions and analyses of these issues, which may ultimately result in effectively incorporating collateral consequences into juvenile representation.

I. THE COLLATERAL CONSEQUENCES OF JUVENILE ADJUDICATIONS

As with adult convictions, several collateral consequences potentially attach to juvenile adjudications. While some consequences are unique to adult convictions, others apply to both adult convictions and juvenile adjudications. For instance, as with adults, juveniles could be disqualified from residing in public housing because of their adjudications. Professor Kristin Henning has illustrated that some housing authorities, in addition to conducting background checks for adult applicants, can investigate whether any member of the family unit, including a juvenile member, has been convicted of specific disqualifying offenses.¹⁷

Juvenile adjudications may also limit future employment opportunities. For example, adjudications could impact an individual's eligibility to serve in the military.¹⁸ As a result, adjudications can directly affect juveniles' future economic mobility. Additionally, adjudications for certain sex offenses may lead to requirements that the juvenile register as a sex offender, and be subject to community notification provisions.¹⁹

¹⁶ See generally Henning, *infra* note 17; Shepherd, *infra* note 18.

¹⁷ Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities be Notified?*, 79 N.Y.U. L. REV. 520, 570 (2004) (providing examples of housing authorities that check juvenile records). This consequence perhaps best illustrates the ways that these consequences can affect families, as the disqualification extends to the family unit.

¹⁸ Robert E. Shepherd, *Collateral Consequences of Juvenile Proceedings: Part II*, 15 CRIM. JUST. 41 (Fall 2000) (explaining how juvenile adjudications could potentially impact eligibility for military service).

¹⁹ See Henning, *supra* note 17, at 537 n.92 (citing, *inter alia*, a couple of state statutes requiring juveniles to register as sex offenders); see also Daniel M. Filler, *Silence and the*

Also, juvenile adjudications may be used to enhance future sentences. For example, in those states with “three-strike laws”, juvenile adjudications can be counted as a strike in certain instances.²⁰ Moreover, a past juvenile adjudication may affect sentencing in a future criminal proceeding by factoring into whether the individual is eligible for classification as a juvenile and reduced sentencing.²¹

Lastly, juveniles can face consequences that are unique to their status as juveniles. Specifically, juvenile adjudications can impact immediate educational opportunities. For example, public schools, acting pursuant to zero tolerance policies, often expel students who have been adjudicated in juvenile court.²² As a result, juveniles can lose both short and long-term opportunities because of their involvement with the juvenile justice system.

II. COMMENTATORS, COURTS, AND COLLATERAL CONSEQUENCES

Several commentators have written about the potentially life-spanning effects of collateral consequences. Despite the longstanding effects, however, commentators have observed that criminal defendants are often left unaware of these consequences until their onset.²³ As a general rule, neither defense attorneys nor trial courts are required to inform and/or advise defendants about these consequences.²⁴ As a result, defendants often plead guilty to criminal offenses or are otherwise sentenced, aware only of the direct consequences that will attach immediately to their convictions, while wholly unaware of these collateral—and, in many instances, more sustained—consequences.

Numerous appellate courts have addressed claims brought by appellants seeking to overturn their convictions based on the absence of information provided to them regarding the relevant consequence(s) that have subsequently attached to their convictions. The appellants have claimed that their unawareness of the collateral consequences stemming from their convictions rendered their guilty pleas invalid. Some of these appellants have argued that defense counsel had an affirmative duty to inform them of the relevant collateral consequences and that counsel’s failure to do so violated the appellants’ Sixth

Racial Dimension of Megan’s Law, 89 IOWA L. REV. 1535, 1561 (2004) (noting that in many states juveniles must be adjudicated as adults to be subject to registration requirements).

²⁰ See, e.g., CAL. PENAL CODE § 667(d)(3) (1999) (setting out circumstances in which a prior juvenile adjudication could count as a “strike”); LA. REV. STAT. ANN. § 15:529.1(A)(1)-(2) (2005) (setting out the specific prior juvenile adjudications that will count as a “strike”); TEX. PENAL CODE ANN. § 12.42(f) (2003) (stating a juvenile adjudication for a felony offense that results in commitment to the Texas Youth Commission is deemed a “final felony conviction” for purposes of future enhanced sentencing).

²¹ If the juvenile is convicted as an adult the range of collateral consequences facing adults could potentially attach. This Article, however, is limited to those consequences that attach to juvenile adjudications.

²² See Henning, *supra* note 17, at 577-79 (providing examples of state notification statutes and explaining how students can be expelled for criminal activity).

²³ See, e.g., Charles F. Wilson et al., *What the Courts May Not be Telling Defendants: Collateral Consequences of Guilty Pleas in the Massachusetts Criminal Justice System*, BOSTON BAR J., Jan./Feb. 2003, at 10, 11 (noting that collateral “consequences often [reach past] those identified . . . during plea colloquies” and are often unexpected by defendants).

²⁴ See Chin & Holmes, *supra* note 7, at 704-09.

Amendment right to receive effective assistance of counsel.²⁵ Others have asserted that the trial court had a duty to inform them of the collateral consequences and that the courts' failure to do so resulted in an unknowing plea.

Appellate courts have rejected these claims nearly in total, declaring that neither trial courts²⁶ nor defense attorneys²⁷ are obligated to inform defendants of collateral consequences. In doing so, these courts have reasoned that collateral consequences are "indirect" ramifications of criminal convictions that impose "civil" rather than "criminal" penalties.²⁸ Moreover, courts have observed that many of the penalties are imposed by agencies independent of the criminal justice system.²⁹ As a result, courts find that these penalties do not constitute *criminal punishment*. Thus, courts have held that neither attorneys nor courts are under any duty to inform defendants of collateral consequences of conviction. An attorney's failure to inform his client of collateral consequences when advising the client about the ramifications of pleading guilty is not ineffective assistance of counsel.³⁰ Likewise, trial judges do not render defendants' pleas unknowing by failing to inform the defendants of collateral consequences when either accepting guilty pleas or pronouncing sentences.³¹

²⁵ U.S. CONST. amend. VI.

²⁶ See, e.g., *People v. Boespflug*, 107 P.3d 1118, 1121 (Colo. Ct. App. 2004) (trial court not required to inform defendant of losing right to vote while incarcerated, as this penalty is an indirect consequence that does not constitute punishment); *People v. Norris*, 767 N.E.2d 904, 907 (Ill. App. Ct. 2002) (trial court not obligated to warn defendant about possibility of civil commitment); *Commonwealth v. Duffey*, 639 A.2d 1174, 1176 (Pa. Super. Ct. 1994) (trial court not obligated to inform defendant that it has the power to suspend his or her driver's license following conviction).

²⁷ See *Chin & Holmes*, *supra* note 7, at 699 (documenting the extent to which federal and state courts have held that attorneys are not obligated to inform defendants of collateral consequences).

²⁸ See, e.g., *Bussell v. State*, 963 P.2d 1250, 1253-54 (Kan. Ct. App. 1998) (holding that neither trial court nor defense counsel is required to inform defendant about the Kansas Sexually Violent Predator's Act because the Act is civil, not criminal); *Duffey*, 639 A.2d at 1175 (defendant had no right to be informed that guilty plea to underage drinking would result in license suspension, as this sanction was a civil consequences rather than a criminal penalty).

²⁹ See, e.g., *Moore v. Hinton*, 513 F.2d 781, 782-83 (5th Cir. 1975) (defendants in Alabama are not required to be informed that pleading guilty to driving while intoxicated will result in driver's license suspension, as this penalty is imposed during a separate proceeding by the Alabama Department of Public Safety); *Commonwealth v. Shindell*, 827 N.E.2d 236, 238 (Mass. App. Ct. 2005) (sex offender registration is a collateral consequence of which defendant need not be informed before pleading guilty because the requirement is not automatic and the determination of whether or not the defender would have to register is made by an independent agency).

³⁰ See, e.g., *State v. Carney*, 584 N.W.2d 907, 910 (Iowa 1998) (counsel's failure to inform defendant that plea to operating vehicle while intoxicated would possibly result in driver's license revocation did not constitute ineffective assistance, as revocation is a collateral consequence); *Ames v. Johnson*, No. CL04-413, 2005 WL 820305, at *3 (Va. Cir. Ct. Mar. 28, 2005) (trial counsel had no professional duty to inform client about the civil commitment process under Virginia's Sexually Violent Predators Act because such commitment does not automatically follow guilty plea, "but, rather, from a separate civil proceeding").

³¹ Some courts have also highlighted logistical reasons for excluding collateral consequences from the criminal process. See, e.g., *United States v. Yearwood*, 863 F.2d 6, 8 (4th Cir. 1988) (warning that requiring defense counsel to advise clients about collateral conse-

Several commentators have critiqued these court decisions and have argued for the inclusion of collateral consequences into the advisory process. Some commentators have taken issue with the indirect/direct distinction and have argued that these consequences are encompassed within the punishment that will ultimately be imposed.³² Therefore, courts or attorneys must advise defendants of these consequences in order for defendants to make fully informed decisions about whether to plead guilty. While some commentators have argued that fundamental fairness dictates that *either* defense attorneys or trial courts inform defendants of collateral consequences,³³ most constituencies, including the American Bar Association, assert that the ethical duty to provide defendants with this information rests primarily upon defense counsel.³⁴

In setting out these concerns, commentators have largely focused on the collateral consequences of adult criminal convictions, and have not incorporated the ways in which these consequences can attach to juvenile adjudications. However, as with adult convictions, collateral consequences follow juvenile adjudications. Also, as with adult convictions, collateral consequences are not considered legally relevant to juvenile adjudications. Unlike in the adult context, however, the case law regarding the obligations of attorneys to inform juveniles of collateral consequences is minimal. There are few reported decisions that address collateral consequences in the juvenile context, and they concern very narrow issues.

For instance, *Commonwealth v. Albert A.* involved two juveniles who pled guilty to sexually related offenses.³⁵ Subsequent to the juveniles' pleas, the Massachusetts legislature passed the Sex Offender Registration and Notification Act, pursuant to which the two juveniles were required to register as sex offenders.³⁶ Both challenged their guilty pleas on the ground that they would not have entered their pleas had they known that they would have subsequently been required to register.³⁷ After reiterating the general rule that defendants need not be informed of collateral consequences, the Court held that the Act's

quences "would place [an] unreasonable burden on . . . counsel to ascertain . . . the[se] . . . consequences of a guilty plea . . .").

³² Mele & Miller, *supra* note 6, at 11 (arguing that collateral consequences "function to continue *criminal* punishment") (emphasis in original); Travis, *supra* note 4, at 64 (arguing that collateral consequences constitute punishment); Eric Blumenson & Eva S. Nilsen, *The Law's Treatment of the Disadvantaged: How to Construct an Underclass or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 82-83 (2002) (mentioning various collateral consequences and arguing that, "[i]n short, you will be branded a kind of untouchable—a caste status that any layman (but not the law) would recognize as an extra layer of punishment").

³³ See Chin & Holmes, *supra* note 7, at 704; Francis, *supra* note 9, at 691; Budeiri, *supra* note 9, at 192.

³⁴ See ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 8, at Standard 19-2.3 cmt. (asserting that this duty rest primarily with defense counsel).

³⁵ *Commonwealth v. Albert A.*, 729 N.E.2d 312 (Mass. App. Ct. 2000).

³⁶ *Id.* at 313.

³⁷ *Id.* at 314.

registration and notification provisions were “but one of many contingent or collateral consequences of such an adjudication.”³⁸

III. WHAT SHOULD BE THE LAWYER’S ROLE IN THE JUVENILE COLLATERAL CONSEQUENCES CONTEXT?

Collateral consequences greatly impact the lives of individuals with criminal records, as well as, in many instances, the lives of their families.³⁹ These consequences, both individually and collectively, constrict the individual’s social, economic and political access and therefore impede the individual’s ability to reintegrate successfully into his or her community upon release.⁴⁰ Moreover, these consequences exacerbate the stigma that follows criminal convictions and incarceration.⁴¹ For these reasons, several commentators have observed that collateral consequences long outlast the formal criminal sentence and potentially impact all aspects of the individual’s life.⁴²

While, as noted above, commentators have argued that defendants should be informed of collateral consequences, they have also recognized that substan-

³⁸ *Id.* Similarly, the Texas Court of Appeals held that a thirteen year-old juvenile was not required to be informed of a mandatory registration requirement, as “the Sexual Offender Registration Program [is] remedial rather than punitive and the consequences of registration [are] collateral rather than direct.” *In re B.G.M.*, 929 S.W.2d 604, 606-07 (Tex. App. 1996). Subsequent to *B.G.M.*, the Texas legislature amended its statute setting out the warnings the trial court must provide the defendant prior to accepting a guilty plea, adding a provision that requires the court to admonish the defendant on several ramifications, including that he or she would be required to register as a sex offender if convicted of certain enumerated offenses. TEX. CODE. CRIM. PROC. ANN. art. 26.13(a)(5) (Vernon 2005). However, at least one Texas court, in an appeal involving an adult defendant, has subsequently maintained that the registration requirement is a collateral consequence, and that the failure to inform the defendant of the consequence constitutes harmless error. *Alvarez v. State*, 63 S.W.3d 578, 583 (Tex. App. 2001). At least one court has also held that immigration consequences constitute a collateral consequence of a juvenile adjudication. *In re E.J.G.P.*, 5 S.W.3d 868, 872 (Tex. App. 1999).

³⁹ Mele & Miller, *supra* note 6, at 21 (relating that collateral consequences “reach far beyond individuals who have come into direct contact with the criminal justice system to include their families and communities”).

⁴⁰ See, e.g., Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-offender Reentry*, 45 B.C. L. REV. 255, 272-73 (2004) (explaining the “social and civil restrictions that flow” from collateral consequences); Margaret E. Finzen, Note, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL’Y 299, 299 (2005) (observing that collateral consequences impact the social and political rights of recently released individuals and interfere with reintegration).

⁴¹ See, e.g., Dina R. Rose & Todd R. Clear, *Incarceration, Reentry and Social Capital: Social Networks in the Balance*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES AND COMMUNITIES 326-28 (Jeremy Travis & Michelle Waul eds, 2003) (relating that formerly incarcerated individuals often feel stigmatized); Henning, *supra* note 17, at 528-29 (arguing that “[w]ithout confidentiality protections, ex-offenders carry the deviant label through each phase of their lives, lack meaningful opportunities for rehabilitation, and never earn full reentry and status in the community”); Thompson, *supra* note 40, at 273, (arguing that collateral consequences “quite effectively relegate ex-offenders to the margins of legitimate society, stigmatizing them and further highlighting their separation from law-abiding members of society”).

⁴² See Travis, *supra* note 4, at 63; Love, *supra* note 4, at 1705.

tial barriers exist to providing full and complete information regarding these consequences. Specifically, the collection of consequences that can attach to a single conviction is exceedingly difficult to grasp, as they comprise a mixture of federal and state statutory law, regulatory law and local policies.⁴³

The recent focus on the collateral consequences component has led various groups to compile and study the range of consequences that could potentially impact individuals. Most prominently, the American Bar Association has adopted standards regarding these consequences, among which calls for each jurisdiction to assemble its various consequences and codify them in a single location.⁴⁴ Furthermore, the ABA suggests that each jurisdiction implement procedures for informing defendants of these consequences as part of the guilty plea process.⁴⁵ In response to the ABA's charge, constituencies in a growing number of jurisdictions have begun to assemble their respective collateral consequences.⁴⁶

A. Juveniles Should be Informed of the Collateral Consequences That Will Automatically and/or Potentially Attach to Their Convictions.

The arguments, studies and efforts noted above have essentially been confined to the adult context. None of these arguments or studies has addressed collateral consequences in the juvenile context. Nevertheless, the notions of fairness and understanding that commentators and bar associations have urged with regard to notifying adult defendants of these consequences should naturally extend to the juvenile context.

In *In re Gault*,⁴⁷ the Supreme Court recognized the adversarial nature of juvenile delinquency proceedings and provided to juveniles constitutional rights similar to those conferred upon adults. Specifically, *Gault* gave juveniles in delinquency proceedings trial-related constitutional rights, including the rights to counsel, to remain silent, to confront witnesses, and to be notified of the charges against him or her.⁴⁸ As a result, *Gault* recognized not only the stakes involved in juvenile delinquency proceedings, but also that juveniles have a *voice* in these proceedings. In doing so, the Supreme Court recognized that, in many respects, juvenile delinquency proceedings and adult criminal proceedings are analogous.

In much the same way, the collateral consequences that attach to convictions and juvenile adjudications are analogous, as they both extend the sanctions past the individual's "direct" sentence and squarely impact reentry. Moreover, several of these consequences impact not only the individual

⁴³ See, e.g., Chin, *supra* note 12, at 254 (explaining the difficulties of grasping the range of consequences that attach to a particular offense).

⁴⁴ ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 8, at Standard 19-2.1.

⁴⁵ *Id.* at Standard 19-2.3.

⁴⁶ See generally Mossoney & Roecker, *supra* note 10; CIVIL ACTION PROJECT, THE BRONX DEFENDERS, *supra* note 10; NANCY FISHMAN, *supra* note 10; CHRISTOPHER JOHNS, *supra* note 10; THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA RE-ENTRY PROGRAM, *supra* note 10; REENTRY OF EX-OFFENDERS CLINIC, UNIVERSITY OF MARYLAND SCHOOL OF LAW, *supra* note 10; WASHINGTON DEFENDER ASSOCIATION, *supra* note 10.

⁴⁷ 387 U.S. 1 (1967).

⁴⁸ *Id.* at 32-34, 41, 55, 57.

offender, but also his or her family. As a result, the fairness issues pertaining to notice that commentators have asserted in the adult context, and the related recent efforts in several jurisdictions geared towards educating defendants and practitioners of these consequences, should extend to the juvenile context. To the extent that these consequences may or will confront juveniles as a result of their adjudications, juveniles should be notified about, and be able to consider, the true effects of their adjudications when determining how to proceed.

B. The Logistical Difficulties of Informing Juveniles of Collateral Consequences

There are compelling arguments in favor of developing mechanisms to inform juvenile defendants of the various collateral consequences that could attach to their adjudications. Indeed, the American Bar Association's Criminal Justice Section has urged, in the guilty plea context, that "The judge should separately advise the youth in open court of the conduct with which they are charged, the rights they are relinquishing, the possible sentence and other consequences of such a plea, *including collateral consequences.*"⁴⁹

However, conveying information to juveniles about these consequences seemingly presents unique logistical challenges, which the ABA does not address. Even assuming that attorneys or trial courts are able to assemble the relevant consequences that would attach to juvenile adjudications, there is a serious question as to whether the attorneys or courts could convey them to the juveniles. The scope and extent of collateral consequences can be difficult to convey to juveniles in such a way that they could understand the long-term effects these consequences could have on their lives.

A significant body of literature has examined and questioned the extent to which juveniles understand both the nature of long-term consequences and the criminal process. This literature raises serious concerns about whether juveniles can fully understand and appreciate the collateral consequences of their adjudications. Several studies indicate that the ability to make long-term decisions and understand the consequences of one's decisions increases as an individual matures. As a result, "[a]dolescents, more than adults, tend to discount the future and to afford greater weight to the short-term consequences of decisions."⁵⁰ Indeed, juveniles have been found to think through only the immediate impact of their decisions, and to ignore or minimize the future implications of those decisions.⁵¹

The general diminished capacity of juveniles bears directly on their ability to understand all aspects of the criminal process. Specifically, studies indicate that juveniles' immaturity prevents them from understanding the various stages

⁴⁹ ABA BAR ASSOCIATION CRIMINAL JUSTICE SECTION, TASK FORCE ON YOUTH IN THE CRIMINAL JUSTICE SYSTEM, *YOUTH IN THE CRIMINAL JUSTICE SYSTEM: GUIDELINES FOR POLICYMAKERS AND PRACTITIONERS* 18 (2001) (emphasis added).

⁵⁰ Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 154 (2003).

⁵¹ Patrick M. McMullen, *Questioning the Questions: The Impermissibility of Police Deception in Interrogation of Juveniles*, 99 NW. U. L. REV. 971 (2005).

of the criminal process.⁵² For instance, studies have found that juveniles often do not comprehend Miranda warnings.⁵³ Moreover, juveniles often do not understand the full complexity of criminal proceedings and therefore “may lack adequate capacities to process information and reason in making trial decisions, especially when the options are complex and their consequences far-reaching.”⁵⁴

These studies seem to correlate directly to juveniles’ abilities to understand the collateral consequences of their adjudications.⁵⁵ The main point during the criminal process at which these consequences become relevant is the plea bargaining phase. During this phase, the attorney advises the juvenile client about the advantages and disadvantages of entering a plea; this discussion generally includes the numerous trial-related rights the juvenile would waive by entering the plea. The juvenile then decides whether taking the plea is in his or her best interests.

If the attorney and the juvenile discuss collateral consequences during the plea bargain phase the juvenile must attempt to weigh the various consequences that would automatically and/or potentially attach to the underlying adjudication. This is a longitudinal analysis that considers the adjudication’s long-range affects, rather than its immediate and short-term consequences. However, given the studies that have found both that juveniles do not understand the various phases of the criminal process and that they cannot fully comprehend long-term consequences (or tend to ignore these consequences in favor of immediate consequences), serious questions should arise as to whether juveniles can adequately consider, weigh and understand these consequences when analyzing the merits of entering a guilty plea.

C. *The Unique Ethical Dilemmas of Advising Juveniles about Collateral Consequences.*

The juvenile justice system acknowledges the relative incapacities noted above. Indeed, perhaps the key distinction between the juvenile and adult criminal processes is the presumption that juveniles are relatively unable to act

⁵² See Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 ABA SEC. CRIM. JUST. 26, 27 (2000) (“The effects of immaturity are evident from the time the juvenile becomes involved in a crime, through the police interview, planning for hearings, and considering a plea.”).

⁵³ See Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1160, 1165 (1980) (documenting that the “vast majority” of juveniles younger than fifteen “misunderstood at least one of the four standard *Miranda* statements, and compared with adults, demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights,” and that fifteen- and sixteen-year-olds “did not adequately understand the *Miranda* warnings relative to an absolute standard”); see also McMullen, *supra* note 51, at 989 (arguing that juveniles are more susceptible to deceptive interrogation practices).

⁵⁴ Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 819 (2005).

⁵⁵ Indeed, one study has specifically found that juveniles often do not understand the majority of legal words and phrases that attorneys use to convey information to them. Barbara Kaban & Judith C. Quinlan, *Rethinking a “Knowing, Intelligent and Voluntary Waiver” in Massachusetts’ Juvenile Courts*, 5 J. CENTER FOR FAMILIES, CHILD. & CTS. 35, 42 (2004).

autonomously on their own behalf.⁵⁶ The system recognizes that juveniles' lack of understanding makes them particularly vulnerable throughout the juvenile process, and that they often cannot fully consider whether certain actions or decisions align with their best interests.

To offset this imbalance, the role of other actors whose interests presumably align with those of the juvenile—most notably parents—is pronounced in the juvenile context. For instance, several states require that law enforcement authorities notify parents or other “interested adults” prior to interrogating juveniles, or that courts consider as a factor whether these adults had been notified when determining the admissibility of the juvenile’s statement to these authorities.⁵⁷ Abundant case law holds that a juvenile cannot waive his or her Miranda rights outside the presence of a parent or “interested adult.”⁵⁸ Moreover, parents are often involved in all aspects of the juvenile process, such as

⁵⁶ See, e.g., *People v. Mitchell*, 810 N.E.2d 879, 882 (N.Y. 2004) (“Children of tender years lack an adult’s knowledge of the probable cause of their acts or omissions and are least likely to understand the scope of their rights and how to protect their own interests.”). These presumed incapacities extend to other areas of law. See Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1763 (1995) (providing other examples where the legal system presumes that “adolescents are inherently less mature than adults, and thus less qualified to make decisions regarding their own welfare”).

⁵⁷ See, e.g., COLO. REV. STAT. ANN. § 19-2-511(1) (West 2005) (stating as a general rule that statements or admissions of a juvenile during custodial interrogation are not admissible against the juvenile “unless a parent, guardian or legal or physical custodian of the juvenile” was present during the interrogation and advised of the juvenile’s Fifth Amendment rights); IND. CODE § 31-32-5-4(3) (2003) (requiring juvenile courts to consider whether the parent, guardian or custodian “had been informed of the delinquent act with which the child was charged or of which the child was suspected” when determining whether the waiver of rights during custodial interrogation was knowing and voluntary); see also Barbara Kaban & Ann E. Tobey, *When Police Question Children*, 1 J. CENTER FOR CHILD., FAMILIES & CTS 151 (1999) (“The underlying rationale of the interested-adult rule is that the immaturity of juveniles significantly affects both their ability to fully understand their rights and their susceptibility to the compelling atmosphere of police interrogation”).

⁵⁸ See Barry C. Feld, *Competence, Culpability and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 530 n.262 (2003) (citing cases reiterating that a parent or “interested adult” presence is a prerequisite to a juvenile’s Miranda waiver). However, states differ in the protections they afford to juveniles in this context. See Andy Clark, Comment, “Interested Adults” with Conflicts of Interest at Juvenile Interrogations: Applying the Close Relationship Standard of Emotional Distress, 68 U. CHI. L. REV. 903, 910-11 (2001) (illustrating how states have adopted a totality of circumstances approach that does not require the presence of a parent or interest adult to validate a juvenile’s waiver of his or her right against self-incrimination but considers said presence or absence to be among the factor to consider, while other states have adopted a per se rule that requires the presence of a parent or interested adult). Interestingly, the presence of a parent is by no means an indicator that the juvenile will actually assert his or her right against self-incrimination. See Kimberly Larson, Note, *Improving the “Kangaroo Courts”: A Proposal for Reform in Evaluating Juveniles’ Waiver of Miranda*, 48 VILL. L. REV. 629, 655-56 (2003) (reviewing literature suggesting that parents in the majority of situations advise their children to speak to law enforcement authorities, thereby waiving their right against self-incrimination).

weighing in on whether the juvenile should enter a guilty plea,⁵⁹ as well as trial strategies, dispositional options and treatment methods.⁶⁰

Given the pronounced role afforded to parents in the juvenile context, it seems intuitive that, under a regime that informs juveniles of the various collateral consequences, parents would have some role in helping juveniles weigh those consequences. Part of this role would seemingly require the parents to formulate *their* opinion(s) as to how their child should proceed in light of these consequences. Ideally, parents could help their child process information about the scope and effect of all consequences and provide guidance as to how to proceed.

However, there is a significant question as to whether—and, if so, to what extent—parents should be informed of these consequences, either prior to the entry of a guilty plea or during any other part of the proceeding. This question is particularly thorny because certain consequences could deleteriously affect the parents. For instance, in certain jurisdictions, a juvenile's plea to the charge could have drastic implications for his or her family if the family lives in or wishes to apply for public housing, as guilty pleas to juvenile charges can render juveniles and, by implication, their families ineligible for public housing. In essence, the family would confront the choice of living in public housing without the juvenile or pursuing alternative housing options. Similarly, a plea to a sex offense might require the juvenile to register as a sex offender. In addition to the potential housing hurdles that such registration raises, the community notification component of this requirement could potentially stigmatize the family.⁶¹ While a juvenile might or might not consider the long-range effects tied to registration, and how those effects could potentially impact his or her family, parents in this situation could conceivably consider this family-based stigma as part of the calculus, and might put other family members' needs before those of the child.

As a result, information relating to collateral consequences could potentially create a conflict among family members, between the juvenile and the family members, or between the attorney and the family members. As a result, numerous questions abound for the lawyer in this context. For instance, how is a lawyer to know that such a potential conflict exists? If the lawyer determines

⁵⁹ See, e.g., Kaban & Quinlan, *supra* note 55, at 38 (explaining how the defense attorney usually explains, albeit hurriedly, the plea offer and process to the juvenile and his or her parents).

⁶⁰ See, e.g., Thomas L. Hafemeister, *Parameters and Implementation of a Right to Mental Health Treatment for Juvenile Offenders*, 12 VA. J. SOC. POL'Y & L. 61, 82 (2004) (noting that one characteristic of the juvenile justice system is that "a range of concerned or affected individuals," including the juvenile's parents, "may assert a right to make or be involved in treatment decisions pertaining to the juvenile offender"). Kristin Henning, *It takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 837 (2006) ("Whether we represent the child against charges of petty theft or homicide, parents often remain integrally involved—for better or worse—in many of the child's case-related decisions").

⁶¹ See, e.g., Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 68 (2005) (asserting that some of the most common barriers reported by registered sex offenders are "ostracization by other residents, harassment, and emotional problems for [their] families").

that a potential conflict does exist, how can he or she adequately communicate these issues to the client?

IV. PAVING THE WAY TO CONSIDERING THESE ETHICAL AND LOGISTICAL ISSUES

The purpose of this Article is not to offer concrete “answers” to these ethical and logistical issues. Indeed, such answers are factually specific and might differ depending upon a host of variables. Rather, this Article seeks both to offer observations that might assist critical analyses of these heretofore ignored issues, and to spark related discussions.

As an initial matter, lawyers representing juveniles in delinquency matters must become aware of the various collateral consequences that attach (or potentially attach) to their clients’ adjudications.⁶² This understanding is necessary for attorneys to represent their clients in this context, by helping their clients navigate the juvenile justice system and forecasting the long-range ramifications of their adjudications.

A few commentators have suggested ways for criminal defense lawyers in the adult context to incorporate counseling with respect to collateral consequences into their practices.⁶³ Awareness of these consequences could similarly assist lawyers who represent juveniles. Moreover, such awareness has an added benefit in the juvenile context: The attorney could better assess, to some reasonable degree, whether discussing collateral consequences with the parents would create a conflict.⁶⁴ In essence, knowledge that a client’s guilty plea would likely present *family-based* collateral consequences might influence how the lawyer proceeds with the family. In situations where a plea would not foreseeably raise these obstacles, the lawyer might conclude that involving the parents throughout all aspects of the representation, including any discussions about collateral consequences, presents no risks.

Obviously, the more difficult ethical questions arise when the lawyer recognizes that his or her client’s guilty plea (or finding of guilt after trial) could present family-based collateral consequences. As a general matter, attorneys are ethically bound to follow their client’s instructions.⁶⁵ This general rule also applies in the juvenile context. Indeed, as the American Bar Association’s Model Rules of Professional Conduct set out, in those situations where the client’s youthfulness undercuts his or her ability “to make adequately consid-

⁶² See Cynthia Works, *Essay: The Impact of Civil Reentry Barriers on Indigent Defense in America*, 31 S.U. L. REV. 227, 231-32 (2004) (asserting that criminal defense attorneys must become aware of the various collateral consequences and suggesting ways for them to do so).

⁶³ See, e.g., McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 494 (2005) (describing strategies used for incorporating collateral consequences into plea negotiations).

⁶⁴ For instance, if the attorney knows that the client’s family lives or plans to live in public or government assisted housing, knowledge of whether a guilty plea would eliminate these housing options might influence the extent to which the attorney involves the parents in the representation.

⁶⁵ MODEL RULES OF PROF’L. CONDUCT R. 1.2(a) (2002) (the client decides the “objectives of representation”) [hereinafter MODEL RULES].

ered decisions in connection with a representation . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”⁶⁶ As a result, the ethical guidelines presume that “a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting [his or her] own well-being.”⁶⁷ However, given the literature that sets out the extent to which juveniles do not understand the criminal process, as well as their relative inability to think through the long-term consequences of their actions, to what extent could juveniles weigh these consequences adequately?

Obviously, the answer to this question is individualized, as it depends upon the relative maturity, or lack thereof, of the particular juvenile. However, it would seem as though juveniles, to the extent that they prioritize immediate, short-term consequences over those that are more future-oriented, would be hard-pressed to assess these collateral consequences adequately when deciding how to proceed. In these situations, however, Model Rule 1.14(b) seems to provide a viable avenue, as it allows the attorney to involve other individuals in making decisions for clients in instances where the attorney reasonably believes that the client “cannot adequately act in [his or her] own interest.”⁶⁸

Parents (or other adult family members) would seemingly be the most logical individuals to fill this void. Indeed, irrespective of the ethical parameters set out above, the design of the juvenile justice system allows—and expects—parents to have a prominent role. As a result, lawyers representing juveniles in delinquency proceedings are expected to involve the parents, to some degree, in the representation.

However, parental influence over the representation—while perhaps theoretically sound—presents particular difficulties in the collateral consequences context. The model assumes that parents will make decisions that benefit the child and the family. But, as illustrated above, collateral consequences potentially disrupt this assumption because, in at least some instances, these consequences could position the family’s interests against those of the client. As a result, the potential discord that collateral consequences introduce in these instances could undermine the family’s ability to make decisions that would best steer the child through the juvenile justice system. Again, the ethical rules seemingly present a solution, as they command that “the lawyer must keep the client’s interests foremost and . . . must look to the client, and not family members, to make decisions on the client’s behalf.”⁶⁹

⁶⁶ *Id.* R 1.14(a). As a result, “in juvenile court, as in adult court, ‘counsel must take all reasonable lawful means to attain the objectives of the client.’” RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT 13-14 (1991) (quoting *Nix v. Whiteside*, 475 U.S. 157, 166 (1986)).

⁶⁷ MODEL RULES, *supra* note 65, at R. 1.14 cmt. This comment speaks directly to the ability of children to make decisions related to their legal status, asserting that “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.” *Id.*

⁶⁸ *Id.* at R. 1.14(b).

⁶⁹ *Id.* at R. 1.14 cmt.

V. CONCLUSION

The ethical rules, as well as numerous legal scholars, start with the presumption that juveniles in delinquency cases enjoy client-focused representation, and that they make the crucial decisions regarding the representation.⁷⁰ However, as a result of the foregoing, incorporating collateral consequences into the representation of juveniles in delinquency proceedings presents a prickly paradox. On the one hand, based on the various incapacities noted above, lawyers should presume that juveniles will not understand the full scope and extent of these consequences, and that they might suffer long-term ramifications in exchange for perceived short-term gains. On the other hand, consulting parents about these consequences—both to convey to the parents their role in the adjudicatory process and to ascertain the parents' perceptions in light of the collateral consequences—could cause parents to fail to act in the best interest of their children.

The purpose of this Article is not to offer concrete proposals for working through these paradoxical logistical and ethical issues. Rather the Article seeks to raise these heretofore unnoticed issues, and to stimulate analyses of these issues, particularly within the context of our client-focused representational system. The potential analysts could include legal scholars, policy analysts, legal organizations, juvenile court practitioners (both defense and prosecution attorneys) and juvenile court judges. Perhaps some lessons could be gleaned from the recent attention afforded collateral consequences in the adult context. However, these lessons would at best be incomplete, as they have not considered the very unique and vexing issues that inclusion of collateral consequences would present in the juvenile context.

⁷⁰ See *id.* at R. 1.2(a), R.1.14(a), R.1.14 cmt.; see also Henning, *supra* note 60, at 837-38 n.7 (citing scholars who advocate client-driven representation in juvenile delinquency proceedings).